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## 1. GENERAL BACKGROUND

The Kingdom of the Netherlands (*Koninkrijk der Nederlanden*) has a quasi-federal structure and comprises the Netherlands, the Netherlands Antilles (namely Curacao, Bonaire, St. Maarten, St. Eustatius, Saba) and Aruba. The 1980 Hague Convention on the Civil Aspects of International Child Abduction (hereafter '1980 Hague Convention') was ratified for the entire Kingdom,<sup>1</sup> but it only applies to the Netherlands (for the Kingdom in Europe).<sup>2</sup>

The Netherlands is a constitutional monarchy with a parliamentary system. It could also be characterised as a decentralised unitary State. The Netherlands operates a civil law system both on a central level within the twelve provinces (*provincies*) and within more than five-hundred local communities (*gemeenten*).<sup>3</sup> Most of the Dutch Private family law can be found in book 1 of the Civil Code (*Burgerlijk Wetboek*) and the relevant procedures are set out in the Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*).

Jurisdiction, recognition and enforcement of custody issues in the Netherlands, as in other European Union (EU) States,<sup>4</sup> are partially governed by the Brussels II Regulation<sup>5</sup> which came into force on 1 March 2001. Although the Regulation has priority over Dutch domestic law, in its original form, it did not affect the application of the 1980 Hague Convention (see Article 4 of the Regulation). However, the revised Brussels II Regulation (also known as Brussels II bis),<sup>6</sup> which came into force on 1 March 2005,<sup>7</sup> will have an impact

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<sup>1</sup> Rijkswet van 2 mei 1990, *Stb.* 202.

<sup>2</sup> But when Aruba or the Netherlands Antilles ask for assistance in child abduction cases, the Dutch Central Authority may assist them: information from the Dutch Central Authority, 25 August 2003.

<sup>3</sup> Jansen, O.; Middeldorp G. *Researching Dutch Law* 2001. Available at <http://www.LLRX.com/features/dutch.htm>

<sup>4</sup> With the exception of Denmark which is not a party to this Regulation – see Article 2(3).

<sup>5</sup> Council Regulation (EC) No. 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses OJ No. L160, 30.6.2000, p. 19.

<sup>6</sup> Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility, repealing Regulation (EC) No. 1347/2000, OJ L338, 23.12.2003, p. 1.

<sup>7</sup> Article 72.

insofar as an application is made in one EU State<sup>8</sup> in respect of a child habitually resident in another Member State. First, courts are required, when applying Articles 12 and 13 of the 1980 Hague Convention, to ensure “that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity”.<sup>9</sup> Secondly, a court “shall, act expeditiously in proceedings on the application using the most expeditious procedures available in national law” and without prejudice to that obligation, “shall, unless exceptional circumstances make this impossible, issue its judgment no later than six weeks after the application is lodged”. Thirdly, a court is not permitted to refuse a return upon the basis of Article 13b “if it is established that adequate arrangements have been made to secure the protection of the child after his or her return”. Fourthly, a court is not permitted to refuse a return unless the left-behind parent has been given the opportunity to be heard. If a return order is refused, the court must, within one month, transmit both the order and relevant documentation to the court or Central Authority of the State in which the child was habitually resident before the abduction. In turn the last mentioned court or Central Authority must invite the parties to make, within three months of notification, submissions in accordance with national law, so that the court can examine the question of the custody of the child. In other words, it is the court of the child’s habitual residence that has jurisdiction to hear the case on its merits. If, after hearing the merits, the court requires the child’s return, then such an order is enforceable without need for any further orders.

### 1.1 IMPLEMENTATION OF THE CONVENTION

The 1980 Hague Convention entered into force for the Netherlands on 1 September 1990. The Netherlands was the 14<sup>th</sup> Contracting State (the 12<sup>th</sup> to ratify but with two other States, Belize and Hungary also having previously acceded).<sup>10</sup> Once ratified, international conventions are directly applicable in the Netherlands. There is no need to incorporate them word for word into a national statute. It is sufficient that a statute is passed formally by / through Parliament approving the Convention subject to any reservations that may have been made.<sup>11</sup> Articles 93 and 94 of the Constitution (*Grondwet*) provide for the direct effect of provisions of conventions if they are binding on all persons by virtue of their contents. Whether this is the case is left to the courts to decide. This means that a citizen can invoke a provision of an international convention in a legal procedure and, provided the court decides that the provision is directly applicable it will prevail over conflicting Dutch law.

In the case of the 1980 Hague Convention, legislation was necessary to create the required competent Central Authority and to establish some special proce-

<sup>8</sup> Except Denmark, see Article 2(3).

<sup>9</sup> This is already the position in the Netherlands, see post at 3.5.

<sup>10</sup> [http://www.hcch.net/index\\_en.php?act=conventions.publications&dtid=36&cid=24](http://www.hcch.net/index_en.php?act=conventions.publications&dtid=36&cid=24)

<sup>11</sup> For the Parliamentary history see: *Kamerstukken* II 1987-1990, 20 461 (R 1345); *Handelingen* II 1989/90, p. 575-576; *Kamerstukken* I 1989/90, no. 71, 124, 124a, 124b; *Handelingen* I 1989/90, 1 mei 1990.

dural rules for dealing with requests for return. This legislation (hereafter 'Implementation Act')<sup>12</sup> (*Wet van 2 mei 1990 tot uitvoering van het op 20 mei 1980 te Luxemburg tot stand gekomen Europees Verdrag betreffende de erkenning en de tenuitvoerlegging van beslissingen inzake het gezag over kinderen en betreffende het herstel van het gezag over kinderen, uitvoering van het op 25 oktober 1980 te 's-Gravenhage tot stand gekomen Verdrag inzake de burgerrechtelijke aspecten van internationale ontvoering van kinderen alsmede algemene bepalingen met betrekking tot verzoeken tot teruggeleiding van ontvoerde kinderen over de Nederlandse grens en de uitvoering daarvan*)<sup>13</sup> does not repeat the (full) text of the Convention. Instead, it regulates the tasks and competence of the Central Authority; determines which courts have jurisdiction; sets out the procedure for dealing with incoming return and access applications and makes provision for legal aid.

In addition to the Implementation Act, there is a protocol about how the Central Authority handles child abduction cases.<sup>14</sup>

## 1.2 OTHER CONTRACTING STATES ACCEPTED BY THE NETHERLANDS

The Netherlands ratified the Convention as a Member State of the Hague Conference and as such it must accept the ratifications by all other Member States. Nevertheless, under Article 38, non-Member States may accede to the Convention and Contracting States are not obliged to accept accessions. The department of foreign affairs decides if accessions will be accepted or not in consultation with the Central Authority. The Netherlands has a policy of accepting accessions to the Convention provided the acceding State has a Central Authority. As of 1 January 2005 the Convention was in force between 73 Contracting States and the Netherlands.

For a full list of all States with which the Convention is in force with the Netherlands, and the dates that the Convention entered into force for the relevant States, see the Appendix.

## 1.3 BILATERAL AGREEMENTS WITH NON-CONVENTION STATES

The Netherlands has no bilateral agreements with non-Hague States. In its Concluding Observations, the Committee on the Rights of the Child encouraged

<sup>12</sup> This legislation also implements the *European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children (1980)* (hereafter '1980 European Custody Convention'). In cases where the 1980 European Custody Convention and the 1980 Hague Convention are both applicable, the Convention which is likely to be most beneficial to the return of the child will be applied. When the Central Authority receives an application it decides – in the best interests of the child – which convention will be used. Usually this is the Hague Convention. In fact, only five or less cases of child abduction per year are dealt with on the basis of the European Custody Convention: Information from the Dutch Central Authority, 25 August 2003. This position is, however, complicated by the Brussels II Regulation which takes precedence (see Article 37 of the Regulation) over the European Custody Convention and offers little scope to apply the European Convention. Indeed it will be confined to cases to and from Denmark and Contracting States outside the EU.

<sup>13</sup> *Uitvoeringswet van 2 mei 1990, Stb.* 1990, 202.

<sup>14</sup> *Protocol Internationale Kinderontvoering* (Ministry of Justice, September 2000). This Protocol does not, however, have legal status. Consequently it is unclear as to whether the Central Authority is bound by its terms.

the Netherlands to consider concluding bilateral agreements with States that are not parties to the 1980 Hague Convention or 1980 European Custody Convention.<sup>15</sup> The Netherlands is not in favour of this, because in their opinion entering into bilateral treaty negotiations might prevent States from becoming party to the multilateral conventions.<sup>16</sup>

However, Article 2 of the Implementation Act determines that this Act will also be applied in cases of international child abduction not governed by the European or the Hague Convention. The Implementation Act does not contain specific rules for non-Hague Convention cases. The only exception is that Article 13(3) of the Implementation Act determines that in those cases the judge could reject the application on basis of Articles 12(2), 13 and 20 of the 1980 Hague Convention (and not on basis of Articles 9 or 10 of the 1980 European Custody Convention). Although, in theory, applications from non-Hague Convention States should therefore be treated in exactly the same way as applications from Contracting States, in practice refusals to return are likely to be more common.

#### 1.4 CONVENTION NOT APPLICABLE IN INTERNAL ABDUCTIONS

Abductions within the Kingdom of the Netherlands are not covered by the Convention. This therefore includes abductions between the Netherlands (part of the Kingdom in Europe) and the Netherlands Antilles and Aruba.

There is no specific legislation governing internal abductions.<sup>17</sup> Instead, Dutch courts apply civil law provisions about custody<sup>18</sup> and / or the criminal law.<sup>19</sup> According to Article 40 of the Charter for the Kingdom of the Netherlands (*Statuut voor het Koninkrijk der Nederlanden*),<sup>20</sup> the decisions of the courts are enforceable within the entire Kingdom (i.e. including the Netherlands Antilles and Aruba).

## 2. THE ADMINISTRATIVE AND JUDICIAL BODIES DESIGNATED UNDER THE CONVENTION

### 2.1 CENTRAL AUTHORITY

There is one Central Authority in the Netherlands. A division of the Ministry of Justice (*Directie Justitieel Jeugdbeleid*), fulfils the obligations of the Central Authority, under both the Hague and European Conventions. The Central Authority also deals with non-Hague Convention cases, in collaboration with the Ministry of Foreign Affairs.

<sup>15</sup> Concluding Observations of the Committee on the Rights of the Child: Netherlands 26.10.99, CRC/C/15/Add.114 under 15.

<sup>16</sup> *Second Periodic Report by the Kingdom of the Netherlands on the implementation of the UN Convention on the Rights of the Child*, The Hague, March 2002, p. 32.

<sup>17</sup> Court of Appeal (*Hof*) Leeuwarden 1 April 1998, <http://www.clara-wichmann.nl/jurisprudentiel/tekst/jur/99030170-jur.asp>

<sup>18</sup> Book 1 title 14 of the Civil Code (*titel 14 van boek 1 van het Burgerlijk Wetboek*).

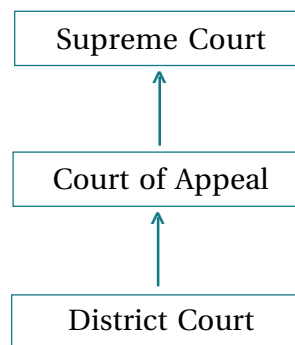
<sup>19</sup> See post at 5.1.2.

<sup>20</sup> The Charter sets out rules of jurisdiction. A limited number of subjects (e.g. defence of the Kingdom, international relations) are considered as matters reserved to the Kingdom as a whole. The three parts of the Kingdom independently look after all other / their own matters (Articles 3 and 41 Charter).

There are two lawyers working (full-time) on child abduction cases although they occasionally also deal with other international cases.<sup>21</sup> The head of the Central Authority works full-time and has responsibility for matters relating to both international child abduction and international adoption.<sup>22</sup> The support staff comprise one part-time secretary for child abduction and inter country adoption cases.<sup>23</sup> The preferred language of communication is English but the Authority can also handle communication in German and French.<sup>24</sup> The Central Authority can be contacted at the following address:

*Ministerie van Justitie*  
*Directie Justitieel Jeugdbeleid*  
*Bureau Centrale Autoriteit*  
*Schedeldoekshaven 100*  
*Postbus 20301*  
*2500 EH THE HAGUE*  
Netherlands  
Tel: +31 (0) 70 370 4893  
Fax: +31 (0) 70 370 7507

## 2.2 COURTS AND JUDGES EMPOWERED TO HEAR CONVENTION CASES



There are three tiers in the Dutch court system. In Convention cases, jurisdiction at first instance is vested in the District Courts (*Rechtbanken*).<sup>25</sup> There are nineteen District Courts. Convention cases are heard by a children's judge sitting alone or can be referred to a panel of three judges (one of whom is a children's judge) of the Family Division of the District Court in the region where the child is living. If the child has no permanent residence, the District Court in The Hague has jurisdiction.<sup>26</sup>

The relevant Court of Appeal (*Gerechtshof*) hears appeals against judgments given by the District Court. These appeals take the form of a full rehearing of the case. There are five Courts of Appeal. Convention cases are generally heard by a panel of three judges of the Family Division of the relevant Court of Appeal.

<sup>21</sup> E.g. if measures have to be taken to protect a child, the Central Authority may facilitate contact between the Child Protection Board in the Netherlands and the appropriate body in another country, or provide some information.

<sup>22</sup> The Central Authority will also deal with cases both under the revised Brussels II Regulation and under the Hague Protection of Children Convention of 1996.

<sup>23</sup> Information from the Dutch Central Authority, 25 August 2003.

<sup>24</sup> *Ibid.*, 5 January 2004.

<sup>25</sup> Single judges, like the juvenile judge and the so called '*kantonrechter*' (cantonal judge), are members of these District Courts.

<sup>26</sup> Article 11 of the Implementation Act.

Following the appeal, a party to the case may refer the case to the Supreme Court (*Hoge Raad*). Such appeals, known as ‘appeals in cassation’, are heard by five justices of the civil division. Some of them may have had experience in family law matters at the District Court and / or the Court of Appeal level. The Supreme Court only deals with matters of law and not fact. Accordingly, it can only examine whether the proceedings took place in accordance with the rules and whether the law was properly applied.<sup>27</sup> Relatively few cases of international child abduction (in 1999: 12 cases)<sup>28</sup> are brought before a court. Consequently most judges dealing with these cases generally have limited experience and no detailed knowledge of the Convention.<sup>29</sup>

### 3. OPERATING THE CONVENTION – INCOMING APPLICATIONS FOR RETURN

#### 3.1 LOCATING THE CHILD

The Central Authority attempts (in a practical way) to investigate the child’s location when necessary. If it receives a specific address (and in most cases there is some address or telephone number available), it can ask an official of the relevant municipality if the child is registered.<sup>30</sup> The official is obliged to give this information as local authorities and officials of local bodies are obliged to give, without charge, any information, copies and certificates of registrations to the Central Authority, if the Central Authority needs this for the performance of its task.<sup>31</sup> Dutch law facilitates tracing an abductor inasmuch as everyone is required to register their change of residence within five days in the register of their municipality. However, non-registration is only a minor offence.<sup>32</sup>

When no address has been notified, the Central Authority formally requests in writing the head of public prosecutors of the district where the child probably resides to look for the child,<sup>33</sup> which request has to be dealt with as a matter of priority. If that place is unknown, the head of the public prosecutors in The Hague will be addressed. The Central Authority enjoys full cooperation from the police. Police officers trying to locate the child are allowed to enter every place as far as that is reasonable.<sup>34</sup> It is relatively easy to locate the child: the Netherlands is a small country and it is difficult to hide from investigating police officers. In addition, it is often possible to locate the child at school. A case is not closed as long as the child has not been found.<sup>35</sup>

There is an opportunity to publish information and pictures of missing children at <http://www.missingkids.nl>.

<sup>27</sup> Administration of Justice, ‘*The Court System in the Netherlands*’, August 2002, p. 5, 10.

<sup>28</sup> See post at 7.

<sup>29</sup> There currently exists a working group on International Child Abduction, so this knowledge will hopefully be enlarged.

<sup>30</sup> Information from the Dutch Central Authority, 25 August 2003.

<sup>31</sup> Article 8 of the Implementation Act.

<sup>32</sup> Article 66 *Wet gemeentelijke basisadministratie persoonsgegevens*. Not only the place of residence but also marriages, births and deaths are registered.

<sup>33</sup> They may use reporting systems like National Schengen Information System (NSIS) or Interpol.

<sup>34</sup> Article 9 of the Implementation Act.

<sup>35</sup> Information from the Dutch Central Authority, 25 August 2003.

### 3.2 CENTRAL AUTHORITY PROCEDURE

The Netherlands has made no reservation to Article 24 of the Convention. Therefore documents can be translated into French or English.<sup>36</sup> The Dutch Central Authority asks the foreign Central Authority to translate documents, but exceptionally, where interests of speed dictate, it translates documents itself at its own cost.<sup>37</sup> Normally, applications are sent to the Central Authority but alternatively, the applicant may apply directly to the District Court or other authorities.<sup>38</sup> The Dutch Central Authority has its own application form.

On receiving an application for return the Central Authority examines it to ensure that it comes within the scope of the Convention. It only checks to ensure that the legal minimum conditions are fulfilled. If not, it calls or writes to the foreign Central Authority.<sup>39</sup> If the Central Authority concludes that the conditions for becoming active have not been fulfilled, it will inform the applicant that it rejects the application or – at a later stage – stops its activities.<sup>40</sup> The applicant may file an objection against this decision to the District Court (administrative law sector) in The Hague within one month after receiving the (written) decision. There is, however, no appeal against the District Court’s judgment.

The Dutch Implementation Act requires the Central Authority to seek an amicable solution and a voluntary return. The Central Authority must inform the abductor by registered mail about the application. If the Central Authority is of the opinion that, given the circumstances of the case, a return is extremely urgent or a voluntary return is not to be expected, the Central Authority is not obliged to send a registered mail.<sup>41</sup>

The Central Authority informs the abductor by registered mail, about the application for return, the grounds for the application and its intention to file a petition with the court for a judicial return order if the abductor does not voluntarily return the child within a reasonable period. What is a reasonable period depends on the facts of the case. Normally, ten days is deemed reasonable.<sup>42</sup> Within that period the abductor has to contact the Central Authority to inform it if he or she is willing to cooperate. After such contact has been made, the Central Authority tries to reach an amicable solution. The Central Authority acts as an “intermediary” between the parents to seek a negotiated agreement. This can take a few weeks.

<sup>36</sup> Applications in other languages are also occasionally accepted, if a member of staff is able to read and understand it: information from the Dutch Central Authority, 25 August 2003.

<sup>37</sup> When a letter in a foreign language is received just before a (court) hearing, the Central Authority translates it itself for reasons of speed: information from the Dutch Central Authority, 25 August 2003.

<sup>38</sup> Article 4(2) of the Implementation Act and Article 29 of the Hague Convention. For the position with regard to legal representation on direct applications to the court see post at 3.3.

<sup>39</sup> Information from the Dutch Central Authority, 25 August 2003.

<sup>40</sup> Article 6 of the Implementation Act. If, in the Central Authority’s view, the child must not be returned, it does not bring the case, but only for factual not for subjective reasons. E.g. when there is a court decision that the left-behind parent was sentenced for paedophilia (not for minor offences).

<sup>41</sup> Article 10 of the Implementation Act. However, in practice, the Central Authority always sends a letter. Nevertheless, there is no sanction for not sending a registered mail.

<sup>42</sup> Three weeks in the holiday season. But if there is a serious risk that the parent will flee with the child to a foreign country, the period can be as short as forty-eight hours: Information from the Dutch Central Authority, 25 August 2003.

When the negotiations for a voluntary return are inappropriate or fail and no other amicable solution has been reached, the Central Authority will send a letter to the abductor informing him or her that it will forward the case to a District Court. The legal proceedings are conducted by the Central Authority which applies in its own name *and* as representative of the left-behind parent as the applicant.<sup>43</sup> The Central Authority is empowered to act on behalf of the applicant even without explicit authorisation.<sup>44</sup>

The Central Authority may engage the Services of the Child Protection Board (*Raad voor de Kinderbescherming*) and give instructions to the Board to act on her behalf.<sup>45</sup> The Child Protection Board can investigate the social situation of the child,<sup>46</sup> for example, when the Central Authority has doubts if a return will be in the best interests of the child.

### 3.3 LEGAL REPRESENTATION

The Central Authority applies both in its own name and as representative of the left-behind parent as the applicant. One of the lawyers working at the office of the Central Authority personally appears in court and acts fully as an advocate.<sup>47</sup> However, if the applicant wishes, he or she can retain a private lawyer and apply directly to the court in accordance with Article 29 of the 1980 Hague Convention. In such cases the application is conducted entirely by advocates retained and the Central Authority plays no role.<sup>48</sup>

In theory in petition proceedings (*verzoekschriftprocedures*) before the District Court the defendant does not need to be represented by a lawyer provided he does not lodge a written statement of defence. In practice, however, a written statement of defence is nearly always lodged, and, accordingly, legal assistance of an attorney-at-law is normally required.<sup>49</sup> In cases brought before the Court of Appeal and the Supreme Court the defendant always needs a lawyer.

In general the aims of the Central Authority and the left-behind parent are the same, namely, to seek return of the child to the requesting State. The Central Authority acts in the best interests of the child according to the principles set out by the Convention. However, the left-behind parent can, as mentioned before, always hire his own lawyer and may well choose to do so when, for example, his views differ from those of the Central Authority (though in such cases it is also open to the left-behind parent simply to tell the court that he or she holds a different opinion to that of the Central Authority). The left-behind parent can also lodge an appeal with his or her own lawyer when the Central Authority does not.<sup>50</sup>

<sup>43</sup> In comparison, in Australia, the Central Authority also applies as the applicant, rather than as a representative.

<sup>44</sup> Article 5(1) Implementation Act.

<sup>45</sup> Article 7 of the Implementation Act.

<sup>46</sup> *Normen 2000, 'Beleidsregels met betrekking tot de werkwijze van de Raad voor de Kinderbescherming', version 2, § 8.1.4* (hereafter 'Normen 2000').

<sup>47</sup> Although the lawyers do not have to be at the bar. Note also that at the Supreme Court the Central Authority is always represented by an attorney.

<sup>48</sup> Article 29 of the Hague Convention. Article 4(2) of the Implementation Act. It is not known how frequently parents apply directly to the Court. Dr. Lenters (former Head of the Dutch Central Authority) thinks, however, that this happens only two or three times a year. Information from the Dutch Central Authority, 25 August 2003.

<sup>49</sup> Articles 278, 279(3) and 282 of the Code of Civil Procedure.

<sup>50</sup> This is different from the situation in Australia. If the Australian Central Authority does not lodge an appeal, the left-behind parent is not entitled to appeal the case himself.



Over the years the Central Authority has accumulated a vast expertise in litigating cases of international child abduction. The respondent, on the other hand, does not have this expertise and the same often applies to his or her lawyer. For the left-behind parent the involvement of the Central Authority has the important advantage that he or she can benefit from this expertise. Moreover, the involvement of the Central Authority is free of charge to the applicant whereas the defendant has to pay for his or her lawyer unless he or she qualifies for legal aid assistance.

On the other hand, some argue that as the Central Authority is a representative of the Minister of Justice and that some judges may therefore be inclined to accede to a request of the Central Authority. At the same time, however, it seems fair to note that the Central Authority's experience and knowledge makes it possible to provide the court with objective information about the implementation of the Convention. Even so, some critics have suggested that the 'power' of the Central Authority raises questions regarding the principle of 'equality of arms'.<sup>51</sup>

The fact that the Central Authority acts both as the applicant and as representative of the left-behind parent in Convention proceedings may lead to a conflict of interests. Indeed the role of the Central Authority as an intermediary seeking a voluntary return or another amicable solution and as 'attorney' of the left-behind parent has been criticised in Parliament.<sup>52</sup>

The government's position was that initially the Central Authority should play the role of an intermediary and give the parties the opportunity to reach amicable solution for themselves. If there is no agreement the second stage starts, in which the Central Authority no longer acts as an intermediary, but as the applicant on behalf of the left-behind parent who seeks return of the child. Although it is perfectly logical for the Central Authority to assume different roles at different stages, it is nevertheless important for both parties that it is absolutely clear when the Central Authority stops acting as an intermediary. The government promised to and subsequently did prepare protocols to exclude misunderstandings about this.<sup>53</sup>

In the National Ombudsman's view, the Central Authority does not have to play a very active mediating role seeking amicable solution, because this is not in keeping with its obligation to realize the main purpose of the 1980 Hague Convention, namely, the return of the child.<sup>54</sup>

<sup>51</sup> Information from the Dutch Central Authority, 25 August 2003. The inequality between the parties – as the abductor is represented by a lawyer who has less experience with child abduction cases – was criticised by the Ombudsman Foundation (hereafter '*Stichting de Ombudsman*'). In its opinion it is also particularly unfair that the judge and Central Authority do not take into account the circumstances under which the abductor must return. Report of the Ombudsman Foundation (*Stichting de Ombudsman*), *The Hague Child Abduction Convention*, January 2003, p. 3. [The Ombudsman Foundation is an independent national foundation which inter alia gives advice in individual cases or refers issues to other organisations].

<sup>52</sup> *Kamerstukken II 2000/01*, 27 400 VI, nr. 14, p. 2-4.

<sup>53</sup> *Aanhangsel Handelingen II 1999/2000*, nr. 952, p. 2074. See *Protocol Internationale Kinderontvoering* (Ministry of Justice, September 2000). This Protocol is discussed ante at n. 14.

<sup>54</sup> *Report Nationale Ombudsman* 12 June 2003, 2003/169, p. 46. The National Ombudsman, which is not to be confused with the Ombudsman Foundation (see ante n. 51), is an independent national office, established in 1995, whose task is to deal with complaints from citizens about government.

### 3.4 COSTS AND LEGAL AID

The Netherlands has made a reservation to Article 26 concerning costs in Convention proceedings and consequently is only bound to assume those costs covered by the Dutch legal aid system (*Wet op de rechtsbijstand*).<sup>55</sup> Applicants seeking return of a child from the Netherlands will not have to pay legal costs if they apply through the Central Authority and allow the Central Authority to conduct legal proceedings. However, the Central Authority can subsequently claim a refund of expenses from the applicant or the abductor.<sup>56</sup> Legislation permits, as mentioned before, private applications outside the Central Authority. In such cases applicants will have to pay themselves unless they are eligible for legal aid in the Netherlands.

Eligibility for legal aid (known in the Netherlands as *Rechtsbijstand*) for the applicant and defendant in abduction cases depends upon standard criteria of financial means. They are not required to give security for the payment of costs, damages etc.<sup>57</sup> If a litigant qualifies for legal assistance, the government pays a proportion of the costs but the litigant has to pay an individual contribution.

In order to qualify, the applicant must complete a Declaration of Income and Assets (*Verklaring omtrent Inkomen en Vermogen*). This form can be obtained from a local council or social services. After completing the Declaration form and submitting it to a local authority, a council official stamps the form. A lawyer or provider of legal assistance completes an application form. This is forwarded together with the Declaration form and additional documents (e.g. a copy of the most recent pay slip) to the Legal Aid Council (*Raad voor rechtsbijstand*). The Legal Aid Council determines if someone is eligible for legal aid.<sup>58</sup>

In accordance with Article 26, the person who has successfully sought the return can be asked to pay the repatriation costs for a child but this is subject to the court's discretion.

### 3.5 LEGAL PROCEEDINGS

In Convention cases, proceedings are brought by petition (*verzoekschriftprocedure*). The Implementation Act adds some specific rules to the standard petition procedure under the Dutch Code of Civil Procedure.<sup>59</sup> As mentioned before, while generally, it is the Central Authority who brings the case to the District Court, it is possible for the applicant to bypass the Central Authority and file a petition for return of the child directly with the court.<sup>60</sup>

In proceedings by petition the case is either heard by a children's judge sitting alone or can be referred to a panel of three judges<sup>61</sup> of the Family Division. The proceedings are heard in chambers (*met gesloten deuren*).<sup>62</sup>

<sup>55</sup> [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=24](http://www.hcch.net/index_en.php?act=conventions.status&cid=24). Article 16 (1) of the Implementation Act.

<sup>56</sup> Article 5(3) of the Implementation Act.

<sup>57</sup> Article 16(2) of the Implementation Act.

<sup>58</sup> Administration of Justice, 'Do you need legal assistance?', September 2002, pp. 8, 9 and 'U wilt rechtsbijstand'- English, May 2004, pp. 7, 8.

<sup>59</sup> Articles 11 and 12 of the Implementation Act.

<sup>60</sup> Article 4(2) of the Implementation Act.

<sup>61</sup> One of the judges must be a children's judge. Article 808 Code of Civil Procedure.

<sup>62</sup> Article 13(2) of the Implementation Act.

The Convention obligation to act expeditiously is reflected in Article 13(2) of the Implementation Act inasmuch as Convention cases are given priority over routine family cases. According to the Central Authority,<sup>63</sup> in 2003 hearings for return are normally scheduled within three weeks and decisions issued within one or two weeks. According to the 1999 statistics, however, proceedings were much slower.<sup>64</sup>

It is normal practice for an oral hearing to be held which is open to the party opposing the application, the child, if old enough, and the applicant, if he chooses and at his own expense, to attend. The applicant is not required to attend the hearing, but while the applicant is in the Netherlands for the hearing, the Central Authority can request that he or she will get permission to visit the child.<sup>65</sup> The judge is not allowed to decide the application before providing the child the opportunity to be heard unless, because of his or her physical or mental health or his or her age, it is impossible to hear the child.<sup>66</sup> The child usually has a (separate) meeting with the judge in court, but the judge may also hear the child in his or her place of residence.<sup>67</sup>

There are no formal restrictions on the nature of evidence that may be taken (for example, affidavits by witnesses, information by authorities). The burden of proof for finding exceptions to return<sup>68</sup> lies on the person opposing the return. The rules of evidence are found in Articles 149-207 Code of Civil Procedure.

The court may invite the Child Protection Board (*Raad voor de Kinderbescherming*) to attend the oral hearing. At the hearing the court may ask the Board to investigate the situation of the child within the Netherlands. In this investigation<sup>69</sup> the child will always be involved and the Central Authority might become required to supply information. The report must be submitted within six weeks,<sup>70</sup> but in most cases the judge is unable to wait for that long.

According to the Central Authority, their applications for return are generally granted by the court.<sup>71</sup>

If, following an application under the domestic law, a Dutch court has to decide on custody rights over a child for whom a request of return has been submitted to the Central Authority, the custody decision will be postponed until a final decision on this request has been made. If such a request for return has not been submitted but is expected soon the court will postpone its final decision

<sup>63</sup> Information from the Dutch Central Authority, 25 August 2003.

<sup>64</sup> See post at 7.1.3.

<sup>65</sup> The taking parent can refuse to give permission for this visit.

<sup>66</sup> Article 13(2) of the Implementation Act. Sometimes children as young as 8½ years are heard: Court of Appeal (*Hof*)'s-Gravenhage 30 September 1994, *NJ* 1995, 356. Compare Article 12 of the UN Convention on the Rights of the Child 1989 and Article 809 of the Code of Civil Procedure.

<sup>67</sup> Article 802 of the Code of Civil Procedure.

<sup>68</sup> E.g. where the exceptions to return under Articles 13 and 20 are raised.

<sup>69</sup> This is no extensive investigation. The research will be limited to the appearance of one of the exceptions to return or to questions formulated by the Court.

<sup>70</sup> *Normen 2000*, op. cit., n. 46 at § 8.1.4.

<sup>71</sup> Information from the Dutch Central Authority, 25 August 2003. See also Report of the Ombudsman Foundation (*Stichting de Ombudsman*), op. cit., n. 51, p. 2. In contrast, a research of 33 court decisions (in the period 1990-2000) shows that in 13 cases the return was refused (almost 40%): Dohmen, C.; Frohn, L., 'Tien jaar Haags Kinderontvoeringsverdrag in Nederland: rechtspraakoverzicht', *NIPR* 2001-1, p. 25. According to the 1999 statistics (see post at 7.1.2) there were 2 refusals out of 26 return applications.

in the custody case for a reasonable period of time (Article 15 of the Implementation Act).<sup>72</sup> Presumably, if the request for return is submitted within that period of time, a further postponement will be made until the final decision on the request for return has been made.

In Convention cases, proceedings may not only be by petition (*verzoekschriftprocedures*) but also by a procedure known as the interim injunction proceeding (*kort geding*).<sup>73</sup> This latter procedure can be used in urgent cases. A single civil law judge hears the case without delay and gives a provisional judgment in which he may grant certain injunctions (orders). The parties can then apply for a final decision in an action on the merits before the District Court, or can just accept the provisional judgment.<sup>74</sup> Another possibility is to file an appeal against the provisional judgment with a Court of Appeal and following this a further appeal, 'appeal in cassation', to the Supreme Court is possible.<sup>75</sup> In interim injunction proceedings the applicant - but not the defendant has to be represented at first instance by an attorney-at-law.<sup>76</sup>

In fact, the Central Authority always proceeds by petition. A left-behind parent will rarely start interim injunction proceedings before the Central Authority initiates petition proceedings (because the parent does not need to attempt amicable solution).

It is important to note that in international child abduction cases, petition proceedings might be faster than an interim injunction proceeding as an appeal in the latter proceedings must be lodged within four weeks and appeal in cassation within eight weeks, while those terms are shorter for petition proceedings in child abduction cases (see post at 3.6).<sup>77</sup>

### 3.6 APPEALS

The applicant,<sup>78</sup> defendant or any other interested party has only two weeks to give notice of appeal against the decision of the District Court.<sup>79</sup> This appeal lies to the Court of Appeal (*Gerechtshof*). A further appeal (an 'appeal in cassation') on a point of law lies to the Supreme Court (*Hoge Raad*). It must be lodged within four weeks after the decision of the Court of Appeal.<sup>80</sup>

<sup>72</sup> Compare Article 16 of the Hague Convention.

<sup>73</sup> Article 11 of the Implementation Act. It is also possible to combine those two procedures. For an example: District Court (*Rechtbank*) Utrecht 13 November 1996, *NIPR* 1997, 89. The father (left-behind parent) in this case started an interim injunction proceeding himself and after that the Central Authority applied for return in a petition proceeding.

<sup>74</sup> Administration of Justice, *The Court System in the Netherlands*, August 2002, p. 12.

<sup>75</sup> Article 332 and 398 of the Code of Civil Procedure.

<sup>76</sup> Administration of Justice, *The Court System in the Netherlands*, August 2002, p. 12 and Article 255(1) Code of Civil Procedure.

<sup>77</sup> Articles 339(2) and 402(2) of the Code of Civil Procedure.

<sup>78</sup> If the applicant was represented by the Central Authority, the notice of appeal will be disallowed if the Central Authority does not sign. Court of Appeal (*Hof*) Amsterdam 17 April 1997, *FJR* 1999, p. 143, 144.

<sup>79</sup> Article 13(7) of the Implementation Act. This is shorter than the normal period.

<sup>80</sup> Article 13(7) of the Implementation Act and Article 426(2) of the Code of Civil Procedure. For more information see § 2.2.

In the Netherlands no substantial requirements need to be satisfied in order to appeal to the Court of Appeal.<sup>81</sup> One apparent consequence of this is the relatively high proportion of Hague applications that are appealed.<sup>82</sup>

### 3.7 ENFORCEMENT OF ORDERS

If there is concern that a parent may abscond with a child, the court can, on its own motion or upon request, prior to, or after a return order is issued, direct that the child be taken into provisional guardianship (*voorlopige voogdij*). If the application for return is rejected, this order will be terminated *ipso jure*.<sup>83</sup> Orders for return are immediately enforceable, even if an appeal is lodged.<sup>84</sup>

If the court orders the return of the child (in which case a date for the return will be specified), the child must be surrendered to the person who has custody over the child or to a guardianship institution (*voogdij-instelling*).<sup>85</sup> The Public Prosecution Service can be called upon to enforce the return order, if necessary.<sup>86</sup> The judge may, upon his own motion or upon request, order that the person(s) having responsibility for the abduction pay the costs incurred by the Central Authority or by the person who has the custody over the child relating to the abduction and return of the child.<sup>87</sup>

The judge may order the abductor to pay a *dwangsom*,<sup>88</sup> which is a punitive sum payable to the applicant on a daily basis until the order is complied with. Additionally, according to the Civil law, the abductor can also be committed to prison for a maximum of one year for failure to comply with a judicial order (*lijfswang*).<sup>89</sup> But of course, the imposition of fines or detentions may not in themselves bring the child back to the applicant and will not be in the best interest of the child in most cases.

In practice, the Central Authority contacts the abductor and asks when the child will be returned. If necessary, the Central Authority assists and, if there are any problems, tries to solve them, as for example, by communicating with the Central Authority of the Requesting State in an attempt to arrange that the abductor will not be prosecuted if he or she returns with the child. According to

<sup>81</sup> But an 'appeal in cassation' to the Supreme Court is only possible where there is a dispute about whether the proceedings took place in accordance with the rules or whether the law was properly applied.

<sup>82</sup> See post at 7.1.3.

<sup>83</sup> Article 13(4) of the Implementation Act and Article 306a of Book 1 of the Civil Code (*Art. 1:306a BW*).

<sup>84</sup> Article 13(5) of the Implementation Act. In interim injunction proceedings, according to Article 258 of the Code of Civil Procedure, the judge *may* declare that the order is immediately enforceable. In abduction cases he usually will. Sometimes, however, after an order for return has been made, the abductor may bring interim injunction proceedings wherein he asks to stop the enforcement of the return order.

<sup>85</sup> Article 60 *Wet op de Jeugdhulpverlening (old)*-as of 1 January 2005, article 1(f) *Wet op de Jeugdzorg*.

<sup>86</sup> Article 13(6) of the Implementation Act and Article 813(2) of the Code of Civil Procedure.

<sup>87</sup> Article 13(5) of the Implementation Act. E.g. the abductor could be ordered to pay to the applicant: costs of a detective bureau, attorney-at-law, immaterial damage and statutory interest. District Court (*Rechtbank*) Zwolle 6 February 2002, AE1640, *Zaaknr:* 66987/HA ZA 01-700 (<http://www.rechtspraak.nl>).

<sup>88</sup> Articles 611a-611i of the Code of Civil Procedure.

<sup>89</sup> Article 585, 589 of the Code of Civil Procedure. E.g. District Court (*Rechtbank*) Rotterdam 18 May 1999, KG 1999, 175. Such orders are rarely immediately attached to the order for return but occasionally the judge may order a *dwangsom* or *lijfswang* in an interim injunction proceeding after the abductor fails to comply with the order for return.

the Dutch Central Authority, in most cases there are no problems with the enforcement of court decisions.<sup>90</sup>

## 4. OPERATING THE CONVENTION – INCOMING APPLICATIONS FOR ACCESS

### 4.1 CENTRAL AUTHORITY PROCEDURE

For the most part the system just described applies equally to access applications. Requests for access are handled in the same manner as returns.<sup>91</sup> At first, the Central Authority seeks an amicable solution. The parent is asked by registered mail whether he or she is willing to cooperate. If an amicable solution does not seem possible, the Central Authority will file a petition with the District Court.<sup>92</sup>

The Central Authority may engage the Services of the Child Protection Board (*Raad voor de Kinderbescherming*) and give instructions to the Board to act on her behalf<sup>93</sup> as, for example, asking the Board to investigate the social situation of the child if there are problems with access rights.<sup>94</sup>

### 4.2 LEGAL PROCEEDINGS

The Central Authority can start petition proceedings before the District Court to organise or protect international access rights and securing respect for the conditions to which the exercise of these rights may be subject.<sup>95</sup> The Central Authority applies in its own name and as representative of the parent requesting access. However, the applicant is allowed to bypass the Central Authority and issue proceedings directly with the court.<sup>96</sup>

The Central Authority usually requests a holiday arrangement and a proposal is drawn up together with the parent. If, in the Central Authority's view, access is not reasonable, it does not assist the parent. In most cases the 1980 Hague Convention (Article 21) and not the 1980 European Convention is used.<sup>97</sup> However, although the Central Authority will bring an application before the court under Article 21, in practice those cases are decided on their merits and the courts apply the relevant rules of domestic legislation, namely, articles 1:377a-377h of the Civil Code regulating the child's right to access to the parent who does not exercise parental responsibility. Right of access is only refused if it would be highly detrimental to the child.<sup>98</sup> There are no specific procedural rules determining that a Hague application for access is heard expeditiously.

<sup>90</sup> Information from the Dutch Central Authority, 25 August 2003.

<sup>91</sup> For more information about the Central Authority procedure; costs and legal aid; and legal proceedings please see ante at 3.

<sup>92</sup> [http://www.travel.state.gov/family/abduction/country/country\\_510.html](http://www.travel.state.gov/family/abduction/country/country_510.html) (hereafter 'Travel').

<sup>93</sup> Article 7 of the Implementation Act.

<sup>94</sup> *Normen 2000*, op. cit., n. 46 at § 8.1.4.

<sup>95</sup> Article 21(3) of the 1980 Hague Convention.

<sup>96</sup> Article 4(2) of the Implementation Act.

<sup>97</sup> Information from the Dutch Central Authority, 25 August 2003.

<sup>98</sup> *Second Periodic Report by the Kingdom of the Netherlands on the implementation of the UN Convention on the Rights of the Child*, The Hague, March 2002, p. 29 (hereafter 'Second Periodic Report').

The court may invite the Child Protection Board (*Raad voor de Kinderbescherming*) to attend the oral hearing. At the hearing the court may request the Board to conduct an examination into the best interests of the child. Sometimes the examination includes contact between the parent requesting access and the child under supervision of a Board social worker in the Netherlands. Child psychologists or psychiatrists may assist, if necessary.<sup>99</sup> During the Board's examination, prior to advising the court on access, a number of mediation meetings can be held.<sup>100</sup> Before submitting the report to the judge the Board gives the parents the opportunity to comment on the report. After that, the report is discussed in a hearing before the judge.<sup>101</sup>

A possible role for the government in mediation and supervision of access is being considered. The Ministry of Justice launched some experiments with access mediation.<sup>102</sup> The judge might refer the parents, at their own costs, to a mediator if they agree. Before going to court the parents can always decide themselves to let their case be tried through a mediator (again at their own cost). The Central Authority can provide names of licensed mediators.

#### 4.3 ENFORCEMENT OF ORDERS

In almost all cases the judge declares that the order has immediate effect, which means that the order is enforceable even if an appeal is lodged. Otherwise the exercise of the right of access starts if the judgment has become final and conclusive.<sup>103</sup> There are no specific penalties in the event of non-compliance with the right of access. More general measures according to civil law, such as ordering compliance on pain of a penalty payment, may be imposed.<sup>104</sup>

If there are problems with access rights and the child's physical or mental development is jeopardised, a supervision order (*ondertoezichtstelling*) can be made.<sup>105</sup> In that case a social worker (*gezinsvoogd*) is responsible for the actual support of the child and parents and will attempt to get the exercise of access rights well organised.<sup>106</sup>

#### 4.4 COSTS AND LEGAL AID

Legal aid for access applications is available if the eligibility requirements are met. The same conditions for filing an application for legal aid apply as for return applications.<sup>107</sup> The involvement of the Central Authority acting as applicant and representative is free of charge.

<sup>99</sup> Travel, op. cit., n. 92.

<sup>100</sup> Second Periodic Report, op. cit., n. 98, p. 29.

<sup>101</sup> Travel, op. cit., n. 92.

<sup>102</sup> Second Periodic Report, op. cit., n. 98, p. 29.

<sup>103</sup> Book 1 Article 377d of the Civil Code (1:377d BW).

<sup>104</sup> The possibilities are: periodic penalty payment (*dwangsom*); a committal for failure to comply with a judicial order (*lijfsdwang*) and specific performance (*reële executie*) Articles 611a, 585, 812 of the Code of Civil Procedure.

<sup>105</sup> A supervision order can be requested by a parent, Child Protection Board, Public Prosecutor but not by the Central Authority (Book 1 Article 254 of the Civil Code (1:254 BW)).

<sup>106</sup> There is some discussion about the (improper) use of supervision orders to solve problems with access rights. Bruning, M.R. *Rechtvaardiging van kindbescherming. Naar een nieuw maatregelenpakket na honderd jaar kindbescherming*, Kluwer Rechtswetenschappelijke Publicaties 2001, p. 214-217.

<sup>107</sup> Article 16 of the Implementation Act. For more information, see ante at 3.4.

## 5. OPERATING THE CONVENTION – OUTGOING APPLICATIONS FOR RETURN

### 5.1 PREVENTING THE REMOVAL OF THE CHILD FROM THE JURISDICTION

#### 5.1.1 CIVIL LAW

An application by one parent for a passport for a child or an application to include a child on an adult's passport can only be processed with the written consent of those exercising parental responsibility for the child. If there is a reasonable fear that the child may be taken from the Netherlands, the judge may attach to the arrangement for parental access the condition that the child will be removed from the other parent's passport or that the parent hands in his or her passport prior to the access. Where the child has dual nationality, assistance from the Embassy or Consulate of the other country is necessary.<sup>108</sup>

There are more orders which can be obtained in Dutch courts to prevent abductions. Anyone who has custody of the child may go to court and request that an order be made in respect of access rights of that child, if the child has to cross an international border to exercise those rights. Orders can be made for one or more visits or for a certain period. The following orders can be requested:

- A declaration confirming that the applicant has custody of the child;
- Arrangement of place of residence and period of the child's stay in the foreign country and, if necessary, other circumstances in respect of the stay;
- A request to the relevant authorities of the State where the child stays during the exercise of access rights, that access is to be supervised, especially according to the place and period, and, if necessary, that measures will be taken to return the child after the period has expired.<sup>109</sup>

#### 5.1.2 CRIMINAL LAW

Although international parental child abduction, as such, is not a criminal offence in the Netherlands, intentionally removing a minor from the custody of the person or persons exercising legal authority over him, or from the supervision of a person legally vested with such supervision, is. Under Article 279 of the Criminal Code (*Wetboek van Strafrecht*) such an offence is punishable with a maximum of six years imprisonment or a fine of the fourth category.<sup>110</sup> When the minor is under the age of twelve, or, if older, where deception,<sup>111</sup> an act of violence or threat of violence has been used, a term of imprisonment with a maximum of nine years or a fine of the fifth category can be imposed. The abducting parent who does not have parental responsibility / custody of the

<sup>108</sup> De Hart, B. *Internationale Kinderontvoering. Oorzaken, preventie en oplossingen, Utrecht: Nederlands Centrum Buitenlanders 2002*, p. 64 (hereafter 'De Hart'). In a case wherein the court ordered that the child had to be removed from the Moroccan passport of the father, the Moroccan Consulate cooperated. District Court (*Rechtbank*) Roermond 23 August 1988, *Migrantenrecht* 1989, 42.

<sup>109</sup> Article 14 of the Implementation Act.

<sup>110</sup> Viz. up to €11,250; for category five offences the fine is up to €45,000 (Article 23 of the Criminal Code).

<sup>111</sup> E.g. where a mother asks the father if she can take the child to school, but then she abducts the child instead.



child can be punished according to Article 279 Criminal Code. A parent who shares parental responsibility can be accused of this crime too.<sup>112</sup> Although some parents have been convicted of this crime, such convictions are relatively unusual.<sup>113</sup>

Another crime is intentionally hiding a minor who has been removed or had himself removed from the custody of the person or persons exercising legal authority over him or from the supervision of a person legally vested with such supervision, or concealing him from the investigation by judicial officers or police officers. According to Article 280 of the Criminal Code, such a crime carries a maximum sentence of three years imprisonment or a fine of the fourth category. When the minor is under the age of twelve, a maximum of six years imprisonment or a fine of the fourth category can be imposed.<sup>114</sup>

If a child has been abducted, parents are advised to go immediately to the local police.<sup>115</sup> The local police officer decides for national (*Opsporingsregister*) or international reporting (National Schengen Information System / NSIS) of the missing child. When there are indications that the child is not living in a 'Schengen country', the Interpol X400 network can be used.<sup>116</sup>

## 5.2 CENTRAL AUTHORITY PROCEDURE

The Dutch Central Authority acts mainly as a communicator between the applicant and the foreign Central Authority. It will assist applicants in completing the relevant application forms. It will then examine the forms to ensure that the information comes within the scope of the Convention. The Central Authority will also arrange for translation of the relevant documents, where appropriate, and will then submit the application to the foreign Central Authority. The Central Authority will monitor the progress of the case and keep the applicant informed.

The Central Authority may seek assistance of the Child Protection Board. If the abductor refuses to return the child, the Central Authority can request the Board to investigate and supply information about the child's situation if returned to the Netherlands. The Central Authority can also request the Board to supply information within the scope of a return procedure in another State.<sup>117</sup>

## 5.3 PROTECTION AND ASSISTANCE ON RETURN

The Central Authority will provide, or arrange for, support, advice and information as appropriate and necessary. There are a number of non-governmental organisations operating in the Netherlands, which can advise

<sup>112</sup> Supreme Court (*Hoge Raad*) 15 February 2005, 01198/04, AR8250.

<sup>113</sup> De Hart, B. op. cit., n. 108, at, *Utrecht: Nederlands Centrum Buitenlanders* 2002, p. 63. E.g. District Court (*Rechtbank*) Assen 19 March 2003, AF5918, *Zaaknr:*19/810118-01.

<sup>114</sup> A cumulation of Articles 279 and 280 of the Criminal Code is possible.

<sup>115</sup> [http://www.justitie.nl/publiek/familie\\_en\\_gezin/kinderbescherming/internationale\\_kinderontvoering](http://www.justitie.nl/publiek/familie_en_gezin/kinderbescherming/internationale_kinderontvoering)

<sup>116</sup> <http://www.interpol.int/Public/Children/Missing/NationalLaws/mcNetherlands.asp>

<sup>117</sup> *Normen 2000*, op. cit., n. 46 at § 8.1.4.

and support parents.<sup>118</sup> In practice in most cases the child returns to the Netherlands without the Central Authority being involved. Indeed, the Central Authority generally does not know what happens to the children after they are returned.<sup>119</sup>

#### 5.4 COSTS AND LEGAL AID

The assistance of the Dutch Central Authority is free of charge. But the applicant or the abductor has to bear the travelling costs for the return of the child to the Netherlands.

In 2002 it was suggested in Parliament that a Foundation be created from which costs that parents incur for legal assistance in proceedings in a foreign country after return of the child to that country (e.g. custody and access proceedings) could be (partly) refunded, because often parents cannot obtain free legal aid abroad and cannot afford legal assistance themselves. But the Minister of Justice did not consider such a Foundation to be appropriate, because it would cause discrimination inasmuch as in other procedures in foreign countries involving Dutch nationals, the Kingdom of the Netherlands does not assist them if they lack financial means.<sup>120</sup>

## 6. AWARENESS OF THE CONVENTION

### 6.1 EDUCATION OF CENTRAL AUTHORITIES, THE JUDICIARY AND PRACTITIONERS

Dutch representatives have participated in judicial conferences held in De Ruwenberg and Noordwijk and a Dutch delegation always attends the Special Commission Meetings on the 1980 Hague Convention held at The Hague.

As there are a limited number of Hague Convention cases, conferences on child abduction for judges and practitioners are not frequently held. Nevertheless there has been some training for judges. For example, on 11 October 2002 juvenile judges had a meeting with the Permanent Bureau of the Hague Conference.<sup>121</sup> A one day course on 'international child abduction' for attorneys organised by Defence for Children International-Netherlands was held on 10 June 2004.

The staff of the Central Authority is 'trained' by its head. If the head gets some information (e.g. from the legislation department) she informs the lawyers

<sup>118</sup> For more information, see post at 6.2.

<sup>119</sup> Information from the Dutch Central Authority, 25 August 2003. According to the Minister of Justice the Central Authority is not obliged to gather information as to what happens to a child after his or her return: *Kamerstukken II 2000/01*, 27 400 VI, nr. 14, p. 6.

<sup>120</sup> *Niet-dossierstuk 2002-2003, just020844, Tweede Kamer*, 22 October 2002, p. 2. This was suggested before: *Kamerstukken II 2000-2001*, 27 400 VI, no. 14 and no. 50. The difficulty of obtaining legal aid abroad was also mentioned as one of the main bottlenecks in the application of the Convention in the Report of the Ombudsman Foundation (*Stichting de Ombudsman*), op. cit., n. 51, at pp. 3, 4.

<sup>121</sup> Information from the Dutch Central Authority, 25 August 2003.

of the Central Authority about that during a meeting. In addition the staff attend judicial and non-judicial courses.<sup>122</sup>

## 6.2 INFORMATION AND SUPPORT PROVIDED TO THE GENERAL PUBLIC

The Dutch Central Authority has produced a brochure<sup>123</sup> on international child abduction. It is available to anyone on request either in Dutch and English. The Dutch Central Authority does not have its own web site. However, information is available on the web site of the Ministry of Justice (in Dutch).<sup>124</sup> The web site and brochure explain what parents should do if their child is abducted. They advise that the first step a parent should take, is to contact the Central Authority as soon as possible. The Central Authority has been working on the development of a new web site and a new brochure.

There are some non-governmental organisations (NGOs) which as part of their activities pay attention to cases of international child abduction (e.g. Defence for Children International-Netherlands, *Stichting de Ombudsman*), but save for one, *Stichting Gestolen Kinderen*, which limits its activities to supporting parents in cases of threatened abduction and parents from whom a child has been abducted from the Netherlands, a NGO focusing exclusively on such cases does not yet exist. Most web sites about child abduction are only in Dutch but one web site with information in English is <http://www.missingkids.nl>.

The Central Authority has initiated meetings with parties working in the field of child abduction to consider practical problems. At the first meeting a list of problems was drawn up. Working groups were established and have drafted proposals in an attempt to solve those problems.<sup>125</sup> The head of the Central Authority intends to consult organisations in the field every year, and, indeed, on<sup>126</sup> 18 November 2003 there was an expert meeting to discuss the task and role of the Central Authority with regard to incoming cases.

## 7. THE CONVENTION IN PRACTICE – A STATISTICAL ANALYSIS OF APPLICATIONS IN 1999<sup>127</sup>

The Central Authority for the Netherlands handled a total of 58 new applications in 1999, making the Netherlands the twelfth busiest Convention jurisdiction in that year.<sup>128</sup>

<sup>122</sup> Ibid.

<sup>123</sup> Ministry of Justice, *Internationale kinderonvoering*, October 2002 and some earlier versions. As of November 2004 there is a completely renewed brochure.

<sup>124</sup> [http://www.justitie.nl/publiek/familie\\_en\\_gezin/kinderbescherming/internationale\\_kinderonvoering](http://www.justitie.nl/publiek/familie_en_gezin/kinderbescherming/internationale_kinderonvoering)

<sup>125</sup> E.g. they have drawn a protocol for the police about how to handle child abduction cases.

<sup>126</sup> Information from the Dutch Central Authority, 25 August 2003.

<sup>127</sup> The following analysis is based on *A Statistical Analysis of Applications made in 1999 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, drawn up by Professor Nigel Lowe, Sarah Armstrong and Anest Mathias and available at [http://www.hcch.net/index\\_en.php?act=publications.details&pid=2847&dtid=32](http://www.hcch.net/index_en.php?act=publications.details&pid=2847&dtid=32)

<sup>128</sup> The USA, England and Wales, Germany, Australia, France, Italy, Canada, New Zealand, Spain, Mexico and Ireland all handled more cases in 1999.

Incoming return applications	26
Outgoing return applications	21
Incoming access applications	8
Outgoing access applications	3
<b>Total number of applications</b>	<b>58</b>

## 7.1 INCOMING APPLICATIONS FOR RETURN

### 7.1.1 THE CONTRACTING STATES WHICH MADE THE APPLICATIONS

Requesting States		
	Number of Applications	Percent
UK-England and Wales	5	19
Italy	3	12
Germany	2	8
Portugal	2	8
USA	2	8
Australia	1	4
Canada	1	4
Columbia	1	4
Cyprus	1	4
Greece	1	4
Israel	1	4
New Zealand	1	4
Poland	1	4
Slovak Republic	1	4
South Africa	1	4
Spain	1	4
Switzerland	1	4
<b>Total</b>	<b>26</b>	<b>~100</b>

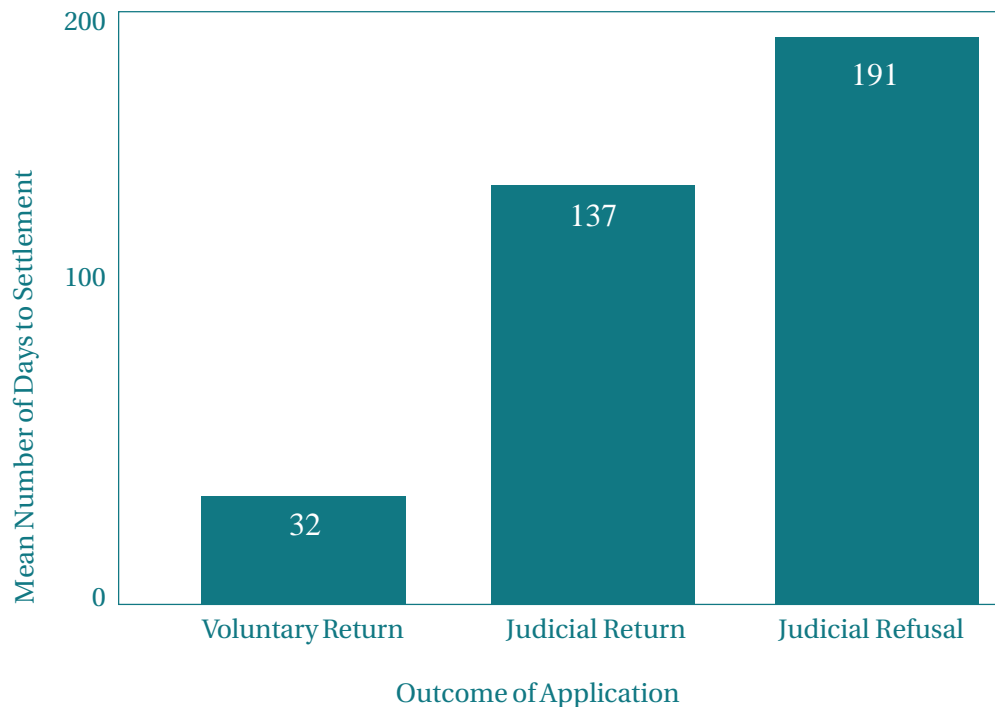
The largest proportion of applications for return came from England and Wales, totalling 19%. The next highest number of applications were received from other mainly European States, namely Italy, neighbouring Germany, Portugal and the USA. One application was recorded as having been made by the Slovak Republic, notwithstanding that it was not a Contracting State to the Convention in 1999.

### 7.1.2 THE OUTCOMES OF THE APPLICATIONS

Outcome of Application		
	Number	Percent
Rejection	8	31
Voluntary Return	5	19
Judicial Return	10	38
Judicial Refusal	2	8
Withdrawn	1	4
Pending	0	0
Other	0	0
<b>Total</b>	<b>26</b>	<b>100</b>

Proportionally, there were a high number of rejected applications, 31% as opposed to a global norm of 11%. As against this, the rest of the figures for the Netherlands compared favourably. There was a slightly lower judicial refusal rate, 8% compared with a global norm of 11%. At 19%, the proportion of voluntary returns was also slightly higher than the global norm of 18%. The judicial return rate of 38% was again higher than the global average of 32%. Consequently, a high proportion of applications ended in return, 58% compared with a global norm of 50%. In total, 67% of the applications that ended in return did so under a judicial rather than voluntary agreement. Twelve applications went to court, totalling 46% of all applications. Of these, 83% resulted in a judicial order to return the child, which is higher than the global norm of 74%.

### 7.1.3 THE TIME BETWEEN APPLICATION AND FINAL CONCLUSION



Information was available on the speed of 4 of the 5 applications that ended in a voluntary return and all of the judicial returns and refusals. The chart above, therefore, relates to these cases only. The mean average speed of voluntary returns, at 32 days, was markedly quicker than the global norm of 84 days. The ten judicial returns took a mean average of 137 days which was slower than the global norm of 107 days. At 191 days, the mean average time for a judicial refusal was also longer than the global average of 147 days. The following table shows the minimum and maximum number of days taken in each category as well as the mean and median average times.

Number of Days Taken to Reach Final Outcome			
	Outcome of Application		
	Voluntary Return	Judicial Return	Judicial Refusal
Mean	32	137	191
Median	28	130	191
Minimum	0	75	179
Maximum	71	274	202
<b>Number of Cases</b>	<b>4</b>	<b>10</b>	<b>2</b>

This table shows that both of the judicial refusals took a long time being decided respectively in 179 days and 202 days.

Altogether 4 of the 12 judicial decisions were the result of appeals. At 33% this is a high proportion compared with a global norm of 14%. The high proportion of appeals perhaps goes some way to explaining why the mean number of days to settlement for both judicial returns and judicial refusals was relatively slow. Three of the judicial returns were the result of appeals. On average these cases took 158 days to be concluded. This was faster than the global mean of 208 days. There was also one judicial refusal as the result of an appeal, which took 202 days to be resolved and which was slower than the global mean of 176 days.

Another factor that undoubtedly contributes to the relatively slow overall disposal times is the time given to achieving a voluntary settlement.<sup>129</sup> However, notwithstanding these mitigating factors the fact remains that within the EU the Netherlands is among the slowest to dispose of applications if they go to court. Significantly, according to the 1999 statistics, no court decision was reached within the six week deadline envisaged by Article 11(3) of the revised Brussels II Regulation. Indeed the quickest a judicial return order was made was 75 days after the application was first received. But, according the Central Authority,<sup>130</sup> disposal times have significantly improved to the extent that in 2003 hearings for return are normally scheduled within three weeks and decisions issued within a further one or two weeks.

## 7.2 INCOMING APPLICATIONS FOR ACCESS

### 7.2.1 THE CONTRACTING STATES WHICH MADE THE APPLICATIONS

Requesting States		
	Number of Applications	Percent
Australia	1	13
Canada	1	13
Finland	1	13
France	1	13
Hungary	1	13
South Africa	1	13
Spain	1	13
USA	1	13
<b>Total</b>	<b>8</b>	<b>~100</b>

<sup>129</sup> See ante at 3.2.

<sup>130</sup> Information from the Dutch Central Authority, 25 August 2003.

At 8 out of 34 incoming applications the proportion of access applications received was above the global norm of 17% at just over 24% of all applications received. All 8 access applications were made by different States. None of the Contracting States that made more than one return application made any access applications. The pattern of access applications is therefore quite different to returns.

#### 7.2.2 THE OUTCOMES OF THE APPLICATIONS

Outcome of Application		
	Number	Percent
Rejection by the Central Authority	1	13
Access Voluntarily Agreed	1	13
Access Judicially Granted	3	38
Access Judicially Refused	2	25
Other	0	0
Pending	1	13
Withdrawn	0	0
<b>Total</b>	<b>8</b>	<b>~100</b>

Access was either judicially granted or voluntarily granted in 51% of cases, compared with a global norm of 43%. Access was judicially refused in 2 cases. There was only one case which was rejected and one case which was still pending.

#### 7.2.3 THE TIME BETWEEN APPLICATION AND FINAL CONCLUSION

Timing to Judicial Decision		
	Number	Percent
0-6 weeks	0	0
6-12 weeks	0	0
3-6 months	1	20
Over 6 months	4	80
<b>Total</b>	<b>5</b>	<b>100</b>

Access applications were disposed of noticeably slowly, no judicial decision being made in under 3 months and the vast majority, 80%, taking over 6 months. This can be compared with the global average of 71% of judicial decisions taking over 6 months. Conversely, the one voluntary settlement was arrived at within 6-12 weeks of the application whereas globally, 42% of voluntary settlements took over 6 months to be reached.

## 8. CONCLUSIONS

In conclusion it can be said that in many respects the Netherlands has implemented the Convention effectively. Certainly, for the most part, the Netherlands complies with the recommendations as to good practice contained in the *Guide to Good Practice on Central Authority Practice and Implementing*

*Measures* published by the Permanent Bureau of the Hague Conference.<sup>131</sup> The Central Authority operates efficiently and effectively. Communication about the Convention is good. The Central Authority is able to communicate in various languages and has provided information at a web site and in brochures. The information on the Internet and in the brochure is due to be revised and improved. Every effort is made to seek voluntary settlements (though perhaps too much time is allowed for this – see further below) and voluntary return rates compare favourably with the global average. Furthermore, the vast majority (83%, according to the 1999 statistics) of return applications that do go to court end in a judicial order for return. There appears to be few, if any, problems with locating the child, nor with the enforcement of return orders. Furthermore, the Central Authority has initiated meetings with organisations working in the field of child abduction to improve the application of the Convention. Legal aid provisions regarding incoming applications are generous. Legal aid is provided to the left-behind parent (if the Central Authority does not act free of charge, as applicant) and abductor.

However, one peculiarity of the Dutch system is that the Central Authority acts in judicial proceedings both as the applicant and as representative of the left-behind parent. Although there is a potential conflict of interests in taking these positions, there are nevertheless some advantages as well as disadvantages inasmuch as the Central Authority has acquired an expertise in handling applications and can provide the court with objective information. On the other hand, the system could be seen as being too biased in favour of left-behind parents which could raise questions regarding the principle of ‘equality of arms’. However, it needs also to be pointed out that the left-behind parent can conduct return proceedings (at any stage) with his or her own lawyer, though in fact this rarely happens. Representation by the Central Authority does not appear to have caused many difficulties for left-behind parents.

On the other hand, the role of the Central Authority seeking a voluntary return or other amicable solution but at a later stage acting as ‘attorney’ of the left-behind parent has been criticized because it may create confusion although the position is explained in letters sent by the Central Authority to the abductor.

The Netherlands also can be criticised for not concentrating jurisdiction in cases of international child abduction in a limited number of courts. As the *Guide to Good Practice: Implementing Measures* states,<sup>132</sup> “The Conclusions from the Fourth Special Commission, as well as Conclusions from a number of judicial seminars stress the importance and desirability of concentrating jurisdiction in Hague return cases”.

The principal advantages of such concentration are, as the *Guide to Good Practice: Implementing Measures* says,<sup>133</sup> “an accumulation of experience among the judges concerned; and, as a result, the development of mutual confidence between judges and authorities in different legal systems; the creation of a high level of interdisciplinary understanding of Convention objectives, in particular the distinction from custody proceedings; mitigation against delay; and greater consistency of practice by judges and lawyers”.

<sup>131</sup> See *Guide to Good Practice*, Parts I *Central Authority Practice* and II *Implementing Measures (Jordan’s Family Law*, 2003) and available on the Hague Conference on Private International Law web site at [http://www.hcch.net/index\\_en.php?act=conventions.publications&dtid=3&cid=24](http://www.hcch.net/index_en.php?act=conventions.publications&dtid=3&cid=24)

<sup>132</sup> *Ibid.*

<sup>133</sup> *Ibid.*



This would seem to be of relevance to the Dutch system, for currently, many judges hear only one or two cases per year and consequently lack relevant experience and detailed knowledge of the Convention. Although there has been some discussion about reducing the number of courts empowered to hear Hague applications, at the time of writing, there are no firm plans to change the system but the issue remains under active consideration.

A concern about the current Dutch system, at any rate as evidenced by the 1999 statistics,<sup>134</sup> is the slow overall disposal times particularly of return applications – among the slowest within the European Union. Although this can be explained to some extent by the time allowed to negotiate voluntary returns and by the relative high proportion of appeals, the fact remains that the Netherlands will have difficulty in complying with the requirement under Article 11(3) of the revised Brussels II Regulation, that court proceedings for the return of children under the Hague Convention should be completed within six weeks. It might therefore be appropriate for the Netherlands to consider shortening the time allowed for voluntary settlements before court proceedings are initiated (many other jurisdictions run the two processes concurrently). Consideration ought also be paid to the apparent frequency of appeals, though this might not be necessary if jurisdiction is concentrated at first instance, since that change in itself might reduce the number of appeals.

## 9. SUMMARY OF CONCERNS

- The Central Authority does not have its own web site and insufficient information is available (and only in Dutch) on the Ministry of Justice's web site.
- Acting both as the applicant and as the representative of the left-behind parent in court proceedings having previously been actively involved in negotiations with the parties with a view to arriving at an amicable solution has caused confusion and creates a potential conflict of interests.
- Jurisdiction to hear Convention cases is generally vested at first instance in the District courts which means, given the relatively low numbers of cases that go to court, that most judges have little experience nor detailed knowledge of the Convention.
- Although according the Central Authority speed has been improved, the overall disposal times of return applications were, according to 1999 statistics, among the slowest within the European Union.
- There is a relatively high proportion of appeals in return applications.

## 10. SUMMARY OF GOOD PRACTICES

- The Central Authority is efficient in handling child abduction cases and is able to communicate in various languages other than the Dutch: English, French and German.
- There is information available on the Ministry of Justice's web site and in brochures, and the Central Authority is in the process of constructing a new web site.

<sup>134</sup> But note, according to the Central Authority, disposal times have since improved significantly, see ante at 7.1.3.

- In addition to the Implementing Act a protocol about how the Central Authority handles child abduction cases has been drawn.
- The Central Authority has initiated meetings with organisations working in the field of child abduction to improve the application of the Convention.
- There appear to be few, if any, problems with locating children.
- The applicant does not have to pay for the application as the Dutch Central Authority will present the case to the court.
- The Netherlands provides legal aid both to the left-behind parent (if the Central Authority does not act as applicant) and abductor in incoming applications if certain conditions are fulfilled.
- Where translation of documents is required in incoming return applications to the Netherlands, in exceptional cases where the interests of speed dictate, this can be arranged by the Central Authority at no charge to the applicant.
- The Central Authority arranges translation of outgoing return applications at no charge to the applicant.
- The Netherlands has accepted accessions of most Contracting States.

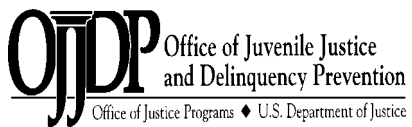
### APPENDIX

As at 1 January 2005, the Convention is in force between the following 73 Contracting States and the Netherlands.

<b>Contracting State</b>	<b>Entry into Force</b>
ARGENTINA	1 JUNE 1991
AUSTRALIA	1 SEPTEMBER 1990
AUSTRIA	1 SEPTEMBER 1990
BAHAMAS	1 FEBRUARY 1994
BELARUS	1 MAY 1998
BELGIUM	1 MAY 1999
BELIZE	1 SEPTEMBER 1990
BOSNIA AND HERZEGOVINA	1 DECEMBER 1991
BRAZIL	1 APRIL 2002
BULGARIA	1 FEBRUARY 2004
BURKINA FASO	1 SEPTEMBER 1992
CANADA	1 SEPTEMBER 1990
CHILE	1 JULY 1994
CHINA-HONG KONG SPECIAL ADMINISTRATIVE REGION	1 SEPTEMBER 1997
CHINA-MACAO SPECIAL ADMINISTRATIVE REGION	1 MARCH 1999
COLOMBIA	1 SEPTEMBER 1998
COSTA RICA	1 APRIL 2002
CROATIA	1 DECEMBER 1991
CYPRUS	1 MARCH 1995
CZECH REPUBLIC	1 MARCH 1998
DENMARK	1 JULY 1991
DOMINICAN REPUBLIC	1 JANUARY 2005
ECUADOR	1 MAY 1992
EL SALVADOR	1 APRIL 2002

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ESTONIA	1 APRIL 2002
FIJI	1 APRIL 2003
FINLAND	1 AUGUST 1994
FORMER YUGOSLAV REPUBLIC OF MACEDONIA	1 DECEMBER 1991
FRANCE	1 SEPTEMBER 1990
GEORGIA	1 NOVEMBER 1997
GERMANY	1 DECEMBER 1990
GREECE	1 JUNE 1993
GUATEMALA	1 MAY 2002
HONDURAS	1 JUNE 1994
HUNGARY	1 SEPTEMBER 1990
ICELAND	1 DECEMBER 1996
IRELAND	1 OCTOBER 1991
ISRAEL	1 DECEMBER 1991
ITALY	1 MAY 1995
LATVIA	1 APRIL 2002
LITHUANIA	1 OCTOBER 2004
LUXEMBOURG	1 SEPTEMBER 1990
MALTA	1 APRIL 2002
MAURITIUS	1 AUGUST 1993
MEXICO	1 OCTOBER 1991
REPUBLIC OF MOLDOVA	1 APRIL 2002
MONACO	1 MARCH 1993
NEW ZEALAND	1 SEPTEMBER 1991
NORWAY	1 SEPTEMBER 1990
PANAMA	1 JUNE 1994
PARAGUAY	1 APRIL 2002
PERU	1 MAY 2002
POLAND	1 NOVEMBER 1992
PORTUGAL	1 SEPTEMBER 1990
ROMANIA	1 MARCH 1993
SAINT KITTS AND NEVIS	1 OCTOBER 1994
SERBIA AND MONTENEGRO	1 DECEMBER 1991
SLOVAK REPUBLIC	1 FEBRUARY 2001
SLOVENIA	1 JULY 1994
SOUTH AFRICA	1 NOVEMBER 1997
SPAIN	1 SEPTEMBER 1990
SRI LANKA	1 APRIL 2002
SWEDEN	1 SEPTEMBER 1990
SWITZERLAND	1 SEPTEMBER 1990
THAILAND	1 DECEMBER 2002
TRINIDAD AND TOBAGO	1 JUNE 2002
TURKEY	1 JULY 2000
TURKMENISTAN	1 MAY 1998
UNITED KINGDOM	1 SEPTEMBER 1990
UNITED STATES OF AMERICA	1 SEPTEMBER 1990
URUGUAY	1 JANUARY 2002
UZBEKISTAN	1 APRIL 2002
VENEZUELA	1 JANUARY 1997
ZIMBABWE	1 NOVEMBER 1995



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