

An overview of the aims and central features of the 1996 Hague Convention on International Child Protection *

*Philippe Lortie***

I. Introduction

The fundamental rights of children are enshrined in the *United Nations Convention on the Rights of the Child*¹ (hereinafter, the Convention on the Rights of the Child). The Convention on the Rights of the Child includes a number of provisions which are at the heart of the international protection of children.

For example, Article 9(1) of the Convention on the Rights of the Child provides that “States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child’s place of residence.”

Article 9(3) of the Convention on the Rights of the Child goes on to provide that “States Parties shall respect the right of the child who is separated from one of both parents to maintain personal relations and direct contact with both parents on regular basis, except if it is contrary to the child’s best interests.”

Article 10(2) of the Convention on the Rights of the Child provides for the same right in a cross-border situation by stating that “[a] child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances, personal relations and direct contacts with both parents.”

It goes without saying that a parent cannot change unilaterally the right of the child to maintain personal relations and direct contacts with both parents. Where separated or divorced parents cannot agree, either on their own or through amicable resolution mechanisms, as to how to articulate their respective personal relations and direct contacts with their child they should turn to competent authorities that will decide for them in the best interests of the child.

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** Philippe Lortie, First Secretary Hague Conference on Private International Law.

¹ The New York Convention of 20 November 1989 on the Rights of the Child, 27531 UNTS 1577.

However, sometimes these basic principles are wrongfully swept aside when children are caught in the turmoil of broken relationships within transnational families, with cross-border disputes over custody and relocation. The incidence of such cross-border problems continues to grow with the ease of international travel, the increase in bi-cultural marriages and the rise in the divorce rate.

Over the years, the Hague Conference has developed two Conventions which aim to provide some solutions to these cross-border family law problems and which, over time, could serve as preventive measures if they were implemented properly and were in the eye of the public. These two Conventions are the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (hereinafter, the 1980 Convention), which predates the Convention on the Rights of the Child, and the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children* (hereinafter, the 1996 Convention). This paper focuses on the latter Convention.

II. Scope of the 1996 Convention

The scope of the 1996 Convention is very broad as it covers a very wide range of civil measures of protection concerning children, from orders concerning parental responsibility and contact to public measures of protection or care, and from matters of representation to the protection of the property of the child.² The Convention is based on the view that child protection provisions should constitute an integrated whole. This is why the scope of the Convention is broad covering both public and private measures of protection or care. The Convention overcomes the uncertainty that otherwise arises if separate rules apply to different categories of protective measures when both may be involved in the same case. Finally, it is to be noted that the 1996 Convention applies to children from the moment of their birth until they reach the age of 18 years. The Hague system will facilitate the continuation of measures of protection, originally taken under the 1996 Convention, under the *Hague Convention of 13 January 2000 on the International Protection of Adults* which covers persons who have reached the age of 18 years.

The function of the 1996 Convention is to avoid legal and administrative conflicts and to build the structure for effective international co-operation in child protection matters between the different systems. In this respect, the Convention provides a remarkable opportunity for building bridges between legal systems having diverse cultural or religious backgrounds. The foundations of the bridges are composed of rules on jurisdiction, applicable law, recognition, enforcement and co-operation.

III. Jurisdiction rules under the 1996 Convention

The Convention centralises jurisdiction in the authorities of the State of the habitual residence of the child and thereby aims to avoid the competition which arises

² Articles 1 – 4 of the 1996 Convention.

when authorities have concurrent jurisdiction.³ The only exception to this principle is Article 10, which provides for the jurisdiction of the divorce court to take measures of protection concerning a child, in certain defined situations. In this case the court in the State of the child's habitual residence and the court in the State where the divorce is being heard may have concurrent jurisdiction: however, in this respect, the 1996 Convention provides a means of solution for possible conflicts of jurisdiction (see Art. 13 of the 1996 Convention).

The Convention also contains provisions which govern the situation where the child's habitual residence changes, either lawfully or unlawfully.⁴ It also provides a jurisdictional rule where a child's habitual residence cannot be established, or where children are internationally displaced or refugees.⁵

Other than as stated above, the exercise of jurisdiction by authorities other than those of the State of the habitual residence of the child would have, in principle, to have been requested or authorised by the authorities of the State of the child's habitual residence through the mechanism of the transfer of jurisdiction provisions.⁶ These provisions may be utilised where it appears that these other authorities would be in a better position to assess the best interests of the child in a particular case.

Lastly, in certain cases of emergency or when provisional measures with a local effect are needed, a local jurisdiction may be exercised autonomously. However, this exercise will remain limited by the measures taken or to be taken by the normally competent authority.⁷

IV. Applicable Law rules under the 1996 Convention

The principle set out in the Convention regarding applicable law is to the effect that when exercising their jurisdiction in relation to measures of protection the authorities of the Contracting States shall apply their internal law.⁸ In relation to the attribution, exercise or extinction of parental responsibility, the Convention lays down a rule of conflict of laws designating the law of the State of the habitual residence of the child.⁹ These rules are complemented by other provisions dealing with the protection of third parties,¹⁰ the universal character of the applicable law provisions,¹¹ *renvoi*¹² and conflicts of systems for choice of law as well as with the exception for public policy.¹³

³ Article 5 of the 1996 Convention.

⁴ Article 5(2), Article 7 and Article 14 of the 1996 Convention.

⁵ Article 6 of the 1996 Convention.

⁶ Article 8 and Article 9 of the 1996 Convention.

⁷ Article 11 and Article 12 of the 1996 Convention.

⁸ Article 15 of the 1996 Convention.

⁹ Article 16 and Article 17 of the 1996 Convention.

¹⁰ Article 19 of the 1996 Convention.

¹¹ Article 20 of the 1996 Convention.

¹² Article 21 of the 1996 Convention.

¹³ Article 22 of the 1996 Convention.

V. Rules for the recognition and enforcement of measures of protection under the 1996 Convention

With regard to the recognition and enforcement of measures of protection, the Convention provides that measures taken by the authorities of a Contracting State shall be recognised by operation of law in all other Contracting States. Recognition may however be refused if:

- a) the measure was taken by an authority whose jurisdiction was not based on one of the grounds provided for under the Convention;¹⁴
- b) except in a case of urgency, the child was not provided with the opportunity to be heard;¹⁵
- c) except in a case of urgency, a person claiming that the judgment infringes his or her parental responsibility was not provided with the opportunity to be heard;¹⁶
- d) such recognition is manifestly contrary to public policy of the requested State;¹⁷
- e) the measure is incompatible with a later measure taken in the non-contracting State of the habitual residence of the child, where this later measure fulfils the requirements for recognition in the requested State;¹⁸ and,
- f) the consultation procedure set out for the placement of the child in another Contracting State was not complied with.¹⁹

The 1996 Convention includes a provision dealing with preventive action for recognition and non-recognition.²⁰ Finally, a system of declaration of enforceability, or registration for purposes of enforcement can be found in the 1996 Convention.²¹

VI. Co-operation under the 1996 Convention

As in the case of a number of Hague Conventions, the 1996 Convention provides for the institution in each Contracting State of a Central Authority. That is the fixed point of contact for authorities of other Contracting States to reply to their requests. In principle, there are no obligations to take an initiative, give information or co-ordinate in advance the taking of measures without requests imposed on Central Authorities.²²

The co-operation under the 1996 Convention goes rather far in the case of consultation procedures set out for the placement of a child in another Contracting State

¹⁴ Article 23(2) a) of the 1996 Convention

¹⁵ Article 23(2) b) of the 1996 Convention.

¹⁶ Article 23(2) c) of the 1996 Convention.

¹⁷ Article 23(2) d) of the 1996 Convention.

¹⁸ Article 23(2) e) of the 1996 Convention.

¹⁹ Article 23(2) f) of the 1996 Convention.

²⁰ Article 24 of the 1996 Convention.

²¹ Article 26 of the 1996 Convention.

²² Articles 29 – 32 of the 1996 Convention.

which involves authorities with jurisdiction under Articles 5 to 10 of the 1996 Convention.²³ It allows communications and direct requests for information between the authorities of different Contracting States called upon to take measures of protection, for example, with regard to securing the implementation of effective exercise of access and contact rights or ensuring that the child is kept out of danger. Finally, the 1996 Convention allows Central Authorities to conclude between them agreements to facilitate their co-operation.²⁴

VII. Important features of the 1996 Convention

The Convention provides a structure for the resolution of issues of custody and contact which may arise when parents are separated and living in different countries.

The 1996 Convention reinforces the 1980 Convention by underlining the primary role played by the authorities of the child's habitual residence in deciding upon any measures which may be needed to protect the child in the long term. It also adds to the efficacy of any temporary protective measures ordered by a judge when returning a child to the country from which the child was taken, by making such orders enforceable in that country until such time as the authorities there are able themselves to put in place necessary protections.

The co-operation procedures within the Convention can be helpful in the increasing number of circumstances in which unaccompanied minors cross borders and find themselves in vulnerable situations in which they may be subject to exploitation and other risks.

The Convention provides for co-operation between States in relation to the growing number of cases in which children are being placed in alternative care across frontiers, for example under fostering or other long-term arrangements falling short of adoption. This includes arrangements made by way of the Islamic law institution of *Kafala*, which is a measure of protection which places the child in the long-term care of persons other than his/her parents but which does not amount to an adoption thus which falls outside the scope of the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*.

VIII. Monitoring and Review of the 1996 Convention

The Hague Conference has developed a unique system of “post-Convention services” in respect of its Children's Conventions. The aim is to promote widespread ratification, to assist Contracting States to implement the Conventions effectively and to promote consistency and the adoption of good practices in the daily operation of the Conventions. Contracting States are both beneficiaries and partners in this continuing enterprise.

²³ Article 33 of the 1996 Convention.

²⁴ Article 39 of the 1996 Convention.

A Special Commission for the Monitoring and Review of the Operation of the 1996 Convention has been set up and has been meeting twice since 2006 to discuss developments. In addition, the Hague Conference has produced General Principles and a Guide to Good Practice on Transfrontier Contact Concerning Children, which is relevant to both the 1980 and 1996 Conventions, and a Practical Handbook on the operation of the 1996 Convention.

IX. Conclusion

The 1996 Convention implements in part Article 11 of the Convention on the Rights of the Child which provides that “(1) *States Parties shall take measures to combat the illicit transfer and non-return of children abroad.* (2) *To this end, States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements*” and Article 35 of the Convention on the Rights of the Child which states that “States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction, the sale of or traffic in children for any purpose or in any form”.

The United Nations Committee on the Rights of the Child recommends regularly to States Parties to the Convention on the Rights of the Child to become Party to the 1996 Hague Convention as a means by which Article 11 of the Convention on the Rights of the Child may be practically implemented. It is hope that Croatia will act as a leader in the region by inviting neighbouring States to also become Parties to the 1996 Convention.