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Justice Programme (2014-2020)



INTERNATIONAL FAMILY MEDIATION IN THE BEST INTERESTS OF THE CHILD

METHODOLOGY AND ORIENTATIONS FOR MEDIATION IN INTERNATIONAL CHILD ABDUCTION





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SERVIZIO SOCIALE INTERNAZIONALE
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MIKK e i International Mediator Centre for Family Conflict and Child Abduction



Missing
Children
Europe

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GLOSSARY

This glossary is based on key terms and definitions used in the Guide to Good Practice on mediation by the Hague Conference on Private International Law¹, as well as legal definitions of the UN Convention on the Rights of the Child and the Regulation EU 2019/1111 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction.

Child

The UN Convention on the Rights of the Child defines a child as any person below the age of 18 years (UNCRC, Article 1).² This definition is upheld also by Regulation EU 2019/1111 (Article 2.2.6).³

The 1980 Hague Convention on the Civil Aspects of International Child Abduction clarifies in Article 4 that it applies to children who have not yet reached 16 years of age.⁴

Committee on the Rights of the Child

The Treaty Body of the UN Convention on the Rights of the Child, an international body of experts mandated to monitor States' progress in implementing the Convention.

International Child Abduction

International child abduction refers to the wrongful removal or retention of a child.

Wrongful removal or retention

The removal or retention of a child where

- such removal or retention is in breach of rights of custody acquired by decision, by operation of law or by an agreement having legal effect under the law of the Member State where the child was habitually resident immediately before the removal or retention; and
- at the time of removal or retention, the rights of custody were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

Regulation EU 2019/1111, Article 2.2.11

Parents

The persons who are considered parents of a child under national law.

The Hague Conference on Private International Law notes that, in "... a small number of cases within the scope of the 1980 Convention it is a person other than the parent (a grandparent, a step-parent or any other related or unrelated person) or an institution or other body whose custody rights are breached by a wrongful removal or retention of the child." In light of these considerations, the terms parents, left-behind parent and taking parent are used to refer to any other person or body whose custody rights are allegedly breached by a wrongful removal or

1 Hague Conference on Private International Law, *Mediation, Guide to good practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, 2012.

2 United Nations Convention on the Rights of the Child, 1989.

3 Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction ([Regulation EU 2019/1111](#)).

4 Hague Conference on Private International Law, *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, No. 28 (1980 Hague Convention).

retention or who are alleged to have wrongfully removed or retained a child.⁵

Holder of parental responsibility

Any person, institution or other body having parental responsibility for a child.

Regulation EU 2019/1111, Article 2.2.8

Left-behind parent

The parent who claims that his / her custody rights were breached by a wrongful removal or retention.⁶

Taking parent

The parent who is alleged to have wrongfully removed a child from his / her place of habitual residence to another State or to have wrongfully retained a child in another State.⁷

Parental responsibility

All rights and duties relating to the person or the property of a child, which are given to a natural or legal person by a decision, by operation of law or by an agreement having legal effect, including rights of custody and rights of access.

Regulation EU 2019/1111, Article 2.2.7

Rights of custody

Rights of custody include rights and duties relating to the care of the person of a child and in particular the right to determine the place of residence of a child.

Regulation EU 2019/1111, Article 2.2.9

Rights of access

Rights of access means rights of access to a child, including the right to take a child

to a place other than his or her habitual residence for a limited period of time.

Regulation EU 2019/1111, Article 2.2.10

Mediation

The Hague Conference on Private International Law (HCCH) describes mediation as follows:

"The definitions of 'mediation' that can be found in legal texts and publications vary significantly and often reflect certain minimum requirements regarding the mediation process and the person of the mediator in the relevant jurisdictions. Drawing together the common features in these various definitions, mediation can be defined as a voluntary, structured process whereby a 'mediator' (...) facilitates communication between the parties to a conflict, enabling them to take responsibility for finding a solution to their conflict."⁸ The HCCH notes that some definitions of mediation refer also to principles of confidentiality, neutrality or impartiality, although these principles are not uniformly upheld by all definitions.

International family mediation

The European Commission defines cross-border family mediation, also referred to as international family mediation, as *"a process conducted by one (or several) impartial, qualified third person(s), the mediator. The mediator has no power to decide but helps the parties to regain communication and assists them in resolving their problem themselves. The agreement reached is a tailor-made solution for their dispute that ensures that their parental decisions take account of the best interests of the child (...)."*⁹

5 Hague Conference on Private International Law, [Mediation](#), *Guide to good practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, 2012, p. 11.

6 Hague Conference on Private International Law, [Mediation](#), *Guide to good practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, 2012, p. 11.

7 Hague Conference on Private International Law, [Mediation](#), *Guide to good practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, 2012, p. 11.

8 Hague Conference on Private International Law, [Mediation](#), *Guide to good practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, 2012, p. 7.

9 European Justice (2020), *Family mediation*, [What is cross-border family mediation?](#), Last update: 8/10/2020.

Mediator

The Hague Conference on Private International Law uses the term “mediator” to refer to an impartial third party, who is conducting the mediation.

The HCCH notes that *“many definitions of the term ‘mediator’ in national or regional instruments mirror the necessary (legal) requirements a person has to fulfil to be a ‘mediator’ and the manner in which mediation has to be conducted. (...) The term is used, unless mentioned otherwise, without prejudice to the professional background of the mediator and specific requirements a person may have to fulfil to be able to call him- or herself ‘mediator’ in a given legal system. The term ‘mediator’ is used (...) without prejudice to whether mediation is conducted as co-mediation or as single mediation, i.e., unless stated otherwise, any use in this Guide of the term ‘mediator’ in the singular is also meant to refer to mediation conducted by more than one mediator.”*¹⁰

Mediated agreement

Mediated agreement refers to the outcome of mediation, i.e., the agreed solution reached by the parties in mediation.¹¹

Domestic violence

Domestic violence refers to all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim.

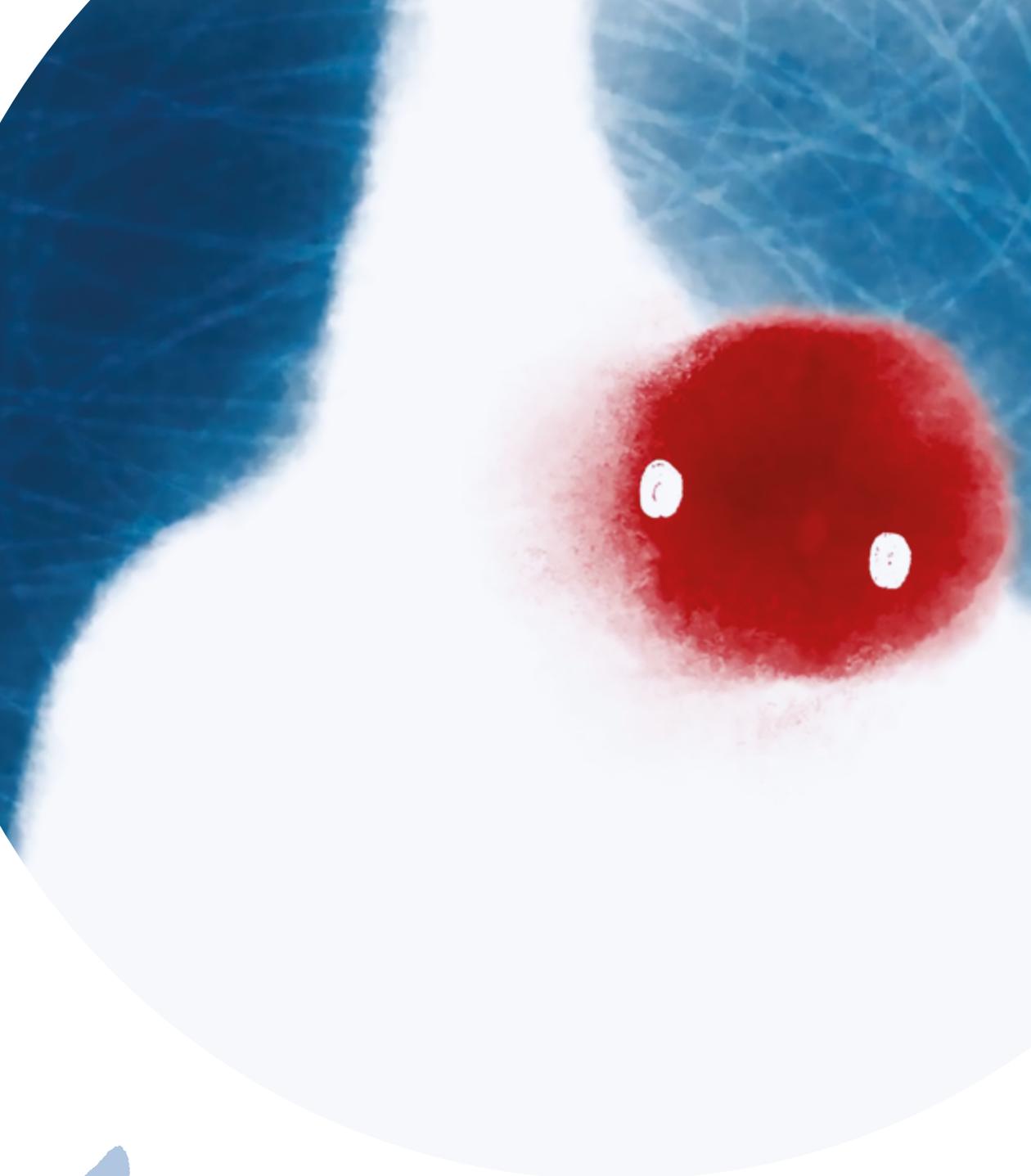
Council of Europe Convention on preventing and combating violence against women and domestic violence (“Istanbul Convention”), CETS No. 210, 2011, Article 3.b.

¹⁰ Hague Conference on Private International Law, [Mediation](#), *Guide to good practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, 2012, p. 7

¹¹ Hague Conference on Private International Law, [Mediation](#), *Guide to good practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, 2012, p. 10.

ACRONYMS

1980 Hague Convention	Hague Convention on the Civil Aspects of International Child Abduction
1996 Hague Convention	Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children
Art.	Article
CBFM	Cross-border family mediation
CIM	Child-inclusive mediation
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)
EU	European Union
HCCH	Hague Conference on Private International Law
IFM	International family mediation
ISS	International Social Service
MiKK e.V	International Mediation Centre for Family Conflict and Child Abduction (Germany)
UNCRC	United Nations Convention on the Rights of the Child



1

INTRODUCTION

International child abduction refers to situations where a parent removes the own child – or children – to another State, or retains them there, without the consent of the other parent.¹² These situations typically arise when families are in crisis and are often related to family members being spread across or having ties to more than one country.

In 2015, the Hague Conference on Private International Law identified 2,270 return applications to Central Authorities in international child abduction cases, involving 2,997 children. The majority of cases concerned single children who were on average just under seven years old.¹³

Missing Children Europe reports that in the European Union (EU), international child abductions represent the second largest group of children considered missing, as well as the vast majority of cross-border cases handled by the Europe-wide network of missing children hotlines. In 2020, national hotlines of 15 European countries opened 664 such cases.¹⁴

Having recognised the complexity and significant scale of these cases, the international community has developed standards and procedures for addressing them. Even though a legislative framework exists at the international and European levels, preventing and responding to international child abduction remains a challenge. The complexity of these cases is due to several factors:

The cross-border nature of the cases requires the collaboration of state authorities, service providers and professionals across national legal and judicial, social welfare and child protection systems; they need to cooperate and communicate across different languages and cultures. Significant differences still exist: as an example, international child abduction is a criminal offence in some EU Member States, making it difficult

¹² See Glossary for a definition of wrongful removal or retention of a child.

¹³ International Centre for Missing and Exploited Children, Hague Conference on Private International Law, *Part I – A statistical analysis of applications made in 2015 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Global report*, Provisional edition pending the completion of the French version, The Seventh Meeting of the Special Commission on the Practical Operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention – October 2017, p. 10. The data are based on a survey with Contracting States and concern the return applications received by Central Authorities during the year 2015. Responses were received from 76 of the 93 Contracting States at that time.

¹⁴ Missing Children Europe (2021), [International child abduction](#), website. Missing Children Europe (undated), [Figures and trends 2020 from hotlines for missing children and cross-border family mediators](#), p. 2.

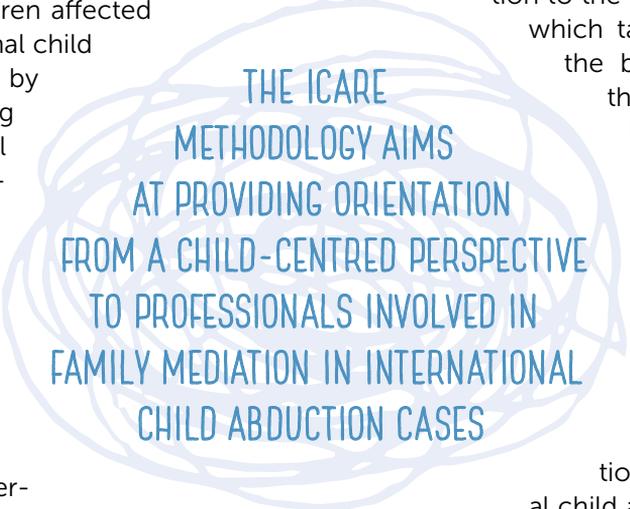
for the abducting parent to return to that country.¹⁵

Against this background, the iCare project aims at improving the situation of children affected by international child abduction by strengthening international family mediation (IFM) as a complement to judicial proceedings with particular attention to the best interests of the child.

International family mediation is a process conducted by one or more qualified mediators who help the parents to communicate with each other again and resolve their dispute.

Mediators are impartial and have no power to decide or to instruct the parents. The agreement reached through mediation is a tailor-made solution to the parental dispute, which takes account of the best interests of the child.¹⁶ The iCare methodology aims at providing orientation from a child-centred perspective to professionals involved in family mediation in international child abduction cases.

The overall objective is to identify approaches and measures suitable for securing the rights of the child and promoting the best interests of the child in the context of international family mediation.



THE ICARE
METHODOLOGY AIMS
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FROM A CHILD-CENTRED PERSPECTIVE
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¹⁵ In some countries, the conduct is criminalised where both, the taking and the left-behind parent hold full parental responsibility (Croatia, Denmark, Cyprus, Finland, France, Germany, Greece, Ireland, Italy, the Netherlands), or where the taking parent holds limited parental responsibility (Austria, Belgium, Hungary, Lithuania, Poland, Portugal, Slovenia, Spain, Sweden). Specjalski, M. (2019), *Criminalization of "parental kidnappings" in some European countries and human right to respect private and family life*, HDIM.CS/0348/19, 24 September 2019. Kosonoga-Zygmunt, J. (2021), *Odpowiedzialność karna rodziców za uprowadzenie lub zatrzymanie małoletniego dziecka (Art. 211 K.)*, [Ius Novum](#), 3/2021.

¹⁶ European Justice (2020), *Family mediation*, [What is cross-border family mediation?](#), Last update: 8/10/2020.

It builds on international and EU law, recommendations and good practice guides, in particular,

- HCCH Guide to Good Practice on Mediation (2012)¹⁷
- Council of Europe Guidelines on child-friendly justice (2010)¹⁸
- Council of Europe, Committee of Ministers Recommendation on family mediation (1998)¹⁹
- Committee on the Rights of the Child, General Comments²⁰
- International Social Service, Charter for international family mediation processes (2017) and Guide to international family mediation “Resolving family conflicts” (2014)²¹
- European code of conducts for mediators and mediation providers (2004 and 2018)²².

This document was developed as part of the iCare project and is based on information collected through survey questionnaires in the project countries Belgium, Bulgaria, Germany, Greece and Italy, as well as Poland and the Netherlands; through consultations with international, European and national stakeholders and experts between May and December 2021; and through national and European seminars in the partner countries Belgium, Bulgaria, Germany and Italy, which were held between April and May 2022.

¹⁷ Hague Conference on Private International Law, *Mediation, Guide to good practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, 2012.

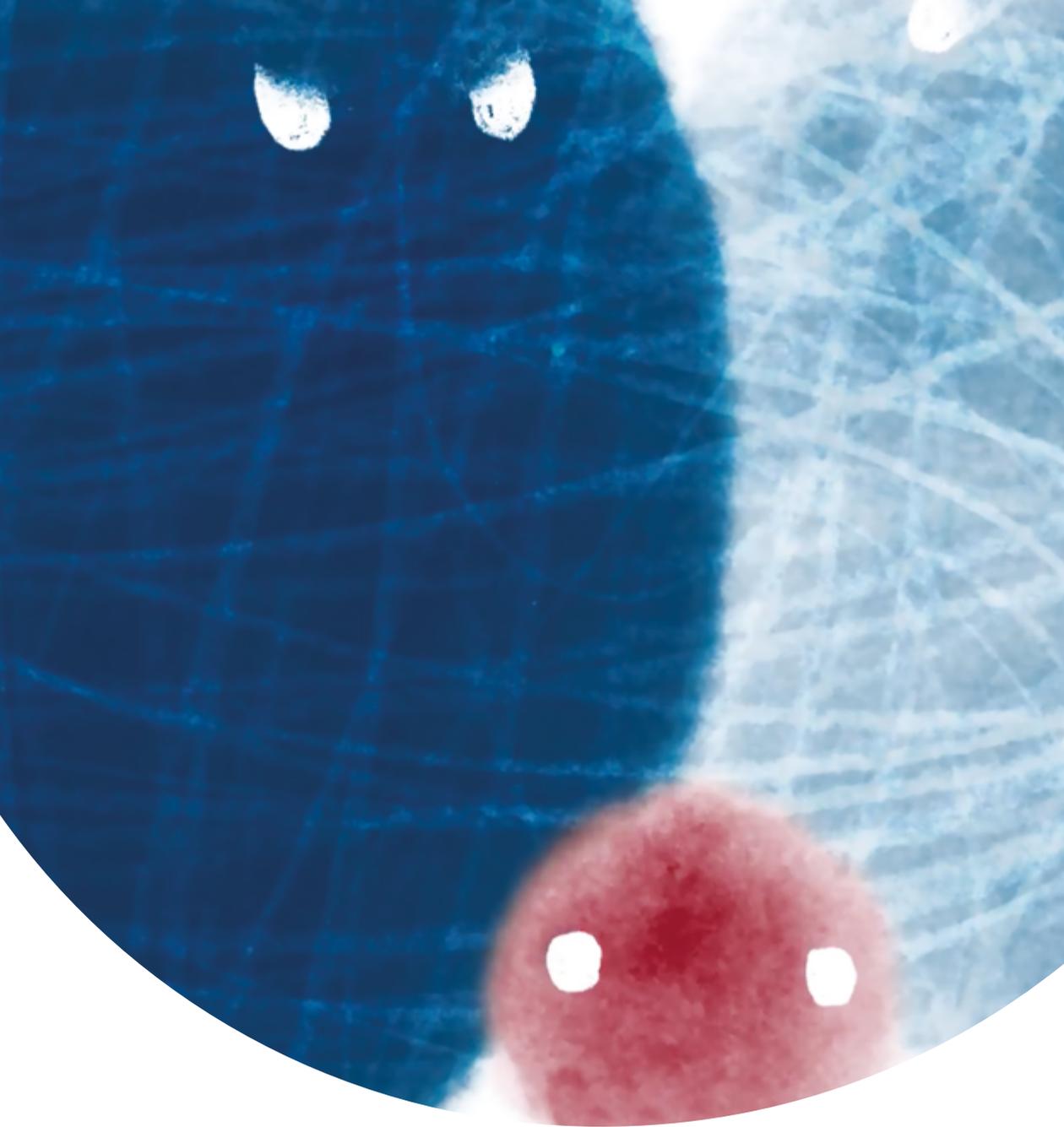
¹⁸ Council of Europe, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*, 2010.

¹⁹ Council of Europe, Committee of Ministers, *Recommendation No. R (98) 1 of the Committee of Ministers to member States on family mediation*, 21 January 1998. See also: Council of Europe, Committee of Ministers, *Recommendation Rec(2002)10 of the Committee of Ministers to member States on mediation in civil matters*, 18 September 2002.

²⁰ See in particular; Committee on the Rights of the Child, General Comment No. 12 (2009), the right of the child to be heard, *CRC/C/GC/12*, 2009. Committee on the Rights of the Child, General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art.3, para. 1), *CRC/C/GC/14*, 2013.

²¹ International Social Service, *Charter for International Family Mediation Processes*, a collaborative process, 2017. International Social Service, *Resolving family conflicts, A guide to international family mediation*, 2014.

²² *European Code of Conduct for Mediators*, 2004. Council of Europe, European Commission for the Efficiency of Justice (CEPEJ), *European Code of Conduct for Mediation Providers*, CEPEJ(2018)24, 3-4 December 2018.



2

MEDIATION IN INTERNATIONAL CHILD ABDUCTION: OPPORTUNITIES AND CHALLENGES



THE HARMFUL EFFECTS OF INTERNATIONAL CHILD ABDUCTION

International child abduction has many harmful effects on the child that may continue throughout life. Empirical studies with adults who had experienced international child abduction in childhood reveal that the children typically perceived the abduction as a disruptive event, as they were "... removed from a home, school, friends, pets, and extended family, and may have been told lies to justify what has happened. Feelings of confusion and concerns about disloyalty often arise ..., which the child has to manage alone, together with those feelings of loss and grief"²³ The return to the left-behind parent was often perceived as yet another disruptive event and it was difficult for the child to integrate with the parent or family they were returned to. For those who were not returned during childhood, these feelings sometimes prevailed into adulthood without being resolved.²⁴

Adults who were abducted by a parent in childhood tend to struggle with long-term effects, such as mental health issues, depression, a feeling of isolation and low self-worth, and even suicidal tendencies. Personal relationships may be impacted due to difficulties in trusting other persons, engaging in intimate relationships and believing in lasting relations due to attachment problems. Some research participants found it difficult to describe the own identity as they felt entirely defined by the experience of abduction. Some felt a sense of guilt towards or rejection by the left-behind parent because of the anger the parent felt towards the child for not finding a way back.²⁵

²³ Freeman, M., [Parental child abduction](#), *The long-term effects*, International Centre for Family Law, Policy and Practice, 2014, pp. 8-9.

²⁴ Freeman, M., [Parental child abduction](#), *The long-term effects*, International Centre for Family Law, Policy and Practice, 2014, pp. 8-9. Freeman, M., Parental child abduction: the long-term effects, Presentation, 25 November 2014, in: Council of the Baltic Sea States, *Transnational child protection: The role of judges, social services and central authorities*, 4th Expert Meeting, Full Meeting Report, PROTECT Children on the Move, CBSS Children's Unit, 2014.

²⁵ Freeman, M., Parental child abduction: the long-term effects, Presentation, 25 November 2014, in: Council of the Baltic Sea States, *Transnational child protection: The role of judges, social services and central authorities*, 4th Expert Meeting, Full Meeting Report, PROTECT Children on the Move, CBSS Children's Unit, 2014. Freeman, M., [Parental child abduction](#), *The long-term effects*, International Centre for Family Law, Policy and Practice, 2014.

THE EXPERIENCES OF CHILDREN AND PARENTS AFFECTED BY INTERNATIONAL CHILD ABDUCTION SHOW THAT IT IS OFTEN INSUFFICIENT TO ONLY ENSURE THE CHILD'S RETURN TO THE LEFT-BEHIND PARENT. TO PREVENT IMMEDIATE AND LONGER-TERM HARM, A CONTINUITY OF SUPPORT SERVICES ARE REQUIRED FOR THE CHILD, THE LEFT-BEHIND PARENT AND ANY SIBLINGS, BEFORE, DURING AND AFTER THE RETURN. CHILDREN WHO ARE NOT RETURNED AND THEIR FAMILIES ARE ALSO IN NEED OF TARGETED SUPPORT.²⁶

Research shows further that abducted children may suffer physical or sexual violence by the abducting parent or in other close relationships while abducted.²⁷ Service providers and state officials handling such cases should therefore not presume that the child is safe and

well cared for simply because the child is staying with a parent. The possibility that the child is a victim of violence or exploitation should always be considered, and mediators need to be sensitised, knowledgeable and competent to react to any indications, suspicions or doubts.

MEDIATION AS A PREVENTIVE SERVICE: ADVANTAGES AND OPPORTUNITIES

Parents typically experience international child abduction as an emotionally highly challenging situation and have difficulties communicating with each other. **Mediation is considered to increase the likelihood of parents to re-establish communication, focus on the needs and best interests of their child and enter into a dialogue to reach an agreement.**²⁸

Mediation is a transparent process and

the parents have to be fully informed to participate on an equal basis. It may involve other key actors, such as the parents' lawyers, the guardian *ad litem* of the child, social or child protection workers and interpreters. Depending on the age of the child, the child could be involved in the mediation as well and contribute their own perspective and views.

Mediation is confidential in so far as the information that parents disclose

²⁶ Freeman, M., *Parental child abduction, The long-term effects*, International Centre for Family Law, Policy and Practice, 2014, p. 7.

²⁷ Janvier, R.F., McCormick, K., Donaldson, R., Parental kidnapping: a survey of left-behind parents, *Juvenile and Family Court Journal*, Vol. 41.1, 1990, pp. 1-8. Cited in: Freeman, M., *Parental child abduction, The long-term effects*, International Centre for Family Law, Policy and Practice, 2014, p. 8.

²⁸ This section builds substantively on: Hague Conference on Private International Law, *Mediation, Guide to good practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, 2012, pp. 21-26.

during the mediation is not shared with the court. Confidentiality enables and encourages parents to engage in open dialogue to address and resolve the issues at hand, even if they are particularly sensitive and complex. In this protected space, parents can participate equally in finding a solution and reaching an agreement. They may have a stronger sense of ownership because they are better able to influence the process and the solution compared to court proceedings. In court, parents may feel more reluctant to disclose personal and sensitive information so that the judge may have to make his or her decision based on incomplete or biased information, and the parents may not consider the outcomes of the court proceedings as a “fair” solution. This would have consequences for the sustainability of the outcome, especially for the child, who could suffer further harm if the conflict between the parents continues. Mediated agreements are therefore generally considered more sustainable than court orders.

Even if mediation does not lead to an agreement and the case is subsequently heard in court, the mediation process usually improves the relationship and communication between the parents. The parents start talking and listening to each other again and develop skills to analyse and resolve their situation and to understand the consequences of their decisions and actions for the child. Mediation can help them to regain a shared responsibility for the child and focus on the child’s best interests. It thus prepares a basis for medium and longer-term collaboration of the parents, which is necessary in view of the child’s right

to contact and personal relations with both parents and the role and responsibilities of each parent towards the child. Mediation can be useful in laying a foundation for the parents to respect and comply with the court decision and refrain from appealing.

Mediation tends to be more cost-effective than judicial proceedings, in particular where parents have access to mediation aid, that is, financial support to cover the costs of the mediator. In the longer-term, costs are reduced where mediation leads to a sustainable agreement between the parents who do not have to bear subsequent costs for legal remedies or new proceedings.

Mediation has procedural advantages as it helps to meet the tight time-frame of six weeks set out in Regulation EU 2019/1111 (Article 24.2) and Article 2 of the 1980 Hague Convention. The left-behind parent can spend time with the child during this period, if mediation is arranged as in-person sessions in the country to which the child was taken.

Whereas court proceedings remain limited to matters that fall in the court’s jurisdiction, in mediation parents have the possibility to address also issues that would not be considered legally relevant in court proceedings, and this can help resolving matters relating to a longer history of family disputes. Although the applicable legal framework and jurisdictional issues are relevant to ensure the mediated agreement will have legal effect, and in the short time-frame available to arrive at a mediated agreement the focus typically lies on the child’s return, parents could address in mediation a broader scope of matters, as

well as details regarding the conditions and modalities of the child's return.²⁹

Mediation has a strong potential also to regulate child relocation and prevent international child abduction. Parents may be more inclined to consent to relocation if their contact with the child is settled in advance. A mediated agreement approved by the court, or a court decision based on a mediated

agreement, will be recognised and enforceable in all other Contracting States of the 1996 Hague Convention (as provided for in Articles 23 and 28). Cross-border contact and relocation cases would therefore also benefit from mediation.



LIMITS AND CHALLENGES OF MEDIATION

Mediation in international child abduction cases is challenged to respond to a number of difficulties, such as the cross-border nature of the cases, the high level of conflict between the parents, the need to act rapidly and, where applicable, the risk of criminal proceedings for the abducting parent in case of return. Further challenges arise from different cultures with regard to the prevention and amicable resolution of parental disputes and the support and assistance available for parents to this end. Enforcing mediated agreements in two countries can be difficult, uncertain and expensive.³⁰

Difficulties are also linked to the *rebus*

sic stantibus character of all decisions concerning children, recognising that the situation of children is dynamic, including in view of their development and evolving capacities. In consequence, the child's situation and the circumstances of the case can change even within a short period of time, and decisions and measures may need to be reviewed and adapted accordingly. These dynamics may have implications for the enforcement of decisions.³¹

There are limits to the use of mediation in international child abduction cases. If one parent is determined not to engage in mediation, mediation cannot

²⁹ Hague Conference on Private International Law, *Mediation, Guide to good practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, 2012, pp. 54-55.

³⁰ As of 1 August 2022, Regulation EU 2019/1111 is in force. One of its aims is to make the enforcement of decisions and agreements easier (Recital 2; regarding agreements establishing the return of the child after an abduction see Recitals 5 and 22). Such agreements shall have specific features (Recital 14), and certain requirements regarding the hearing of the child have to be met (Recital 71). Agreements having the specific features mentioned, should be treated as decisions and, therefore, executed immediately. These provisions are expected to render enforcement less difficult, less expensive and less uncertain. What remains difficult is the circulation of package agreements, which are dealing with different aspects and are not limited to parental responsibility matters. Carpaneto, L., *Introduction to the normative framework regarding mediation in international child abduction cases*, iCare national seminar, Genoa, Italy, 24 May 2022.

³¹ Carpaneto, L., *Introduction to the normative framework regarding mediation in international child abduction cases*, iCare national seminar, Genoa, Italy, 24 May 2022.



succeed as it relies on the voluntary participation of both parents. In situations where there is a strong power-imbalance between the parents, limited cognitive skills of one parent, domestic, gender-based or other forms of violence or exploitation in the family, mental health issues or substance abuse, and depending on the specific circumstances of the case, the use of mediation may not be appropriate and the involvement of a judicial authority may be necessary or preferable.³² Mediators need to be aware of the harmful impact of any form of violence on the child, especially where violence takes place within the family (*see Box 1*).

Against this background, Regulation EU 2019/1111 states in Recital 49 that mediation is not always appropriate, especially in cases of domestic violence. The Council of Europe Convention on preventing and combating violence against women and domestic violence (also referred to as “Istanbul Convention”) obliges States Parties to prohibit mandatory alternative dispute resolution processes, such as mediation and conciliation, in relation to all forms of violence falling within the scope of the Convention (Article 48.1).

The drafters of the Convention recognised that, “in particular in family law, methods of resolving disputes alternative to judicial decisions are considered to better serve family relations and to

result in more durable dispute resolution”. They noted however also “the negative effects these can have in cases of violence covered by the scope of this Convention, in particular if participation in such alternative dispute resolution methods are mandatory and replace adversarial court proceedings”. The provision recognises that perpetrators of such violence may exude a sense of power and dominance and the victim may not be able to enter the alternative dispute resolution processes on an equal basis with the perpetrator. The prohibition of mandatory participation in alternative dispute resolution processes is intended to “avoid the re-privatisation of domestic violence and violence against women and to enable the victim to seek justice”.³³

In view of these challenges, mediation and judicial proceedings should be closely linked. When the two processes go hand in hand, the strengths and safeguards of the two complement each other and prevent harm to the child and the parents. **When complementary, mediation and court proceedings can lead to more sustainable outcomes, give legal effect to mediated agreements and make them enforceable, for instance through court approval or registration, and ensure safeguards for the child are in place, as well as checks regarding the consideration given to the best interests of the child.**³⁴ (*see safeguards in mediation, Chapter 6*)

³² Hague Conference on Private International Law, *Mediation, Guide to good practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, 2012, pp. 23-24.

³³ Council of Europe, *Explanatory Report* to the Council of Europe Convention on preventing and combating violence against women and domestic violence, Istanbul, 11.5.2011, para. 251-252.

³⁴ Hague Conference on Private International Law, *Mediation, Guide to good practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, 2012, pp. 25-26.



BOX 1

THE HARMFUL EFFECTS OF DOMESTIC VIOLENCE ON CHILDREN AND THE RIGHT TO BE SAFE

All violence is harmful for children and damages the child's health, well-being and development. Violence perpetrated in the family, such as corporal punishment, is particularly harmful in the moment it happens and in the medium and longer term; the harm can last for a lifetime. Corporal punishment has been evidenced to cause direct and indirect physical harm, impaired cognitive ability and reduced achievements in education, mental health problems such as depression, anxiety, hopelessness, post-traumatic stress symptoms and self-harming behaviour. It nurtures aggressions, substance abuse and can lead to violent behaviour or involvement in crime, which could persist into adulthood.³⁵

The Committee on the Rights of the Child defines 'corporal' or 'physical' punishment as "any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light. Most involves hitting ("smacking", "slapping", "spanking") children, with the hand or with an implement – a whip, stick, belt, shoe, wooden spoon, etc. But it can also involve, for example, kicking, shaking or throwing children, scratching, pinching, biting, pulling hair or boxing ears, forcing children to stay in uncomfortable positions, burning, scalding or forced ingestion (for example, washing children's mouths out with soap or forcing them to swallow hot spices). In the view of the Committee, corporal punishment is invariably degrading. In addition, there are other

non-physical forms of punishment that are also cruel and degrading and thus incompatible with the Convention. These include, for example, punishment which belittles, humiliates, denigrates, scapegoats, threatens, scares or ridicules the child."³⁶

The Committee therefore recognises corporal punishment as a cruel or degrading form of punishment of children and its prohibition falls within the scope of UNCRC Article 37.a.³⁷

Children are today considered victims of violence irrespective of whether an act of violence in the family home is directed against the child or if the child witnesses violence between the parents. In fact, intimate partner violence and corporal punishment of children tend to be closely linked. Re-

³⁵ End Violence Against Children, End Corporal Punishment, *Corporal punishment of children: summary of research on its impact and associations*, 2021, pp. 2-5. Gershoff, Elizabeth Thompson, Corporal Punishment by Parents and Associated Child Behaviours and Experiences: A meta-analytic and theoretical review, Columbia University, *Psychological Bulletin*, Vol. 128, No. 4, pp. 539–579. Committee on the Rights of the Child, General Comment No. 13 (2011), The right of the child to freedom from all forms of violence, [CRC/C/GC/13](#), 18 April 2011.

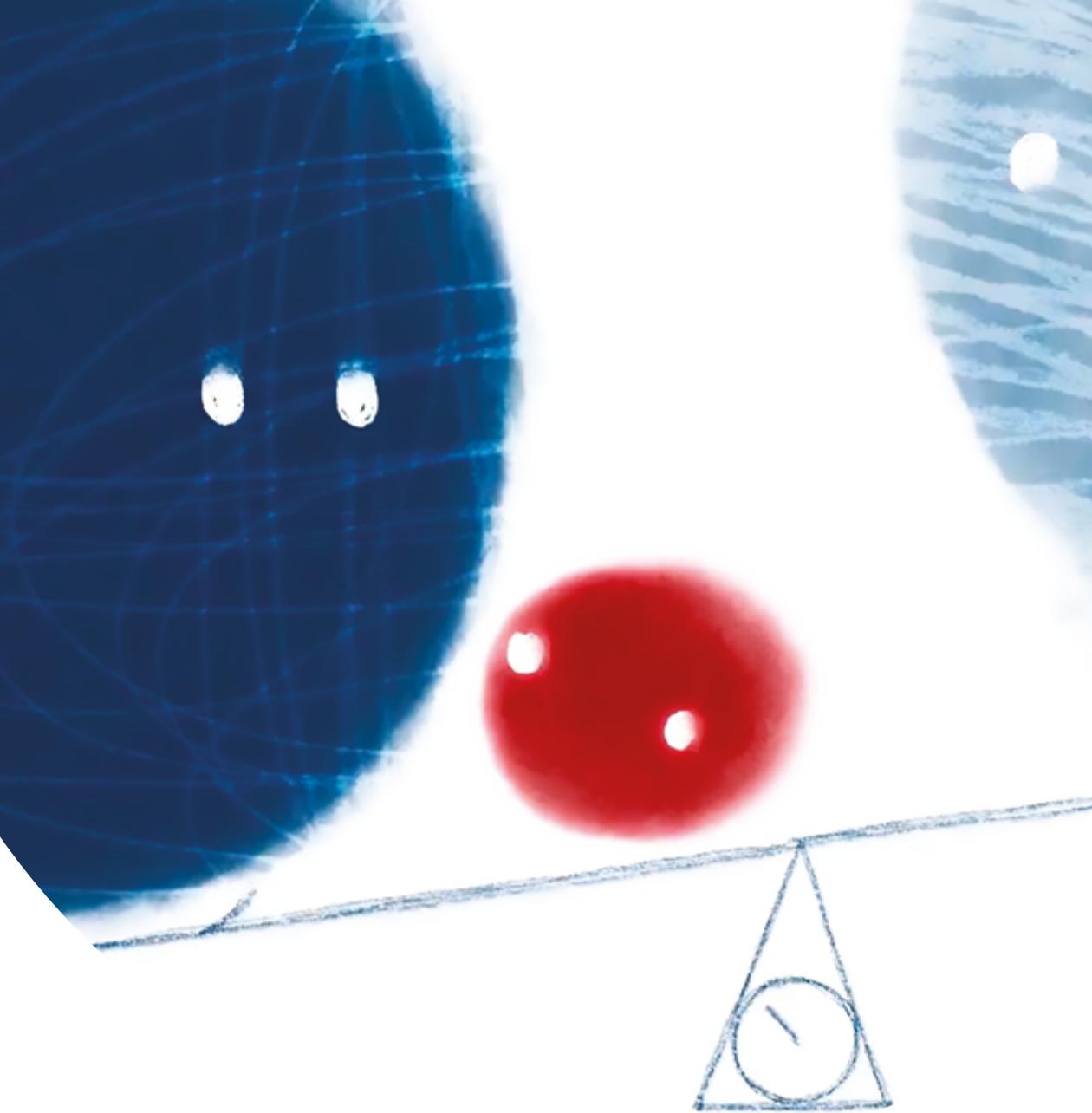
³⁶ Committee on the Rights of the Child, General Comment No. 8 (2006), The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts. 19; 28, para. 2; and 37, inter alia), [CRC/C/GC/8](#), 2 March 2007, para. 11.

³⁷ Committee on the Rights of the Child, General Comment No. 8 (2006), The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts. 19; 28, para. 2; and 37, inter alia), [CRC/C/GC/8](#), 2 March 2007, para. 12.

search shows that the harmful impact is more severe where children have a double exposure as victims of corporal punishment and by witnessing violence between the parents or against siblings. Children who experience such a double exposure to violence in the home have also a higher risk of exposure to violence outside the family, for instance by peers or at school.³⁸

Wherever risks of domestic or other forms of violence are identified, referrals to the child protection services have to be made in accordance with national law, regardless of whether violence is directed against the child or another family member. The same applies to any identified risks to the safety and well-being of the child.

38 End Violence Against Children, End Corporal Punishment, [Corporal punishment of children: summary of research on its impact and associations](#), 2021, pp. 6-7. Gershoff, Elizabeth Thompson, Corporal Punishment by Parents and Associated Child Behaviours and Experiences: A meta-analytic and theoretical review, Columbia University, *Psychological Bulletin*, Vol. 128, No. 4, pp. 539–579. Council of Europe, [Domestic violence](#), undated. Council of Europe, *Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention)*, [Children's rights](#), undated.



3

MEDIATION IN INTERNATIONAL CHILD ABDUCTION: LEGAL FRAMEWORK



The applicable international and EU legal framework recognises the value of mediation in international child abduction cases as a preventive and alternative dispute resolution measure. This section provides a brief overview.

Two families of instruments with a global or regional dimension interact in trying to prevent child abductions or, when abduction has taken place, in achieving the goal of returning the child to his/her habitual residence: on the one side, human rights instruments, such as the 1989 United Nations Convention on the Rights of the Child (UNCRC), the 1950 European Convention on Human Rights (ECHR) and the Charter of Fundamental Rights of the EU in its 2007 final version and, on the other side, instruments of cross-border judicial cooperation, such as the 1980 Hague Convention on the Civil Aspects of International Child Abduction (hereafter the 1980 Hague Convention), the 1996 Hague Convention on parental responsibility and the protection of children (hereafter the 1996 Hague Convention), the Regulation (EC) No. 2201/2003 of the European Union concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, which as of 1 August 2022 is replaced by Regulation EU 2019/1111 (also referred to as Brussels IIa and IIb Regulations respectively).

HUMAN RIGHTS INSTRUMENTS

The UNCRC with its 196 States parties constitutes the most relevant and authoritative legal framework for the protection of children's rights, and imposes important obligations on States.³⁹ Among these, relevant to the purposes of this paper are, in particular, the obligation to make the best interests of the child a primary consideration in all actions concerning children (Article 3) and to secure

³⁹ For further information on the Convention, see: European Union Agency for Fundamental Rights, *Handbook on European law relating to the rights of the child*, Luxembourg, 2022. Vaghri, Z., Zermatten, J., Lansdown, G., Ruggiero, R. (eds.), *Monitoring State compliance with the UN Convention on the Rights of the Child, An analysis of attributes*, Springer, 2022. Tobin, J. (ed.), *The UN Convention on the Rights of the Child, a commentary*, OUP, 2019. Alen A. et al. (eds.), *The UN Children's Rights Convention: theory meets practice*, Intersentia, 2007. Leborgne, A., Putmna, E., Egéa, V. (eds.), *La Convention de New-York sur les droits de l'enfant: vingt ans d'incidences théoriques et pratiques*, Presses universitaires d'Aix-Marseille, 2012. Liefgaard, T., Doek, J.E. (eds.), *Litigating the rights of the child, the UN Convention on the Rights of the Child in domestic and international jurisprudence*, Springer, 2015. Liefgaard, T., Sloth-Nielsen, J. (eds.), *The United Nations Convention on the Rights of the Child, taking stock after 25 years and looking ahead*, Brill Nijhoff, 2016. Autorità garante per l'infanzia e l'adolescenza [National Authority for Children and Adolescents] (ed.), *La Convenzione delle Nazioni Unite sui diritti dell'infanzia e dell'adolescenza, Conquiste e prospettive a 30 anni dall'adozione [The United Nations Convention on the Rights of the Child, Achievements and perspectives at 30 years after its adoption]*, 2019.

the right of the child to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests (Article 9).

With specific reference to the phenomenon of child abduction, States parties are under a specific duty to adopt measures to combat the illicit transfer and non-return of children abroad (Article 11), also by concluding bilateral or multilateral agreements to this purpose (Articles 11 and 35).

The UNCRC prohibits all forms of violence against children: Article 19 obliges States to *"... take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child."* States

are required to put in place a range of protective measures, such as social programmes to provide necessary support for the child, parents and caretakers, as well as measures for the identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment, including, where appropriate, judicial proceedings.

The ECHR, with its 46 States parties⁴⁰, is not anymore the most modern catalogue of human rights, but, thanks to the evolving interpretation by the European Court of Human Rights, the right to family life is constantly interpreted in light of the UNCRC and Council of Europe policy instruments, such as the Guidelines on child-friendly justice⁴¹, with the consequence that the Court is able to grant children specific protection of their rights.

The EU Charter of Fundamental Rights, on the contrary, is one of the most modern human rights treaties and, in its Article 24, synthesises the UNCRC main provisions, by stating as follows:

- 1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.**
- 2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.**
- 3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.**

⁴⁰ After the expulsion from the Council of Europe on 16 March 2022, the Russian Federation ceased to be a High Contracting Party to the European Convention on Human Rights on 16 September 2022. See Council of Europe, Committee of Ministers, Resolution [CM/Res\(2022\)3](#) on legal and financial consequences of the cessation of membership of the Russian Federation in the Council of Europe, 23 March 2022.

⁴¹ Council of Europe, [Guidelines](#) of the Committee of Ministers of the Council of Europe on child-friendly justice, 2010.

CIVIL JUDICIAL COOPERATION INSTRUMENTS

Moving from human rights to the field of judicial cooperation in civil matters, **the 1980 Hague Convention plays a key role in addressing the civil aspects of international child abduction.** The Convention has been ratified by 101 Contracting Parties.⁴² The instrument is grounded on the immediate return principle and, therefore, on the idea that it is in the best interests of the child who has been abducted to be returned to the State of habitual residence.

Exceptions to this principle are provided in Articles 12, 13 and 20: if one year has elapsed after the abduction, the child objects to the return, the return is in fact a violation of fundamental rights, or the return entails a risk of physical or psychological harm to the child, the return shall not be ordered.

Besides the “return and exceptions to return” mechanism described above, the 1980 Hague Convention also makes reference to agreed solutions, which are based on the consent of both parents.

More precisely, under Article 7, Central Authorities shall co-operate with each other and take all appropriate measures, inter alia, “to secure the voluntary return of the child or to bring about an amicable resolution of the issues”. On the other hand, Article 10 states that “the Central Authority of the State where the child is shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child.”

A second instrument, which has been adopted under the aegis of the Hague Conference of Private International Law is the 1996 Hague Convention, which is binding for all EU Member States following a specific invitation in this respect by the EU Commission. It reinforces the 1980 Hague Convention by incorporating the primary substantial law of the courts of habitual residence of the child in deciding matters concerning the child in the long term. It is therefore an important instrument for the concrete implementation of the right to maintain contact with both parents in cross-border cases. It is also possible, under Article 11, to adopt urgent protective measures when returning the child.

The Hague Conference of Private International Law is promoting mediation in child abduction proceedings. In this respect, a milestone is the Guide to Good Practice, which provides important guidance for the amicable settlement of child abduction cases.⁴³

In intra-EU child abduction cases, specific rules have been adopted for the first time in Regulation (EC) No. 2201/2003. More precisely, the rules of the 1980 Hague Convention have been supplemented by special “European” rules, with a view of enhancing the return principle and de-potentiating the exceptions to return and, in particular, the so-called grave risk exception under Article 13 of the 1980 Hague Convention.

⁴² Hague Conference on Private International Law, [Status Table](#), 28: *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, last update: 19 July 2019.

⁴³ Hague Conference on Private International Law, [Mediation](#), *Guide to good practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, 2012.

In this respect, Article 11.8 of the above mentioned Regulation has been always considered a key rule, giving the court of the child's former habitual residence the final word on the return of the child. It is the so-called trumping order, a decision of the court of the State of the child's former habitual residence that can trump and, therefore, overturn the non-return order of the court of the State to which the child was wrongfully removed. It is also possible that the court of the State of the child's former habitual residence, sharing the views of the court of the State to which the child has been wrongfully removed, does not exercise this power. If a trumping order under Article 11.8 is issued, however, such an order is immediately enforceable in the EU Member State in which the child is present.

Regulation (EC) No. 2201/2003 further provided that it should be ensured that

the child is given the opportunity to be heard in abduction proceedings, unless this appears inappropriate having regard to his or her age or degree of maturity (Article 11.2). Such a rule, which is not expressly provided in the 1980 Hague Convention – even if it can be derived by the possibility for the child to object to return as well as from the human rights oriented interpretation of the rules of the Convention itself – was clearly a very important novelty.

Regulation (EC) No. 2201/2003 did not expressly mention alternative resolution methods for child abduction cases. However, as provided by the 1980 Hague Convention under Article 55, Central Authorities were under a duty to *“facilitate agreement between holders of parental responsibility through mediation or other means, and facilitate cross-border cooperation to this end”*.

On the other hand, the Regulation tended to facilitate lawful relocation by virtue of a specific rule on jurisdiction. More precisely, Article 9, entitled “Continuing jurisdiction of the child's former habitual residence”, stated that:

1. Where a child moves lawfully from one Member State to another and acquires a new habitual residence there, the courts of the Member State of the child's former habitual residence shall, by way of exception to Article 8, retain jurisdiction during a three-month period following the move for the purpose of modifying a judgment on access rights issued in that Member State before the child moved, where the holder of access rights pursuant to the judgment on access rights continues to have his or her habitual residence in the Member State of the child's former habitual residence.
2. Paragraph 1 shall not apply if the holder of access rights referred to in paragraph 1 has accepted the jurisdiction of the courts of the Member State of the child's new habitual residence by participating in proceedings before those courts without contesting their jurisdiction.

As a consequence, when the child's lawful relocation with one of the parents occurred within the EU judicial

area, the left behind parent is “assisted” by the jurisdictional rule under Article 9, allowing him/her to initiate pro-

ceedings in the Member State of the former habitual residence of the child, which presumably is the court of the State where the latter parent lives, and which has held the judgments on the right of visit, and apply for the modification of the judgment, which regulated access rights in order to take into account the new situation.

Clearly in establishing such a strong link with the former jurisdiction, Article 9 encouraged the relocating parent to find an agreement with the left behind parent and, possibly, also to prevent abduction.

As of 1 August 2022, Regulation (EC) No. 2201/2003 has been replaced by Regulation EU 2019/1111, which, in confirming the “trumping order” (Article 29), modifies other aspects of the EU child abduction regime, which is now contained in an *ad hoc* chapter, i.e. a chapter dedicated specifically to matters of international child abduction (Chapter III, Articles 22-29).

First of all, it clarifies that, once the court of the State to which the child has been wrongfully removed has de-

nied the return of the child, the proceeding before the court of the State of habitual residence is one on the merits of the case, deciding not only on the return, but more broadly on parental responsibility matters concerning the abducted child.

This novelty is the effect of the interaction between human rights and judicial cooperation instruments: the ECtHR’s case-law requires an in-depth examination of family life before ordering the return of the child (see *Neulinger v. Switzerland*) and considers automatic mechanisms of return of the abducted child, such as the trumping order, not compatible with Art. 8 ECHR (*Kampanella v. Italy, X. v. Latvia*).⁴⁴

A second novelty, which is again the effect of the interaction with human rights instruments, is provided in Article 56 of Regulation EU 2019/1111: the execution of the so-called trumping order, which under the previous regime could not be stopped, may now be suspended temporarily or definitively.

More precisely, Article 56 provides:

4. In exceptional cases, the authority competent for enforcement or the court may, upon application of the person against whom enforcement is sought or, where applicable under national law, of the child concerned or of any interested party acting *in the best interests of the child*, suspend the enforcement proceedings *if enforcement would expose the child to a grave risk of physical or psychological harm due to temporary impediments* which have arisen after the decision was given, or by virtue of any other significant change of circumstances. Enforcement shall be resumed as soon as the grave risk of physical or psychological harm ceases to exist.

⁴⁴ Judgment of 6 July 2010, *Neulinger v. Switzerland*, application No. 41615/07; Judgment of 12 July 2012, *Šneerson and Kampanella v. Italy*, application No. 14737/09; Judgment 26 November 2013, *X. v. Latvia*, No. 27853/09.

5. *In the cases referred to in paragraph 4, before refusing enforcement under paragraph 6, the authority competent for enforcement or the court shall take appropriate steps to facilitate enforcement in accordance with national law and procedure and the best interests of the child.*
6. *Where the grave risk referred to in paragraph 4 is of a lasting nature, the authority competent for enforcement or the court, upon application, may refuse the enforcement of the decision.*

A third novelty, which is particularly relevant for the purpose of this work, is the introduction of an article dedicated to “alternative dispute resolution”. Under Article 25, the court shall “as early as possible and at any stage of the proceedings, ... either directly or, where appropriate, with the assistance

of the Central Authorities, ... invite the parties to consider whether they are willing to engage in mediation or other means of alternative dispute resolution, unless this is contrary to the best interests of the child, it is not appropriate in the particular case or would unduly delay the proceedings”.

Some guidance on the application of Article 25 is provided by Recital 43, stating that:

“(I)n all cases concerning children, and in particular in cases of international child abduction, courts should consider the possibility of achieving solutions through mediation and other appropriate means, assisted, where appropriate, by existing networks and support structures for mediation in cross-border parental responsibility disputes. Such efforts should not, however, unduly prolong the return proceedings under the 1980 Hague Convention. Moreover, mediation might not always be appropriate, especially in cases of domestic violence. Where in the course of return proceedings under the 1980 Hague Convention, parents reach agreement on the return or non-return of the child, and also on matters of parental responsibility, this Regulation should, under certain circumstances, make it possible for them to agree that the court seised under the 1980 Hague Convention should have jurisdiction to give binding legal effect to their agreement, either by incorporating it into a decision, approving it or by using any other form provided by national law and procedure. Member States which have concentrated jurisdiction should therefore consider enabling the court seised with the return proceedings under the 1980 Hague Convention to exercise also the jurisdiction agreed upon or accepted by the parties pursuant to this Regulation in matters of parental responsibility where agreement of the parties was reached in the course of those return proceedings”.

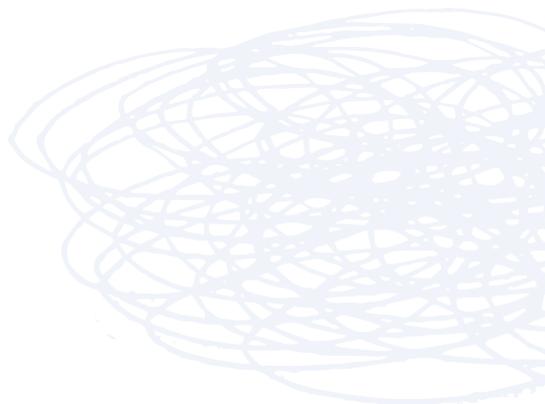
A fourth novelty of Regulation EU 2019/1111 is a new *ad hoc* rule on the “right of the child to express his or her views” establishing that the “child who is capable of forming his or her own views” shall be given “a genuine and

effective opportunity to express his or her views, either directly, or through a representative or an appropriate body” (Article 21). The right provided for under Article 21 specifically applies in return proceedings (Article 26).

CONTINUITY OF MEDIATION BEFORE, DURING AND AFTER INTERNATIONAL CHILD ABDUCTION PROCEEDINGS

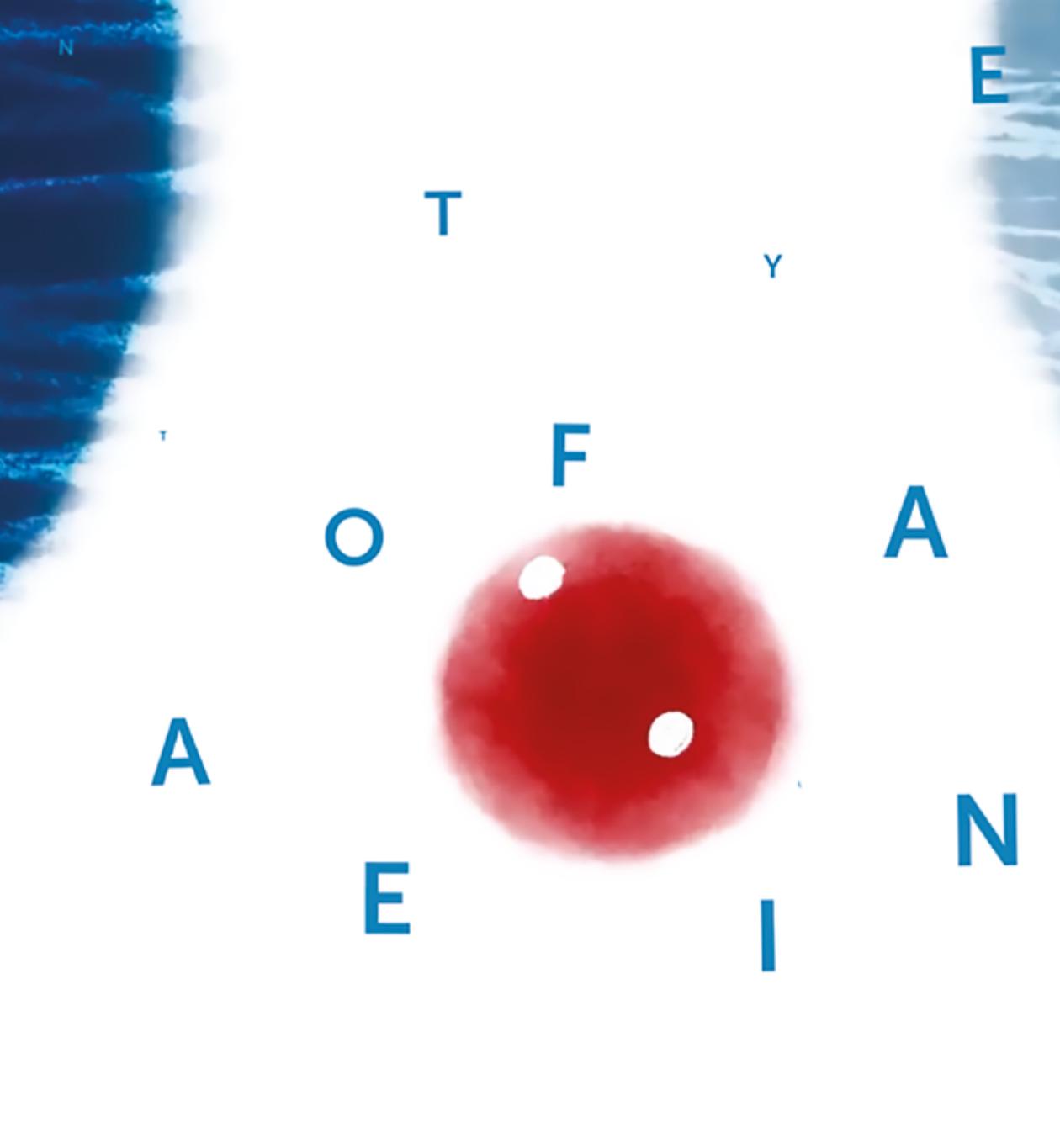
Considering the high level of conflict between parents in international child abduction cases and the long-term harmful effects on children, the amicable settlement of child abduction cases should be promoted in accordance with the applicable international and EU legal instruments⁴⁵ and the best interests of the child. Mediation as a way of bringing about amicable solutions can be initiated at any stage before, during and after the proceedings:

- **Ex ante mediation**, i.e. mediation before the abduction, might be helpful in facilitating lawful relocation.
- **Ex post mediation in the short term**, i.e. immediately after abduction or at the beginning of the proceedings, helps to prevent that the conflict increases and can be successful, in particular if the semi-automatism of the EU child abduction regime is invoked⁴⁶;
- **Ex post mediation in the longer term**: irrespective of the solution to the conflict and the return or non-return of the child to the country of habitual residence, the parents inevitably have to regulate matters of access and contact and benefit from longer-term support through *ex post* mediation.



⁴⁵ See in particular Regulation EU 2019/1111; refer to Chapter 3.

⁴⁶ As discussed above, the automatic return regime of Regulation (EC) 2201/2003 was challenged by ECtHR case law (*Kampanella v. Italy* and *X. v. Latvia*) requiring an in-depth analysis of the family situation prior to return. Regulation EU 2019/1111 takes this development into account: it transforms the proceedings before the court of habitual residence from proceedings only on return to proceedings on the merits, which take into consideration all issues of parental responsibility.



4

THE CHILD'S RIGHT TO BE HEARD: ENABLING CHILD PARTICIPATION IN MEDIATION



The child's participation in international family mediation is important for several reasons: under international and European law, children have the right to be heard in matters affecting them (UNCRC Article 12, EU Charter Article 24), and national laws regulate when and under what conditions a child has the right to be heard in family proceedings. **To ensure that a mediated agreement has legal effect, therefore, the child's right to be heard has to be respected in accordance with the applicable legal frameworks.** Hearing the child is important for the parents to understand the child's perspective and focus on the child's needs and best interests. It is also important for the mediator to understand the child's views in order to support the parents in reaching an agreement in the best interests of the child. When the child has an opportunity to genuinely express the own views and these are heard and given due weight, the child can feel part of the process and gain a better understanding of the situation and the reasoning behind the parents' agreement.⁴⁷

THE RIGHT OF THE CHILD TO BE HEARD

Legal standards

The UN Convention on the Rights of the Child sets out the right of the child to express his or her views freely in all matters affecting the child and provides that the views of the child shall be given due weight in accordance with the age and maturity of the child (Article 12). This right applies in relation to social and political matters (Article 12.1), as well as in judicial and administrative proceedings (Article 12.2). The Committee on the Rights of the Child has issued a General Comment on the right to be heard and underlines that, in judicial and administrative proceedings, the right needs to

be respected also where proceedings involve alternative dispute resolution mechanisms, such as mediation.⁴⁸

Regulation EU 2019/1111 recognises the right of the child to be heard in proceedings under the Regulation; this requires ensuring the child has a *"genuine and effective opportunity to express his or her views and when assessing the best interests of the child, due weight should be given to those views. The opportunity of the child to express his or her views freely in accordance with Article 24(1) of the Charter and in the light of Article 12 of the UN Convention on*

⁴⁷ Hague Conference on Private International Law, *Mediation, Guide to good practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, 2012, p. 66, Chapter 7.

⁴⁸ Committee on the Rights of the Child, General Comment No. 12 (2009), the right of the child to be heard, [CRC/C/GC/12](#), 2009, para. 32, 33, 52.

the Rights of the Child plays an important role in the application of this Regulation. The Regulation should, however, leave the question of who will hear the child and how the child is heard to be determined by national law and procedure of the Member States” (Recital 39).

Respect for the child’s views in international family mediation

In practice, it remains challenging to enable the child’s participation in mediation in international child abduction cases, particularly due to the high level of conflict between the parents and the short six-week timeframe for Hague return proceedings. **Considering if and how the child should be involved in mediation and enabling the child’s meaningful participation requires careful preparation and planning, ensuring appropriate safeguards are in place. The person hearing the child should be trained specifically for this purpose.**⁴⁹ The training should prepare the mediator to adapt the style and language of communication to the child’s age and maturity, gender and any specific needs or vulnerabilities.

The mediator should ascertain whether the child has already been heard in the proceedings and by whom, for instance a judge, social or child protection services, a child psychologist or other expert. If so, the mediator should seek access to rele-

vant documentation, in accordance with data protection regulations, and, on that basis, assess whether to hear the child again for the purpose of mediation, taking into consideration the age and maturity of the child and the circumstances of the case. If appropriate, the child should be asked if he or she wishes to speak to the mediator.

Where a mediator decides to hear the child in person, the mediator must have regard to the child’s national and social origin, gender and culture, as well as possible experiences of violence and the correlated health impairments or trauma, assess the child’s specific communication and information needs and adapt the language, methods and contents of communication accordingly.⁵⁰

Prior to the hearing, the mediator should ensure that the child is provided with child-friendly information in a language that the child understands, and informed consent should be obtained by the parents and the child in accordance with national law. The mediator should hear the child in an appropriate child-friendly setting and be familiar with the circumstances of the case to prevent any harm and to mobilise support services for the child as appropriate.

The Council of Europe Guidelines on child-friendly justice emphasise that being heard is a right of the child and not a duty.⁵¹ **The principles of voluntariness, confidentiality, impartiality and self-empowerment that generally**

⁴⁹ Hague Conference on Private International Law, *Mediation, Guide to good practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, 2012, p. 71. Council of Europe, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*, 2010, Principle III.A. Participation, Chapter IV, Principles 14 and 15.

⁵⁰ Council of Europe, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*, 2010, Principle III.A. Participation.

⁵¹ Council of Europe, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*, 2010, p. 28, para. 46.

guide family mediation processes apply also to the child's participation in international family mediation.⁵² The mediator should be prepared to explain the meaning of these principles in a child-friendly manner. This includes informing the child that only what has been agreed with the child will be shared with the parents, that it is not the mediator's role to give advice or recommendations, but that the mediator can refer the child to support services, and that the decision in the case will be made by either the parents themselves or by a judge: the child's views are considered important and will be given due weight, but the child is not responsible for any decisions made.

When communicating with children, mediators have to respect legal and quality standards with regard to ethics, safety and privacy. They need to be confident in handling sensitive conversations, reporting incidents or suspicions of violence and exploitation and following up as necessary. Specific safeguards for the child have to be in place before, during and after the hearing (*see safeguards in mediation, Chapter 6*). As mediation is a private service, consideration for these safeguards is paramount, in particular when public service providers such as child protection services are not directly involved in the case.

The voice of the child in mediation

"Article 12 of the United Nations Convention on the Rights of the Child states that children have the right to express their views on decisions and arrangements that affect their lives, and that these shall be given due weight in accordance with their age and maturity. Therefore, where deemed appropriate by the mediator and parents, international family mediation may involve the direct participation of children. Their inclusion in mediation offers them the opportunity to talk about their situation in a child-friendly and safe environment, and to voice views and feelings, concerns and worries without being asked to take sides or make decisions. Children's participation requires specifically trained mediators or trained child specialists in addition to careful evaluation of the suitability of such intervention. The consent of both, parents and children, is required. The mode of the children's participation depends on various case-specific factors. Where child-inclusive mediation is not deemed appropriate, mediators should help the participants to take into account the views, interests and needs of the children."⁵³

International Social Service, Charter for International Family Mediation Process (2017)

⁵² Hague Conference on Private International Law, *Mediation, Guide to good practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, 2012.

⁵³ International Social Service, *Charter for International Family Mediation Processes*, a collaborative process, 2017, pp. 10-11.

THE RIGHT OF THE CHILD TO BE INFORMED

Legal standards

Access to information is a fundamental precondition for children to exercise their rights and participate in a meaningful way in the decisions and procedures that affect them. The UN Convention on the Rights of the Child sets out the right of the child to seek, receive and impart information, which is closely related to the right to freedom of expression and the right of the child to access information from a diversity of sources (Articles 13 and 17). Effective access to information is a safeguard for children's involvement in decision-making process concerning them, including in administrative and judicial proceedings and in family mediation.⁵⁴

Child-friendly information in international family mediation

Due to lack of information or misinformation, fears and concerns, children may not want to participate in mediation or speak openly when asked for their views. Research shows, in fact, that children are often not adequately informed about civil proceedings in which they are involved.⁵⁵ Parents who are primarily responsible for informing their child may find it difficult and need support in talking with their chil-

dren about the situation, whereas the left-behind and the taking parent may have different needs of support in informing their children. The mediator, along with other relevant service providers, should understand the role of the parents in this regard, identify any needs and help parents get the support they need, in the form of written or digital materials, including child-friendly materials, as well as individual support and counselling to give parents tips for communicating with their child. In some countries, a guardian *ad litem* is appointed in family law proceedings to ensure that the child is informed and that his or her views are heard and represented in the proceedings.

In international child abduction cases, information is an important basis for parents and children to assess their situation and the possible solutions and alternatives available to them, to give weight to different factors, views and legitimate interests, to form an opinion and to make decisions. The Committee on the Rights of the Child underlines that it is essential to "ensure that the child receives all necessary information and advice to make a decision in favour of his or her best interests".⁵⁶ Access to child-friendly information is necessary also to help children to decide if they wish to speak to the mediator or not.

⁵⁴ Council of Europe, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*, 2010, Chapter IV.A.1.

⁵⁵ Carpaneto, L., Maoli, F. (eds.), *Children's right to information in EU civil action, Improving children's right to information in cross-border civil cases*, Pacini Giuridica, 2021.

⁵⁶ Committee on the Rights of the Child, General Comment No. 12 (2009), The right of the child to be heard, [CRC/C/GC/12](#), 1 July 2009, par. 16.

Providing child-friendly information is therefore an essential first step before a mediator speaks to the child. In preparation for hearing a child in an international family mediation, the mediator has to ensure that the child is informed as a minimum about the following:

- the mediation process and what it is all about, the steps of the process and the roles of the mediator, parents, and the child in the process, and possible outcomes;
- the child's right to be heard and how the views expressed by the child will be used and considered, and communicated to the parents;
- the possibility to be heard either directly or through a representative;
- practical aspects of the hearing, such as the date and time, location, arrangements for the hearing, and any other person who will be present, such as an interpreter or the child's guardian;
- the child's right to data protection and privacy;
- rules of confidentiality and secrecy, by which the mediator is bound, and any reporting obligations in cases where the hearing reveals specific risks or acts of violence against the child;
- the support services available to the child before, during and after the hearing and mediation process.⁵⁷

In addition, the mediator has to ensure the child understands that, while the child's views will be heard and given due weight, the child is never responsible for the decisions of the parents, a social worker or a judge.

When providing information to the child, the mediator may ask the child to repeat the information in his or her own words to be certain that the child understands it and invite the child to ask questions. Providing the child with additional child-friendly information material can be helpful for the child to look up information later. Child-friendly materials include brochures, videos, information accessible through social media or applications, and other printed or digital material.

Child-friendly materials make it easier to inform children and help children to reflect on the information provided by a parent, guardian or mediator and to formulate any questions or doubts that can be clarified in a follow-up conversation. Regardless of the child's role in the mediation, the child and, if applicable, the child's guardian should be informed promptly of the mediated agreement. The mediator should encourage the parents to explain the agreement to the child in a language the child understands.

⁵⁷ See: Committee on the Rights of the Child, General Comment No. 12 (2009), The right of the child to be heard, [CRC/C/GC/12](#), 1 July 2009, par. 41, 42, 45.

EXAMPLE OF PRACTICE: ZANK WEBSITE OFFERS CHILD-FRIENDLY INFORMATION FOR CHILDREN AFFECTED BY PARENTAL SEPARATION, RELOCATION OR INTERNATIONAL CHILD ABDUCTION (GERMANY)

In Germany, the International Social Service has developed an information website for parents and children affected by parental separation, relocation or international child abduction.⁵⁸ The website is part of a centralised contact point for cross-border parental disputes over childcare and mediation, providing information and advice for parents and children and referring them to relevant local support services. The Federal Ministry of Family Affairs, Senior Citizens, Women and Youth commissioned the development of the website and continues supporting it.

The website offers separate access points for parents, younger children and adolescents. Children can access information about what it means to be in a situation of parental separation, relocation or international abduction. The website provides information in child-friendly language and through illustrations explaining important terms, such as the Youth Office (local child protection services), the mediator, counselling services, family court, the lawyer and guardian *ad litem*.

Mediation, for example, is explained as follows: "If your parents decide to see a mediator together, i.e. a person who is trained to listen and ask the right questions, it will help them to resolve their conflict. There they can talk calmly about their views and what is important to them. In the discussion with the mediator, they will try to agree on a way forward that is okay for both of them. In the end, their agreement is put down in writing. This makes it easier to keep to what they agreed upon in the future."⁵⁹

On the website, children have access to information on a range of themes that are relevant in such situations, such as

- what it means when parents live in different countries after separation;
- the rights of the child;
- how they can meet other children who are in a similar situation;
- how to deal with their own emotions and what to do if they are worried or upset about the situation;

⁵⁸ ZAnk – Zentrale Anlaufstelle für grenzüberschreitende Kindschaftskonflikte und Mediation [Zank – Central contact point for cross-border parental disputes over childcare and mediation], <https://kinder.zank.de/>.

⁵⁹ ZAnk – Zentrale Anlaufstelle für grenzüberschreitende Kindschaftskonflikte und Mediation [Zank – Central contact point for cross-border parental disputes over childcare and mediation], <https://kinder.zank.de/>.

- what happens if the case is referred to a family court;
- the role and rights of the child in family proceedings.

The website's separate section for adolescents provides similar information

in a language and manner appropriate to teenagers. For each of these topics, the website offers tips for children and adolescents, a set of questions and answers, and information on how to access further support and advice.

ENABLING CHILDREN TO SPEAK OUT: CREATING SUPPORTIVE CONDITIONS FOR CHILDREN'S PARTICIPATION IN MEDIATION

Creating a trustful atmosphere for hearing the child

Speaking with children about parental abduction can be delicate because the situation may be stressful for the child, there may be conflicts of loyalty, and much is at stake. The child may feel abandoned by parents and other family members or service providers. A parent or another adult may have instructed the child to make certain statements, to omit certain facts or not to express his or her views. In addition, a lack of information or incorrect information may influence the child's willingness to speak out or speak openly. In such sensitive situations, it can be difficult for children to trust a mediator and believe that the mediation process will be of meaningful help.

A basic level of trust is important, however, to give the child a genuine and effective opportunity to express his or her views and to ensure that the mediator and the parents can take them appropriately into account.

Children tend to appreciate it when service providers talk to them, ask questions and listen, explain all steps and make decisions and procedures transparent.⁶⁰ Considering that, in international child abduction proceedings, the time available to organise and conduct a meeting with a child is often very short, a mediator should carefully prepare the hearing, take the time to talk and listen to the child and maintain a neutral and empathic approach throughout the conversation (*see Box 2*).

⁶⁰ Wenke, Daja, *Service Providers as Champions for Non-Violent Childhoods*, Service provision for children and parents to end corporal punishment, Non-Violent Childhoods Project, Council of the Baltic Sea States, 2018. Wenke, D., *Listen Up! Creating conditions for children to speak and be heard*, Professional communication with children at risk of exploitation and trafficking – experiences and lessons learned from the Baltic Sea Region, Council of the Baltic Sea States, 2019.



BOX 2

WHAT A MEDIATOR CAN DO TO BUILD TRUST WHEN HEARING THE CHILD

- Make the meeting room child-friendly;
- Introduce him- or herself and explain the role of a mediator;
- Provide quality interpretation and cultural mediation, if needed, introduce the interpreter or cultural mediator and explain their role;
- Take time to talk and listen to the child;
- In the introduction phase of the hearing, talk about everyday things, hobbies or sports to break the ice;
- Sense whether the child is comfortable and ask the child how he or she is doing and if there is anything he/she needs;
- Treat the child with empathy and respect;
- Explain the purpose of the meeting;
- Provide child-friendly information and make sure the child has understood, for instance by asking the child to repeat the information in his or her own words;
- Ask the child to express his or her views and show genuine interest in the child's views;
- Summarise what the child has said and ask if you have understood correctly;
- Agree with the child on what you can pass on to the parents;
- Be transparent about the next steps in the process.



Taking into account the child's age, evolving capacities and experiences

The UN Convention on the Rights of the Child establishes the right of the child to be heard without specifying a minimum age. The Convention recognises the evolving capacities of the child and requires that due weight be given to the views of the child in accordance with his or her age and maturity (Articles 12 and 5).

The Committee on the Rights of the Child "... discourages States parties from introducing age limits either in law or in practice, which would restrict the child's right to be heard in all matters affecting him or her" and notes that "children's levels of understanding are not uniformly linked to their biological age", as demonstrated by research.⁶¹ The Council of Europe Guidelines on child-friendly justice also promote the understanding that it is generally in the best interests of the child to be heard in administrative and judicial proceedings concerning the child.⁶²

Acting on this basis would require competent officials and service providers to generally hear a child's views in matters concerning the child, unless it is determined that this is not in the best interests of the child, and to provide adequate reasons for exceptions. As children involved in international child abduction cases are often young, however, the child's capacity of discernment may need to be assessed,

and this should always be done in an individualised process.

In cases of international child abduction, especially where young children are concerned, professionals may have little confidence in the child's ability to remember events, form an opinion and communicate their views. Where such doubts prevail, mediators and other professionals may not be able to give the child a genuine and effective opportunity to express his or her views or to give due weight to the child's views.

These doubts are dispelled by research showing that children generally are able to remember events and emotions they experienced, accurately recount their memories and form their own views, even at a young age and after traumatic stress. Their ability to give accurate information and disclose what they remember in a hearing or interview, however, depends considerably on the preparation and qualifications of the person hearing the child, as well as the support given to the child (see Box 3). Mediators should be aware, therefore, of the influence that age, evolving capacities and experience have on the child's ability and willingness to express the own views and be trained to take these factors into account when hearing a child.

THE UN
CONVENTION ON THE
RIGHTS OF THE CHILD ESTABLISHES
THE RIGHT OF THE CHILD TO BE HEARD
WITHOUT SPECIFYING A MINIMUM AGE.
THE CONVENTION RECOGNISES THE EVOLVING
CAPACITIES OF THE CHILD AND REQUIRES THAT
DUE WEIGHT BE GIVEN TO THE VIEWS OF THE
CHILD IN ACCORDANCE WITH HIS OR HER
AGE AND MATURITY (ARTICLES 12
AND 5)

⁶¹ Committee on the Rights of the Child, General Comment No. 12 (2009), The right of the child to be heard, CRC/C/GC/12, 1 July 2009, par. 21, 29.

⁶² Council of Europe, *Guidelines on Child-friendly Justice*, 2011. Committee on the Rights of the Child, General Comment No. 12 (2009), The right of the child to be heard, CRC/C/GC/12, 1 July 2009.



BOX 3 EVIDENCE OF CHILDREN'S ABILITY TO MAKE RELIABLE STATEMENTS

Empirical research⁶³ has generated compelling evidence of children's ability to make reliable statements in proceedings concerning them:

While children are able to remember events and emotions and accurately recount their experiences from a young age, the child's ability to remember details, to recount their memories in free recall and to resist leading or suggestive questions by an interviewer evolves considerably with age.

From the age of three, children are generally able to provide information about something they have experienced. At this age, the child's ability to share information in free narrative is still limited, so the interviewer has to ask specific questions to enable the child to respond based on his/her memory. 4-6 year old children tend to provide more information when asked specific and directive questions. As of the age of 5-6 years, children are usually better able to respond to open-ended questions and share information in free recall.

Younger children are more susceptible to the way questions are phrased and are more likely than older children to respond incorrectly to leading and suggestive questions or when asked to choose between different options. Interviewers who are trained and experienced in the use of free recall questions and prompts are nevertheless able to elicit accurate responses from young children.

Stress and traumatic experiences have an impact on memory. Children react differently to stress and trauma, as the specific circumstances of the case, their personal resilience and the level of support they receive influence their ability to cope and to remember. The brain is typically associating traumatic events with the emotions of the moment and stores these associations at a subconscious level. After the traumatic event, memories of it may be triggered by fragments of events, sensations or emotions similar to those experienced during the traumatic event.

The stress associated with memories of traumatic events can make it difficult for the child to remember, find the right words and express what he or she remembers. Chronic stress or prolonged exposure to traumatic stress is also like-

⁶³ For a summary and further references of research findings summarised in this box, see: Hershkowitz, Irit, Lamb, M.E., Orbach, Y., Katz, C., The Development of Communicative and Narrative Skills Among Preschoolers: Lessons from forensic interviews about child abuse, *Child Development*, December 2011, 83(2): 611-22. Lamb, Michael E., Orbach, Y., Hershkowitz, I., Esplin, P.W., Horowitz, D., A structured forensic interview protocol improves the quality and informativeness of investigative interviews with children: a review of research using the NICHD Investigative Interview Protocol, *Child Abuse and Neglect*, Vol. 31, Issue 11-12, November – December 2007, pp. 1201-1231. Wenke, D., *Listen Up! Creating conditions for children to speak and be heard, Professional communication with children at risk of exploitation and trafficking – experiences and lessons learned from the Baltic Sea Region*, Council of the Baltic Sea States, 2019.

ly to have a longer-term impact on the child's memory.⁶⁴ Research shows that child-sensitive and evidence-based methods support professionals in communicating with and interviewing children, starting from an early age and taking into account the child's evolving capacities and level of maturity (see Box 4).⁶⁵

64 United Nations Children's Fund, *Let's Talk, Developing effective communication with child victims of abuse and human trafficking*, Practical handbook for social workers, police and other professionals, UNMIK, Government of Kosovo, Ministry of Labour and Social Welfare, by Barbara Mitchels, September 2004, p. 13, 18.

65 Hershkowitz, Irit, Lamb, M.E., Orbach, Y., Katz, C., The Development of Communicative and Narrative Skills Among Preschoolers: Lessons from forensic interviews about child abuse, *Child Development*, December 2011, 83(2): 611-22. Lamb, Michael E., Orbach, Y., Hershkowitz, I., Esplin, P.W., Horowitz, D., A structured forensic interview protocol improves the quality and informativeness of investigative interviews with children: a review of research using the NICHD Investigative Interview Protocol, *Child Abuse and Neglect*, Vol. 31, Issue 11-12, November – December 2007, pp. 1201-1231.

Creating an enabling environment and context

The ability of children to provide accurate information and express their views depends not only on the child's age, evolving capacities and personal situation, but also on several factors that a mediator can directly influence:

- **the place and environment where the hearing takes place:** a child-friendly place with as few distractions as possible offers the most favourable conditions for interviewing or hearing children;
- **the interviewer's ability to create supportive conditions for the child to speak out** and to hear the child without influencing the child's statement, for instance by following the principles and rules of evidence-based interview protocols;
- **the availability of support services for the child before, during and after the hearing** to prevent any harm as a result of the hearing and to ensure appropriate follow-up to any needs and vulnerabilities identified during the hearing.⁶⁶

Mediation services should generally aim at enabling the child's participation in mediation in international child abduction cases, unless there is evidence that hearing the child is not in the best interests of the child. Mediators should only hear the child themselves, however, if they have the necessary training and qualifications, a child-friendly environment for hearing the child and the possibility to mobilise support services for the child before, during and after the hearing. The national regulatory framework should ensure that mediation providers are able to guarantee these conditions, for instance through adequate operational and budgetary support and training requirements.

66 Lamb, Michael E., Orbach, Y., Hershkowitz, I., Esplin, P.W., Horowitz, D., A structured forensic interview protocol improves the quality and informativeness of investigative interviews with children: a review of research using the NICHD Investigative Interview Protocol, *Child Abuse and Neglect*, Vol. 31, Issue 11-12, November – December 2007, pp. 1201-1231.



BOX 4

EVIDENCE-BASED PROTOCOLS: PRINCIPLES AND RULES FOR A CHILD-SENSITIVE HEARING

Research has identified some principles and rules that help professionals to positively influence the child's willingness and ability to communicate their views and recount their experiences. These principles and rules form the basis of evidence-based protocols, which assist officials and professionals in obtaining accurate and reliable statements from children involved in legal proceedings.⁶⁷ The National Institute of Child Health and Human Development (NICHD) protocol, for instance, is widely used.⁶⁸

Evidence-based means that the protocol's effectiveness has been demonstrated through empirical research: it improves the quality of child interviews and enables the interviewer to create an effective and genuine opportunity for the child to be heard. The NICHD protocol was developed by a multidisciplinary team based on research on children's memory, language and communication skills, social knowledge, suggestibility, the effects of stress and trauma, as well as the behaviour and communication of the interviewer.⁶⁹

The NICHD protocol is structured in different phases and steps: the interview starts with an introductory phase, followed by a narrative phase in which the child speaks about substantial topics, and ends with the closing phase. The protocol gives examples of open-ended and non-leading questions, free-recall prompts and techniques for obtaining detailed, accurate and reliable information from children. It guides the interviewer in upholding ethical standards throughout the interview.

Although developed primarily for investigative and forensic interviews with children, the value of evidence-based interview protocols is increasingly recognised in other contexts where service providers need to have sensitive conversations with children and to hear the child's views in order to make decisions in the best interests of the child.⁷⁰ The principles and rules of the protocol and the examples it provides can therefore guide the training of mediators in child-inclusive mediation in international child abduction cases.

67 Lamb, Michael E., Orbach, Y., Hershkowitz, I., Esplin, P.W., Horowitz, D., A structured forensic interview protocol improves the quality and informativeness of investigative interviews with children: a review of research using the NICHD Investigative Interview Protocol, *Child Abuse and Neglect*, Vol. 31, Issue 11-12, November – December 2007, pp. 1201-1231. Ball, E., Ball, J., La Rooy, D., *The National Institute of Child Health and Human Development (NICHD) Protocol*, [Interview guide](#), 2017.

68 Ball, E., Ball, J., La Rooy, D., *The National Institute of Child Health and Human Development (NICHD) Protocol*, [Interview guide](#), 2017. NICHD Protocol, International Evidence-Based Investigative Interviewing of Children, <http://nichdprotocol.com/>.

69 Lamb, Michael E., Orbach, Y., Hershkowitz, I., Esplin, P.W., Horowitz, D., Structured forensic interview protocols improve the quality and informativeness of investigative interviews with children: A review of research using the NICHD Investigative Interview Protocol, *Child Abuse and Neglect*, 2007, 31(11-12): 1201–1231.

70 Wenke, Daja, *Service Providers as Champions for Non-Violent Childhoods*, Service provision for children and parents to end corporal punishment, Non-Violent Childhoods Project, Council of the Baltic Sea States, 2018. Wenke, D., *Listen Up! Creating conditions for children to speak and be heard, Professional communication with children at risk of exploitation and trafficking – experiences and lessons learned from the Baltic Sea Region*, Council of the Baltic Sea States, 2019.

EXAMPLE OF PRACTICE: CHILD-INCLUSIVE MEDIATION IN INTERNATIONAL CHILD ABDUCTION CASES (REUNITE, UK)

Reunite is the leading mediation service provider in international child abduction cases in the UK and has long-standing experience in child-inclusive mediation.⁷¹

At the beginning of a mediation process, the Reunite mediator meets with the parents and discusses the possibility of hearing the child. The mediator explains the principle of child participation, which is based on the rights of the child to be informed, to be heard and to have his/her views given due weight in decisions concerning the child. The parents are informed of the details of the hearing, when and where it will take place, what safeguards are in place for the child, and how the child's views will be used and shared. The mediator will advise the parents that they must not coach or instruct the child on what to say or not to say to the mediator before the hearing and that they must not question the child about the details of the conversation afterwards. The hearing will only take place if the parents sign a consent form and agree to abide by the rules (see Box 5). If both parents hold parental responsibility, the informed consent of both is required for the mediator to speak to the child.

When meeting with the child, the mediator ensures the child understands what the mediation is about, the role

and responsibility of the child in this process, the purpose of the hearing and how the information of the child will be shared. As mediation provides a confidential and neutral space for resolving a parental dispute, the principle of confidentiality also applies to the hearing of the child. The child must know that the information he or she provides will not be disclosed to a family court judge. At the same time, the child needs to be aware that there may be limitations to the mediator's confidentiality, in particular where the mediator is required by national law to report acts of violence against the child and certain risks to the relevant authorities.

Towards the end of the conversation, the mediator agrees with the child what information the mediator should convey to the parents. When preparing for the hearing, the mediator has to inform the child about this agreement and repeat it at the beginning of the meeting to make sure the child has understood it. Transparency about the steps in the mediation process, the roles and responsibilities of each participant and an agreement on how to handle the child's views, are essential to establish a trusting working relation between the mediator and the child for the purpose of the hearing.

The hearing of the child usually takes place between the parents' first and

⁷¹ Section based on: Janet Flawith and Alison Shalaby, Presentation of the experience of Reunite, UK, iCare national workshop in Italy, Genoa, 24 May 2022.

second meeting with the mediator. The first meeting serves to inform the parents about the hearing of the child and to gather any relevant information the mediator needs to prepare for it. Relevant information may include issues of timing, to accommodate the child's school hours or other activities, and clarification of any special needs the child may have in relation to language and communication, health or disabilities. The hearing may need to be coordinated with the child's guardian or a trusted person who can support the child before, during and after the hearing. Ideally, the mediator will be able to communicate directly with the child but if necessary, a qualified interpreter should be brought in and instructed to maintain a neutral role, limited to interpretation and not interfering in the conversation.

At the second meeting with the parents, the mediator conveys the views of the child. On this occasion, the mediator instructs the parents to listen and not to take notes or record the meeting. This is important to gain the parents' full attention and to maintain the confidentiality of the child's views.

The experience of Reunite mediators shows that participation in the mediation process and the opportunity to express themselves is generally beneficial for the children, even if they do not have a firm opinion on the resolution of the situation. The child's participation also carries risks, however, as they may feel pressured and the parents may not be able or willing to really listen to the child's views and to give them due weight in their decisions and the mediated agreement.

To prevent any harm to the child as a result of their participation in the mediation process, Reunite mediators ensure that support services are available and accessible for the child before, during and after the hearing and throughout the mediation process. In particular, children and parents should be informed of the support available from child protection services and other relevant support and counselling services that could assist them in handling any difficulties related to the process.

Reunite mediators require specific training to carry out child-inclusive mediation. The initial child-inclusive mediation training is part of the basic Reunite training on international child abduction mediation. Mediators are then expected to commit to a certain amount of ongoing training over a three-year period following the initial training. The ongoing training requirements include ten hours of specific professional development in child-inclusive mediation, of which five hours should normally be obtained by attending a course advertised as suitable for child-inclusive mediation professional development. The remaining five hours could be acquired in various ways such as attending further training courses, conferences or workshops, reading or writing relevant material. In addition, the mediator has to carry out three child-inclusive mediation processes within three years and have a supervisor or professional practice consultant who is also trained in child-inclusive mediation and available to provide support. Reunite offers training in this area as part of the Mediation in International Child Abduction training package, as well as supervision from a trained supervisor.



Reunite UK uses the following form to obtain informed consent from parents for their child or children to participate in the mediation process.⁷²

Dear and,

I am glad that you would like (child or children) to have a talk with THE MEDIATOR about how things are going from their point of view. Young people can have mixed feelings when their parents separate and they say it helps to talk things through and feel listened to. As you know, children aged 10 and over have the right to put forward their views and suggestions if they wish.

THE MEDIATOR will meet with them together first of all, and then have a chat with each of them separately, as siblings can have different views and ideas.

.....will be invited to talk on the understanding that:

1. The purpose of the meeting is to give them the opportunity to talk about their views and feelings and to put forward any suggestions or requests they think would help arrangements to work as well as possible for all of you. They will not be asked for choices or decisions. The responsibility for decisions remains yours.
2. You confirm that you will not coach on what to say or not say, nor ask them questions afterwards about what they said, or did not say.
3. You understand that even if does not express any particular views or wishes that they wish to be shared with you, children and young people have emphasised to researchers that feeling included and having the chance to talk is very beneficial for them and helps to reduce their anxieties.
4. The conversation with will be confidential, unless there should be some indication that a child is, or may be, at risk of serious harm, in which case this must be referred to the child protection service for further enquiry.
5. will be asked whether they have a message, suggestion or request that they would like to be shared with you. If so, they will be asked to write it down, or they can ask THE MEDIATOR to write it down for them in their own words. They will be assured that you will be told only what they have asked to be shared with you, without adding anything more.

You confirm that you are willing to listen to their messages and take their views into account in reaching decisions and making arrangements that you consider to be in their best interests. You will take care not to reproach them or show that you feel angry or upset about a difficult message or suggestion that they ask to be shared with you.

⁷² Sample parental consent letter drafted by Lisa Parkinson, accredited Children in Mediation trainer and author of Family Mediation, 4th edition 2020. Parental consent form reproduced with permission by Lisa Parkinson, 12 September 2022. Reunite UK uses this template in mediation in international child abduction cases as an example of best practice.



5

MEDIATION AND THE BEST INTERESTS PRINCIPLE: SUPPORTING PARENTS IN FINDING SOLUTIONS IN THE BEST INTERESTS OF THE CHILD

The UN Convention on the Rights of the Child sets out in Article 3.1 that the best interests of the child shall be a primary consideration in all decisions and actions concerning the child. The article is considered a general child rights principle with particular relevance for the implementation of all the rights afforded by the Convention.

The overall aim of the best interests principle is to promote the integrity and dignity of the child, ensure the child's holistic physical, mental, spiritual, moral, psychological and social development and the full and effective enjoyment of all the rights recognised in the Convention.⁷³ The Committee on the Rights of the Child emphasises the dynamic nature of the best interests of the child, which are evolving in accordance with the child's situation. A child rights-based approach and the collaborative engagement of all relevant actors are required to give effect to the best interests principle.⁷⁴

Given its complexity, the concept is interpreted differently from country to country, within the EU and between EU Member States and third countries, notwithstanding common international and European standards.⁷⁵ Mediators are often confronted with situations where the parental dispute over the child is based on different views on the child's best interests. The guidance provided by the Committee on the Rights of the Child offers a common framework for understanding and interpreting the concept of the child's best interests, not least because it recognises children as rights holders, the universal, indivisible, interdependent and interrelated nature of children's rights and the global nature and reach of the UN Convention on the Rights of the Child. The rights afforded by the UN Convention on the Rights of the Child and the Committee's guidance on the best interests principle provide therefore useful orientation for international family mediation and shall be further elaborated in this chapter.⁷⁶

⁷³ Committee on the Rights of the Child, *General Comment No. 14 (2003) on the right of the child to have his or her best interests taken as a primary consideration*, [CRC /C/GC/14](#), 29 May 2013, para. 4.

⁷⁴ Committee on the Rights of the Child, *General Comment No. 14 (2003) on the right of the child to have his or her best interests taken as a primary consideration*, [CRC /C/GC/14](#), 29 May 2013, para. 4-5, 11.

⁷⁵ See for instance: Missing Children Europe et al., [The voice of the child in cases of international child abduction](#), Position paper, Voice Project, 2019. Missing Children Europe et al., [The voice of the child in international child abduction proceedings in Europe, Case law results](#), Voice Project, 2019, pp. 5-6.

⁷⁶ Committee on the Rights of the Child, *General Comment No. 14 (2003) on the right of the child to have his or her best interests taken as a primary consideration*, [CRC /C/GC/14](#), 29 May 2013, para. 16.

Recognition of the rights of the child

"International family mediation processes uphold the United Nations Convention on the Rights of the Child, and in particular the four guiding principles underpinning all rights of the child: participation, protection, survival and development, and non-discrimination."⁷⁷

International Social Service, Charter for International Family Mediation Process (2017)

THE BEST INTERESTS OF THE CHILD AS A SUBSTANTIVE RIGHT, A FUNDAMENTAL PRINCIPLE AND RULE OF PROCEDURE

The **Committee on the Rights of the Child** explains the best interests principle as a three-fold concept: a **substantive right**; a **fundamental, interpretive legal principle**; and a **rule of procedure**:

- As a **substantive right** Article 3.1 is considered directly applicable and can be invoked in court. Every child has the right to have their best interests assessed and made a primary consideration when weighing different interests in a decision.
- As a **fundamental, interpretive legal principle** the best interests principle provides guidance for the application of laws: where a law leaves room for interpretation or state officials exercise discretion in applying a law, the interpretation that best serves the best interests

of the child shall be applied.

- As a **rule of procedure** the principle means that decision-making processes, which affect children individually or collectively, particularly those aimed at determining the best interests of a child or a group of children, have to be transparent and explain the possible positive or negative impact of the decision on the child or a relevant group of children.⁷⁸

The Charter of Fundamental Rights of the European Union (EU Charter) reaffirms the best interests principle in Article 24.2. Under its Article 51(1), the Charter applies to EU Member States when they implement EU law (*see Box 6*). Regulation EU 2019/1111 refers to these two legal standards in Recital 19.

⁷⁷ International Social Service, *Charter for International Family Mediation Processes*, a collaborative process, 2017, p. 10.

⁷⁸ Committee on the Rights of the Child, *General Comment No. 14 (2003) on the right of the child to have his or her best interests taken as a primary consideration*, [CRC /C/GC/14](#), 29 May 2013, para. 6.

On this basis, the best interests of the child can be considered a substantive right, a guiding principle and a rule of procedure for responses to international child abduction in EU Member States. It applies in legal proceedings, mediation processes and service provision.

Mediators should be prepared, therefore, to support parents in assessing the best interests of the child and to ensure the child's best interests are a primary consideration in their mediated agreement.



BOX 6

THE BEST INTERESTS OF THE CHILD IN THE UN CONVENTION ON THE RIGHTS OF THE CHILD AND THE EU CHARTER

UN Convention on the Rights of the Child, Article 3.1.

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

EU Charter, Article 24.2

In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.

THE BEST INTERESTS OF THE CHILD IN RELATION TO PARENTAL RIGHTS, DUTIES AND RESPONSIBILITIES AND STATE OBLIGATIONS

The UN Convention on the Rights of the Child not only sets out the rights of the child, but also obligations of state authorities, as well as duties of private actors, such as private social welfare institutions, parents and guardians. **Decision-making processes concerning the rights of the child are considered particularly sensitive when they intersect with the rights and responsi-**

bilities of parents and the obligations of the State, as is typically the case in family law proceedings. The principle of the best interests of the child provides important orientation for situations where different rights and legitimate interests need to be balanced and assigned weighed in order to make a decision.

Rights of the child to be cared for and raised by their parents

The child has the right to be cared for by his or her parents and not to be separated from the family, unless this is in the best interests of the child (Articles 7 and 9). The State has to respect the right of the child to preserve his or her identity, which includes nationality, name and family relations (Article 8). In situations where the child and one or both parents do not live together, the child has the right to maintain personal relations and regular direct contact with both parents (Article 9). The Convention affords these rights also specifically in cross-border situations of family separation (Article 10).

Rights and responsibilities of parents

As parents have certain rights and responsibilities under the UN Convention on the Rights of the Child, the implementation of the rights of the child depends not only on state action but also on parents as third parties under the Convention.

While the Convention does not define parental responsibility, it does give examples of areas where parents are accountable for their decisions, actions and inaction in relation to their children. Parents have the primary responsibility for the upbringing and development of the child (Article 18), and

they are responsible for ensuring, within their abilities and financial capacities, living conditions adequate to the child's physical, mental, spiritual, moral and social development (Article 27).

Parental rights are not specifically defined but refer to all rights that can be considered instrumental to provide care, direction and guidance, such as a right to reside with, have access and contact with the child. The right to provide appropriate direction and guidance to the child diminishes in light of the child's evolving capacities of autonomous thinking and acting, of discernment and decision-making (Article 5).⁷⁹

Against this background, parental responsibility is understood as the set of duties and rights of parents to make decisions in the exercise of their parental role, whereas the best interests of the child are considered not only a private interest of the parents and the child but also a matter of public interest. This broad definition of parental responsibility encompasses rights, duties, powers and responsibilities towards the child and the child's property, as well as duties towards the state. The parents enjoy the right to perform their role free from arbitrary state interference with their private and family life, as well as the right to the State's support.⁸⁰ By obliging States parties to support and monitor the parents' role in fulfilling their duties, the Convention makes parental duties legally enforceable where parents do not perform their duties in a manner consistent with the rights of the child.⁸¹

⁷⁹ Ruggiero, R., Volnakis, D. Hanson, K., The inclusion of 'third parties': The status of parenthood in the Convention on the Rights of the Child, *Children's Rights Law in the Global Human Rights Landscape, Isolation, inspiration, integration?*, Edited by Eva Brems, Ellen Desmet and Wouter Vandenhoele, Routledge Research in Human Rights Law, 2017, pp. 71-89, p. 83.

⁸⁰ Ibid. pp. 83-84. See also: Jonathan Law, Elizabeth A. Martin, *A Dictionary of Law*, 7th edition, Oxford University Press, 2014. David Archard, *Children: Rights and Childhood*, 2nd edition, Routledge 2004, p. 149.

⁸¹ Ruggiero, R., Volnakis, D. Hanson, K., The inclusion of 'third parties': The status of parenthood in the Convention on the Rights of the Child, *Children's Rights Law in the Global Human Rights Landscape, Isolation, inspiration, integration?*, Edited by Eva Brems, Ellen Desmet and Wouter Vandenhoele, Routledge Research in Human Rights Law, 2017, pp. 71-89, pp. 81-84.

Obligations of States

States parties to the Convention have a legal obligation to assist parents in fulfilling their childcare and child-rearing responsibilities. Article 3.2 obliges States to ensure children enjoy the protection and care necessary for their well-being, taking into account the rights and duties of the parents. Articles 18 and 27 set out the obligation of the State to support parents through social and financial assistance, childcare facilities and services and other relevant support programmes. Article 19 provides for the development of social support programmes for children and their caregivers to prevent and respond to all forms of violence, exploitation and neglect of children. Article 26 establishes the child's right to benefit from social security. Under Article 37, the State has to ensure children's effective protection from cruel, inhuman or degrading treatment or punishment in the home, in schools and institutions and in all other situations or contexts.

States have to intervene where parents do not fulfil their responsibilities towards the child, but without arbitrarily interfering in private and family life. Due to the role of parents as third parties under the UNCRC, the Convention is interpreted to provide a "framework for a social contract between parents and the state, where protection from undue state in-

terference coexists with the right to receive state support. In this framework, parents enjoy a degree of discretion in exercising their roles and responsibilities, whereas parental rights are considered limited and functional."⁸²

The Convention therefore considers the rights, duties and responsibilities of parents to be limited in time as determined by the evolving capacities of the child, limited in scope as determined by the best interests of the child, and of a functional nature in that they are intended to ensure the care, protection and well-being of the child.⁸³ The best interests principle plays a fundamental role in qualifying these limits and functions.

Balancing the rights of the child, the rights and responsibilities of parents and the obligations of the State

With regard to the upbringing and care of children, the concept of the best interests of the child serves several purposes: it shall enable children to exercise their rights in a way that is most appropriate to their individual situation and needs, provide orientation to third parties under the Convention such as parents, guardians and private service providers to guide and support children to this end, and ensure

⁸² Ruggiero, Roberta, Diana Volnakis and Karl Hanson, The inclusion of 'third parties': The status of parenthood in the Convention on the Rights of the Child, *Children's Rights Law in the Global Human Rights Landscape, Isolation, inspiration, integration?*, Edited by Eva Brems, Ellen Desmet and Wouter Vandenhoele, Routledge Research in Human Rights Law, 2017, pp.71-89, pp. 72-75. See also: McGuinness, S., Best interests and pragmatism, *Health Care Analysis*, 2008, p. 208.

⁸³ Ruggiero, Roberta, Diana Volnakis and Karl Hanson, The inclusion of 'third parties': The status of parenthood in the Convention on the Rights of the Child, *Children's Rights Law in the Global Human Rights Landscape, Isolation, inspiration, integration?*, Edited by Eva Brems, Ellen Desmet and Wouter Vandenhoele, Routledge Research in Human Rights Law, 2017, pp. 71-89, pp. 82-83. See also: Jonathan Law, Elizabeth A. Martin, *A Dictionary of Law*, 7th edition, Oxford University Press, 2014.

that the support provided by state authorities to children and parents is conducive to this overarching goal.

The best interests of the child shall help to make the rights of the child visible in adults' decision-making and to assist private and public decision makers in assessing the impact of their decisions on an individual child or groups of children. The principle aims further

at ensuring that the rights and interests of the child are given weight when they are competing with the rights and legitimate interests of parents or others. There is a general understanding that the interests of children "should carry more weight in such decisions because their outcome is likely to have much more profound effects on children in the immediate and longer term".⁸⁴

ASSESSING THE BEST INTERESTS OF THE CHILD IN INTERNATIONAL FAMILY MEDIATION

The Committee on the Rights of the Child has issued guidance on the steps of a best interests determination procedure. These steps help to ensure that a child's best interests are assessed and determined in a transparent and objective manner, through an established procedure with specific safeguards for the child (see Box 7).

In private law proceedings, the parents, as the holders of parental responsibility for the child, are primarily responsible for ensuring respect for the rights and best interests of the child. In cases of international child abduction, however, there are clearly indications that parents may need support in fulfilling their responsibility towards their child or children. The mediation process requires parents to analyse their fami-

ly situation and to focus on the situation of their child or children and their rights, specific needs and best interests. This exercise is important for parents to reach an amicable agreement and get prepared for respecting it subsequently.

The Council of Europe Recommendation on family mediation sets out the mediator's responsibility in this regard: the mediator "should have special concern for the welfare and best interests of the children, should encourage parents to focus on the needs of children and should remind parents of their prime responsibility relating to the welfare of their children and the need for them to inform and consult their children".⁸⁵

84 Stalford, Helen, The broader relevance of features of children's rights law: the 'best interests of the child' principle, *Children's Rights Law in the Global Human Rights Landscape, Isolation, inspiration, integration?*, Edited by Eva Brems, Ellen Desmet and Wouter Vandenhoele, Routledge Research in Human Rights Law, 2017, pp. 37-51, p. 38. See also: Zermatten, J., The best interests of the child principle: Literal analysis and function, *International Journal of Children's Rights*, 2010, pp. 483-499.

85 Council of Europe, Committee of Ministers, [Recommendation No. R \(98\) 1 of the Committee of Ministers to member States on family mediation](#), 21 January 1998, Principle III.viii.

Consideration of the needs and well-being of the child

"International family mediation processes should pay special attention to the needs and well-being of children involved in a conflict. Mediators should focus participants not only on their own needs but also on the interests and needs of their children. Particular attention should be given to the importance of children's resumption and maintenance of healthy relationships as well as regular physical and virtual contact with both parents and their families where such contact is in the best interests of the child and both parents consent to it."⁸⁶

International Social Service, Charter for International Family Mediation Processes (2017)

The mediator, as a neutral third party, is in a good position to assist the parents in assessing the best interests of the child. The assessment should consider the child's primary needs, participation, development and protection. It should take due account to the child's social, economic, physical, psychological, cognitive and emotional situation, as well as any other factors relevant for the case.

In addition to analysing the child's present situation and personal history, a best interests determination essentially aims at projecting the child's future. This is to ensure that the mediated agreement is suitable to secure the rights of the child at the present time and in the medium and longer term, to promote the child's holistic development and the full and effective enjoyment of the rights recognised in the Convention throughout childhood and in the child's transition to adulthood and independent life.

The Committee's guidance can help mediators to assist parents in assessing the best interests of their child and giving due consideration to the child's best interests when resolving their dispute. The criteria to be assessed and the guidance for giving weight to the rights and best interests of the child can help mediators to ask the parents questions that will help them to focus on the best interests of the child during the mediation process and duly reflect this focus in the mediated agreement.

The mediated agreement should include a statement of how the parents have given primary consideration to the best interests of the child. If the parents make their consideration of the best interests of the child visible in the mediated agreement, this will facilitate the review by the court, where applicable, to give legal effect to the agreement.⁸⁷

⁸⁶ International Social Service, *Charter for International Family Mediation Processes*, a collaborative process, 2017, p. 10.

⁸⁷ Hague Conference on Private International Law, *Mediation, Guide to good practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, 2012, Chapter 6.6.1.6, Chapter 12.



The Committee on the Rights of the Child describes the best interests determination as an established procedure that consists of a comprehensive case assessment and a decision-making process, as well as a follow-up phase with periodic review.⁸⁸

1. Best interests assessment: case assessment phase

The case assessment, also referred to as best interests assessment, aims at gathering and verifying data and information on the child's situation. The assessment should be carried out by trained professionals with due diligence, taking into account the views of the child and using a multi-disciplinary approach as far as possible.

In the assessment phase, all factors relevant for safeguarding the rights of the child and meeting his or her needs should be assessed; relevant factors may vary according to the circumstances of the case and include the following:

- the views of the child;
- the child's upbringing, culture and identity;
- the appropriate preservation of the family environment, taking into consideration the ability and willingness of each parent to care for the child, to respect and promote the rights of the child and to ensure the needs of the child are met;
- the child's contact and relations with family members and significant others;
- any situation of vulnerability, including any risks as well as sources of support and protection;
- the care, protection and safety of the child;
- the child's well-being;
- the child's evolving capacities and development;
- the child's health;
- the child's education;
- the child's usual day-to-day activities and hobbies.⁸⁹

2. Best interests determination: decision-making phase

A decision on the best interests of a child should be made on the basis of the previous assessment of the case. As there may be conflicts between specific rights of the child and the rights and legitimate interests of parents or other relevant persons involved in the case, decision-makers need to undertake a balancing exercise, in which they weigh the relevant factors that have been assessed and ensure that the best interests of the child are a primary consideration.⁹⁰

Such conflicts are likely to occur when mediating in international child abduction cases. After a prolonged absence from the place of habitual residence, for instance, the child may have developed bonds with a stepbrother or stepsister in the place to which the child has been wrongfully removed or where the child

⁸⁸ Committee on the Rights of the Child, General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art.3, para. 1), [CRC/C/GC/14](#), 2013, para. 64.

⁸⁹ Committee on the Rights of the Child (2013), General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art.3, para. 1), [CRC/C/GC/14](#), 2013, Chapter V.A.1 and para. 44. Wenke, D., *Legal instrument on the protection of the best interests of the child in domestic law proceedings by public authorities to limit parental responsibilities or place a child in care*, [Feasibility study](#), Council of Europe, 2021.

⁹⁰ Committee on the Rights of the Child (2013), General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art.3, para. 1), [CRC/C/GC/14](#), 2013, para. 39, 80-84. United Nations High Commissioner for Refugees, United Nations Children's Fund, [Safe and Sound](#), *What States can do to ensure respect for the best interests of unaccompanied and separated children in Europe*, 2014, p. 43.

is retained, so that consideration needs to be given to ensuring the continuity of this relationship. The child's right to continuity of education and healthcare may conflict with considerations of the child's return; where a child has special health needs, for instance, due to chronic illness or disability, this may raise doubts about returning the child to a place where appropriate services are not available.

Where the assessment identifies risks to the child, the provision of appropriate assistance and support services should be considered to remediate those risks. If, for example, there is an allegation that a family member has committed acts of violence against the child, it is necessary to take special protection measures such as supervised contact while the case is under investigation.

When balancing and assigning weight to the established facts and the rights and legitimate interests of the child and the parents, the decision-making process should include an assessment of the likely impact of a decision on the child's present and future situation, giving due consideration to

- the rights and needs of the child, with the risk of harm to the child outweighing other factors,
- sources of support and protection suitable to remediate any identified risks,
- the child's right to be brought up by the parents and to maintain family relations and contact,
- continuity of care,
- matters related to health, education and vulnerability, and
- the child's right to development including in view of his or her transition to adolescence (where applicable) and to adulthood and independent life.

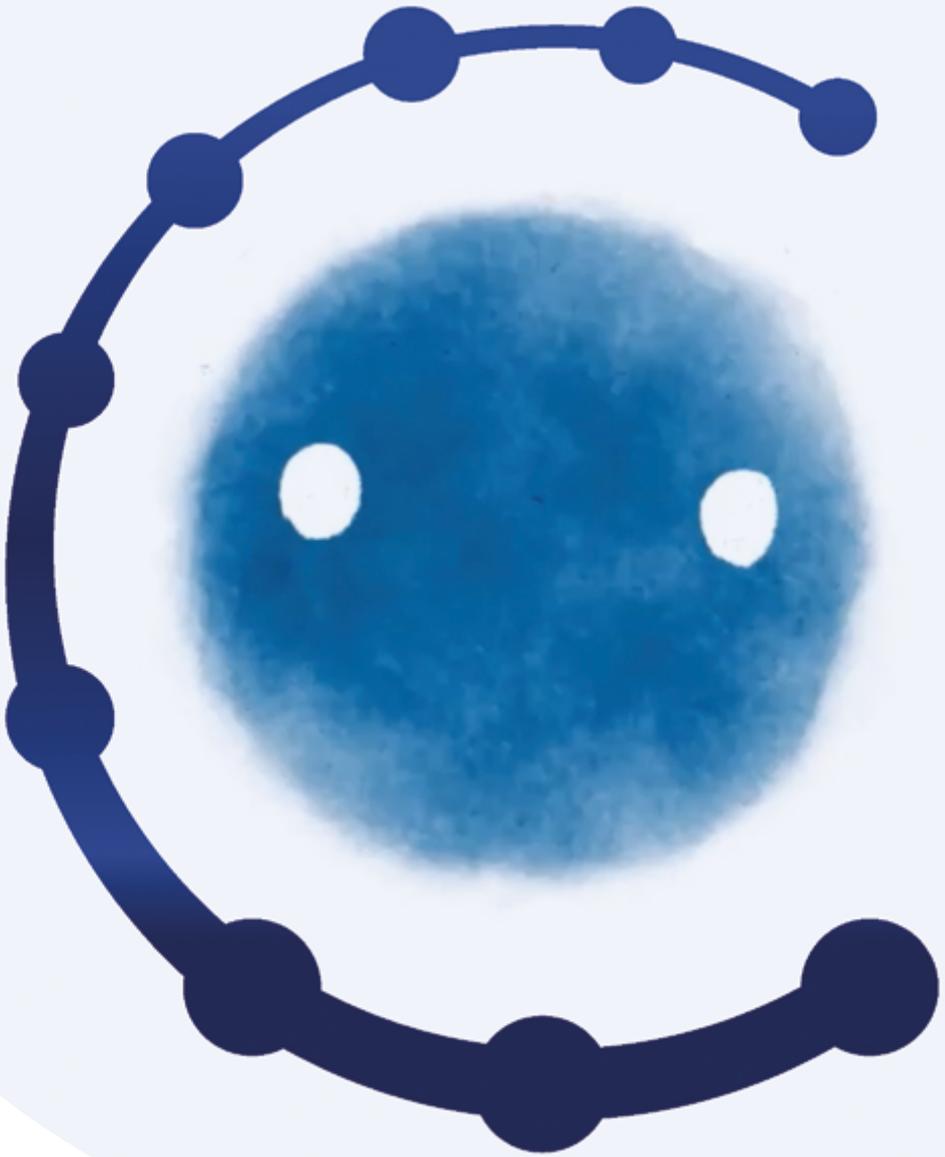
The Council of Europe Guidelines on child-friendly justice underline that the best interests of all children involved in the same proceeding should be separately assessed and balanced with a view to reconciling possible conflicting interests of the children.⁹¹ This may be the case where two or more children have been wrongfully removed or retained, or where the child has step-siblings in the family of the left-behind or taking parent.

3. Follow-up phase: review and evaluation

Where applicable, and in particular in situations of high level parental conflict and where risks to the child have been identified, the best interests determination, including relevant assessments and decisions, has to be periodically updated. The review and evaluation phase depends on the circumstances of the case and the child's evolving capacities and situation. This follow-up phase usually requires the involvement of service providers, such as social and child protection services, to support the child, the parent(s) and other family members beyond the duration of the mediation process and legal proceedings.

As discussed in Chapter 3, a structured process of *ex post* mediation may be required to continue supporting the parents in the medium and longer term. The child should be closely involved in all steps of the follow-up phase, in accordance with his or her rights and the best interests and in light of considerations made in Chapter 4. The review and evaluation phase should continue until a sustainable solution for the child has been identified and implemented in accordance with the best interests of the child.

91 Council of Europe, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*, 2010, p. 18.



6

REGULATING MEDIATION SERVICES IN THE BEST INTERESTS OF THE CHILD

Due to the sensitivity and complexity of international child abduction cases, and considering that international child abduction is a criminal offence in several EU Member States, mediation should be embedded in a regulatory framework that determines how mediation shall be organised, delivered and supervised. A regulatory framework is important to ensure the mediation process is carried out in respect of international standards, as well as European and national law. It ensures that mediators, parents and children have access to support and that appropriate safeguards are in place. Regulation is further important for the coordination between mediation providers, relevant judicial and administrative authorities, Central Authorities and service providers to ensure mediated agreements comply with the applicable legal frameworks and have legal effect.⁹²

The following aspects of mediation services should be regulated by law or through other appropriate mechanisms:

Access to mediation and safeguards:

- access to mediation at any appropriate moment during the case and the proceedings, clarifying the eligibility of parents, children and other family members to access, initiate and participate in mediation;
- the child's participation in the mediation process and, where applicable, the child's representation by a guardian *ad litem*;
- the establishment of a national registry or database of qualified mediators;
- access to mediation aid;
- obtaining the informed consent of parents, children and any other eligible family members participating in mediation;
- use of digital services, online platforms and video-conferencing to facilitate mediation meetings where applicable;
- participation of lawyers;
- safeguards in mediation;

Qualifications and accreditation of mediation providers and mediators:

- licensing of mediation providers;
- minimum qualifications and requirements of mediators;
- training and accreditation of mediators;
- vetting procedures;
- neutrality, independence and impartiality of mediators;

⁹² See Hague Conference on Private International Law, *Mediation, Guide to good practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, 2012.

- ethical standards and codes of conduct for mediators;
- supervision, coaching and accountability of mediators;
- monitoring and accountability of mediation providers, including independent monitoring;

Operation of mediation services:

- confidentiality, secrecy and data protection in mediation;
- reporting obligations of mediators and mediation service providers;
- the role and responsibilities of mediators in referral mechanisms for parents and children in need of support;
- access to support services for mediators, such as interpretation and cultural mediation;
- administrative duties of mediation providers, including the reporting of data and statistics;
- coordination of the mediation process with legal proceedings and central authorities;
- checks of mediated agreements by courts or administrative bodies;
- enforcement of mediated agreements.

The following sections discuss some of these key elements of a regulatory framework for international family mediation services in further detail.

ACCESS TO MEDIATION

International and European instruments promote the use of alternative dispute resolution, such as mediation, as a way of supporting parents in reaching amicable solutions to their disputes (see *Chapter 3*). When regulating access to mediation, several considerations are important to facilitate parents' use of mediation where appropriate, such as ensuring mediation services are available and affordable, participation in the mediation process is practicable, that referrals to mediation are regulated and that the mediation process is coordinated with legal proceedings.⁹³

Experience from a range of European countries shows that only written information about international family mediation as a valuable alternative for parents involved in international child abduction cases is often not enough for parents to opt for this choice and attempt mediation. Where written information is combined with information provided in-person, for instance by a mediator who is present in court or attending the court hearing of Hague return proceedings, the willingness of parents to consider mediation increases notably. This approach has delivered

⁹³ Hague Conference on Private International Law, *Mediation, Guide to good practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, 2012, Chapter 4.

positive results as more parents decided to prefer mediation over the court proceedings. Initiated in the Netherlands, this approach has subsequently

informed initiatives in Germany and the UK, and individual courts are following and adopting this practice also in other countries.⁹⁴

EXAMPLE OF PRACTICE: MEDIATION IN COURT – PROMOTING MEDIATION THROUGH ACCESS IN THE COURT

Inspired by the Dutch experience, MiKK piloted the Mediation in Court (MiC) model in the Berlin Hague Court, and it is now practiced in 22 specialised Hague Courts in Germany and continues to expand. This model foresees that the court schedules two hearings in a Hague return case. A specialised mediator is invited to the first court hearing. As return proceedings have to be completed within a maximum of 6 weeks, the first court hearing is convened within 2-4 weeks. A second court hearing is immediately scheduled for 7-10 days later. At the first hearing, a mediator provided by MiKK is present to explain the benefits of mediation to the parents – in their native language if they wish – and the parents can ask questions. In this way, mediation becomes a concrete and realistic option in the emotionally charged and difficult situation. There is transparency as all parties and participants in the case are present and informed, i.e. the parents and their lawyers, the guardian *ad*

litem of the child, the staff of the Youth Office (local child protection services) and, if necessary, interpreters.

Before the first hearing, MiKK ensures that a co-mediator with the required language and cultural skills is on standby. If the parents agree to attempt mediation, the mediation process takes place in the 7-10 days before the second hearing.

If the parents reach an agreement, the mediator and the parents write down the agreement together, and the parents' lawyers check it before the parents sign. It is then sent to the court or presented at the second court hearing. During mediation, the mediators and the judge do not exchange information or speak to each other, to respect the principle of confidentiality. The court reviews the agreement and, if satisfied, gives it legal effect to make it enforceable, as far as possible and in accordance with the circumstances of the case.⁹⁵

94 Council of the Baltic Sea States, *Transnational child protection: the role of judges, social services and central authorities*, PROTECT Children on the Move project, 4th Expert Meeting, 25-26 November 2014, Full meeting report, 2015, pp. 46-48.

95 See [AMICABLE \(2019-2021\)](#) Best Practice Tools for the Enforceability of Mediated Agreements and Best Practice Model for Incorporating Mediation into Child Abduction Proceedings.

If the parents do not reach an agreement through mediation, the court hearing will take place as scheduled and the judge will decide on the case. Even in such a case, the mediation process usually improves the relation and communication between the parents and helps them to become aware of different ways of solving the situation and to understand the consequences of their decisions and actions for the child. The parents might begin to trust each other again, because it may be the first time that they talk and listen to each other again. So the mediation process, even if it does not resolve the parental dispute, can generally lay the groundwork for parents to respect and adhere to a court decision.

The mediator in court model requires an organisational effort on the part of the specialised mediation NGO to organise a suitable co-mediation team: one mediator with a legal and one with a psycho-social background, who need to be available at short notice and have the appropriate cultural experience and language skills. It is important to ensure

that the parent from abroad has a possibility to have contact with the child or children during the proceedings, and this can be coordinated with the mediation process. Depending on the age of the child and the circumstances of the case, the child can also be involved in the mediation. If the left-behind parent cannot travel to the court hearing and mediation session, the mediation sessions can take place online by video conference.

The multi-lingual MiKK Advisory and Pre-Mediation Service and the international MiKK network of 200 active, specialist cross-border family mediators based in 32 countries, mediating in 30 languages, ensure that this model works well throughout Germany and the EU and worldwide.

In light of the positive experience with the mediator in court model in Germany, England and the Netherlands, the EU co-funded project AMICABLE promoted this model in Italy, Poland and Spain where it has been very positively received.⁹⁶

SAFEGUARDS IN MEDIATION

Safeguards in mediation are a prerequisite for mediation to be conducted in accordance with human rights principles and ethical standards. To be effective, safeguards have to be regulated by law or otherwise.

At the beginning of a mediation process, the mediator may not be sufficiently aware of the particular circumstances of the case and the level of safeguards required. In some cases, incidents or risks of violence in the family may have

96 AMICABLE (2019-2021) Best Practice Tools for the Enforceability of Mediated Agreements and Best Practice Model for Incorporating Mediation into Child Abduction Proceedings: an EU-cofinanced project conceived by MiKK with external legal experts from Germany (Juliane Hirsch, Sabine Brieger) and partners: University of Wroclaw (Poland), University of Alicante (Spain), University Milano-Bicocca (Italy). The Best Practice Tools and Model are available at: <https://www.amicable-eu.org>.

been identified in the course of the proceedings, but such incidents could also remain hidden in legal proceedings and be disclosed only during mediation. The Hague Conference on Private International Law notes that allegations of domestic violence in cases of international child abduction cases are not uncommon, although some may prove to be unfounded. Parties and participants in mediation should be aware that the mediation process is not intended to resolve allegations of violence in the family but questions of contact and access and other relevant matters concerning childcare and child rearing under shared parental responsibility.⁹⁷

Safeguards have to be in place to ensure parents who freely choose mediation can do so in a protected space and on equal terms. To this end, the case has to be carefully assessed for two reasons: first, the assessment has to establish if the case is suitable for mediation and, where this is affirmed, clarify the safeguards required in the case.⁹⁸

The Council of Europe “Istanbul Convention” prohibits mandatory media-

tion in cases involving violence within the scope of the Convention (Article 48.1; see Chapter 2: limits and challenges of mediation). Yet, there is a compelling case for making information meetings on mediation a standard and mandatory measure in all international child abduction cases, as long as participation in mediation remains a voluntary decision by the parents, appropriate safeguards are in place before, during and after mediation, and each parent has effective access to adversarial court proceedings before mediation begins and throughout the process. Requiring parents to attend an information session on mediation should not, however, lead to delays in the return proceedings.⁹⁹

Safeguards include, in particular, the following measures and steps:

- a suitability assessment of the case before mediation begins;
- self-assessment of the mediation provider and the individual mediator to ensure appropriate qualifications and preparedness to handle the case;

⁹⁷ Hague Conference on Private International Law, *Mediation, Guide to good practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, 2012, p. 73, para. 262.

⁹⁸ For a more detailed discussion of mediation in cases where domestic violence has occurred or has been alleged, see: Hague Conference on Private International Law, *Mediation, Guide to good practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, 2012, Chapter 10. Council of Europe, Committee of Ministers, *Recommendation No. R (98) 1 of the Committee of Ministers to member States on family mediation*, 21 January 1998. Freeman, M., *Domestic Violence and Parental Child Abduction*, 2022. Freeman, M., Taylor, N., Domestic violence and child participation: contemporary challenges for the 1980 Hague child abduction convention, *Journal of Social Welfare and Family Law*, Vol. 42, 2020, pp. 154-175. Hague Convention on Private International Law, *Report on the Experts' Meeting on Issues of Domestic / Family Violence and the 1980 Hague Child Abduction Convention*, 12 June 2017, The University of Westminster, London, 2017. Alanen, J., When human rights conflict: mediating international parental kidnapping disputes involving the domestic violence defense, *The University of Miami Inter-American Law Review*, Vol. 40, No. 1, pp. 49-108, 2008.

⁹⁹ Hague Conference on Private International Law, *Mediation, Guide to good practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, 2012, p. 56.

- availability of appropriate support services for the child and the parents;
- practical arrangements to ensure safety if and as necessary in the case;
- safeguards for the child's participation in mediation.

"The welfare, safety and security of all participants in a mediation are of paramount importance for a reliable and trustworthy process. International family mediation is not suitable for all situations and the process should not be used by any participant to avoid or delay legal proceedings or procedures, or to manipulate or influence another participant. Depending on how the mediation is organised, the mediator initially meets, or speaks with, each party separately and informs them about the mediation procedure. They explore together whether mediation is suitable in their case and whether both parties are willing to take part; or whether another dispute resolution process would be more appropriate."¹⁰⁰

This initial assessment includes three crucial issues:

- a. personal safety of the participants;
- b. capacity to participate in mediation;
- c. respect for judicial and administrative proceedings.

International Social Service, Charter for International Family Mediation Processes (2017)

Suitability assessment of the case:

Whether or not a case is suitable for mediation needs to be assessed case by case. To facilitate this process, standardised screening tools for domestic violence and other relevant risks should be devised for mediators (*see Box 8*).

In assessing whether a case is suitable for mediation, the mediator should ascertain that each parent is able and

willing to protect his or her personal interests, as well as the rights and best interests of the child with continuity before, during and after mediation.

Where violence has been alleged, several factors should be considered, such as the severity and frequency of the alleged domestic violence, the alleged perpetrator and victim(s), the physical and mental health of the parents and

¹⁰⁰International Social Service, *Charter for International Family Mediation Processes*, a collaborative process, 2017, pp. 5-7.

the child, and any risks or threats.¹⁰¹

When screening for violence, mediators should not only ask about incidents or experiences of violence but also about emotional abuse and about the level of fear a parent has felt or still feels. Research has shown that persons who experienced domestic violence suffered fear not only of physical violence but also of verbal, psychological and emotional abuse, and where such abuse occurs daily, its effects were more distressing and longer lasting than those of physical attacks.¹⁰²

Emotional abuse can take many different forms; it “includes threats to harm a person or pet or threats to self-harm and blame the partner. Understanding the impact of abusive behaviour on the abused person and on children who witness or overhear it is a key factor in assessment. An abused person may experience fear and humiliation to such an extent that it impairs their ability to assess the risks they continue to face. It is helpful to ask individuals if they can rate the level of fear they are experiencing on a scale of 1–10.”¹⁰³

In addition, specific questions should be asked about the child’s safety and well-being, acts of violence against the child and whether the child has wit-

nessed violence between the parents (see also *Box 1: The harmful effects of domestic violence on children and the right to be safe*).¹⁰⁴

Under the Council of Europe Convention on preventing and combating violence against women and domestic violence, States are obliged to provide for a multi-disciplinary risk assessment of cases of violence under the Convention (Article 51). The aim is to assess the lethality risk, the seriousness of the situation and the risk of repeated violence in order to manage the risk and provide for coordinated safety and support. Where appropriate and possible in the circumstances of the case, the findings of the risk assessment should be used as a basis for determining the suitability of the case for mediation. Where a separate risk assessment has not been conducted, the screening for violence in the case should integrate questions to assess any risks.

If parents wish to attempt mediation despite incidents of domestic or other violence in the family, and the case has been assessed as suitable for mediation, mediators may consider alternative dispute resolution methods that were designed specifically for these purposes and provide for reinforced support from a multi-disciplinary team of specialists.¹⁰⁵

101 Hague Conference on Private International Law, *Mediation, Guide to good practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, 2012, pp. 72-77. International Social Service, *Charter for International Family Mediation Processes*, a collaborative process, 2017, pp. 5-7.

102 Bagshaw, D., *Disclosure of Domestic Violence in Family Law Disputes: Issues for Family and Child Mediators*, Conflict Management Research Group, University of South Australia, 2001. Cited in: Parkinson, L., *Family Mediation*, Fourth edition, Lexis Nexis, 2020, pp. 67-68.

103 Parkinson, L., *Family Mediation*, Fourth edition, Lexis Nexis, 2020, pp. 67-68.

104 Parkinson, L., *Family Mediation*, Fourth edition, Lexis Nexis, 2020.

105 See for example the Coordinated Family Dispute Resolution model: Field, R., Lynch, A., Hearing parties’ voices in Coordinated Family Dispute Resolution (CFDR): an Australian pilot of a family mediation model designed for matters involving a history of domestic violence. *Journal of Social Welfare and Family Law*, 36(4), 2014, pp. 392-402. See also the Parental Coordinator Model still under evaluation: Blanco, M., Leitao Ferreira, J.M., Arias Astray, A., Parenting coordination, a new role for social workers, *Journal of Social Work*, Sage, 2022.



BOX 8

ENHANCING SAFETY IN MEDIATION: SCREENING TOOLS FOR THE IDENTIFICATION OF DOMESTIC VIOLENCE

In international family mediation, screening for domestic violence is an essential element of the suitability assessment required before referring or admitting an international child abduction case to mediation. Screening helps to identify acts and histories of violence in a family and, in consequence, to protect victims of violence from inappropriate exposure to the perpetrator in a mediation process. Screening tools guide the mediator in assessing the likelihood that a person has experienced violence and identifying on this basis the cases that are not suitable for mediation because of safety and power imbalance concerns.¹⁰⁶

Research has identified a number of factors that increase the effectiveness of screening for violence: in particular the use of an effective standardised screening tool; a robust screening procedure; as well as training of professionals conducting the screening and allocation of resources.¹⁰⁷ Research shows further that it is appropriate for service

providers to ask parents and children specific questions about exposure to violence. When asked specifically about it, parents and children tend to speak out more easily. For service providers, including specific questions on violence in screening tools enhances the chances of identifying incidents or risks of violence and enables them to gather more detailed information about the family situation and any risks.¹⁰⁸

There is currently no uniform approach or standardised practice in the use of screening tools in Europe, and not all mediators or mediation providers use screening tools for the suitability assessment. The Mediator's Assessment of Safety Issues and Concerns (MASIC) has been developed specifically to address this gap. The tool guides the mediator through a personal interview with each parent to assess the presence and frequency of indicators associated with different forms of domestic

106 This text box is based on: McCutcheon, R., *Addressing domestic violence in mediation: the need for more uniformity and research*, Harvard Negotiation Law Review, 2021. See also: Holtzworth-Munroe, A., Beck, C.J.A., Applegate, A., The Mediator's Assessment of Safety Issues and Concerns (MASIC): *A Screening Interview for Intimate Partner Violence and Abuse Available in the Public Domain*, *Family Court Review*, 48(4), pp. 646-662.

107 McCutcheon, R., *Addressing domestic violence in mediation: the need for more uniformity and research*, Harvard Negotiation Law Review, 2021.

108 Hultmann, Ole, Children Exposed to Intimate Partner Violence and/or Abused, Findings from Swedish research projects in child psychiatry and child protection work, University of Gothenburg, National Consultation Sweden, 8 May 2017. Anders Broberg, Ulf Axberg, Åsa Cater, Maria Eriksson, Ole Hultmann & Clara Iversen, *iRisk – Utveckling av bedömningsinstrument och stödinsatser för våldsutsatta barn* [Development of assessment tools and support measures for vulnerable children]. Cited in: Wenke, D., *Service Providers as Champions for Non-Violent Childhoods*, *Service provision for children and parents to end corporal punishment*, Non-Violent Childhoods Project, Council of the Baltic Sea States, 2018, p. 18.

violence and to assess the suitability of mediation in view of the specific form of violence identified. The tool is screening for seven forms of violence and comprises a risk assessment: psychological abuse, coercive controlling behaviours, threats of severe violence, physical violence, severe physical violence, sexual violence and stalking. The tool has been tested and was found to lead to more frequent identification of domestic violence than other screening approaches. Initial evidence confirms its internal consistency, as well as the reliability and validity of its results.¹⁰⁹

MASIC is considered a promising screening tool, which has to undergo further testing and evaluation, including with specific attention to the rights and safety of the child. It is freely available in the public domain.¹¹⁰

In addition to the screening in the context of the suitability assessment prior to mediation, research findings recommend that screening is continued throughout the mediation process as this enhances the possibility of identifying acts or risks of violence that were not detected in the initial screening.¹¹¹

109 Pokman, V., Rossi, F.S., Holtzworth-Munroe, A., Applegate, A.G., Beck, C.J.A., D'Onofrio, B.M., Mediator's Assessment of Safety Issues and Concerns (MASIC): reliability and validity of a new intimate partner violence screen, *Assessment*, 21(5), 2014, pp. 529-542.

110 Holtzworth-Munroe, A., Beck, C.J.A., Applegate, A., The Mediator's Assessment of Safety Issues and Concerns (MASIC): [A Screening Interview for Intimate Partner Violence and Abuse Available in the Public Domain](#), *Family Court Review*, 48(4), pp. 646-662.

111 McCutcheon, R., [Addressing domestic violence in mediation: the need for more uniformity and research](#), *Harvard Negotiation Law Review*, 2021.

Self-assessment of the mediation provider and mediator:

In a self-assessment, the mediation service provider should ascertain the preparedness of the service and the individual mediator(s) to mediate in the case guaranteeing the safety of the parties and participants. As a minimum, this requires that:

- the professionals carrying out the suitability assessment are specifically trained and qualified for this purpose;
- the case is entrusted to experienced mediators who are specifically qualified to handle situations where domestic violence is alleged or proven and who are prepared to adapt the model and method of mediation to the circumstances of the case;
- the mediation service provider has a child well-being and safeguarding protocol in place and mediators are aware of and trained in complying with it.

Support services for the child and the parents:

Mediation should only take place where appropriate support services and referral mechanisms are in place. Before initiating the mediation process, the mediation provider should ascertain the following:

- the parents and child have effective access to support, such as psychosocial counselling and legal advice to make an informed decision on their participation in mediation and that they continue receiving support during and after the mediation process;
- a guardian *ad litem* is appointed and available to represent the child, in accordance with applicable law;
- the safety of all parties involved is ensured at all times, in particular the parents, the child, the mediator, interpreter and guardian *ad litem*;
- the confidentiality of the information shared in the mediation process is guaranteed and understood by all parties and participants, and each parent has the necessary information and support to initiate adversarial court proceedings at any time during the process;
- reporting mechanisms are in place and understood by the parties and participants, and the mediator is prepared to make appropriate referrals, for instance to child protection services or law enforcement services, in accordance with national law regulating reporting obligations and limitations to rules of professional secrecy or confidentiality of mediation services;
- any allegations of violence are investigated and followed-up by the competent authorities in accordance with national law to ensure the safety of the parents and the child.

Safeguards in practical arrangements:

If a case is assessed as suitable for mediation and the parents give their free and informed consent to attempt to mediate, additional safeguards may need to be put in place in the practical arrangements. Practical and organisational safety measures should be made in accordance with the findings of the suitability assessment and could include the following:

- If it is considered appropriate for parents to meet in the same room, they should be able to come to the mediation venue accompanied by a person of trust and should not be left alone in the room. The collaboration of co-mediators may be important to ensure this.
- Where appropriate, the mediator should have the possibility to resort to indirect rather than direct mediation by organising separate meetings with the parents or by ensuring parents arrive at the meeting place through different entry points or at a slightly differ-

ent time to prevent encounters outside the meeting venue.

- The use of online dispute resolution, i.e. mediation through internet-based communication and video-conferencing, may be appropriate to avoid physical contact, in which case, special consideration should be given to ensure confidentiality of the sessions.¹¹²

Where allegations of violence are made against the left-behind parent, the mediated agreement should take into account the availability and effectiveness of protective measures in the jurisdiction of the child's habitual residence to respond to identified risk and to protect the child and the taking parent in the event of return.¹¹³

Safeguards for the child's participation in mediation:

As mediators support parents in reaching an agreement, they do not have the competence or authority to investigate the case, summon the child to a hearing or question witnesses about the child's situation in the family. In contrast to court proceedings, where the judge or a specially trained professional would hear the child according to the child's age and maturity and the circumstance

of the case, the child's participation and the best interests determination are not clearly regulated in the mediation process. **Special safeguards have to be in place, therefore, to protect the child and ensure his or her well-being during mediation and ensure mediation takes place in accordance with the best interests of the child.**¹¹⁴ (see *Chapters 4 and 5*)

ETHICAL STANDARDS FOR MEDIATION SERVICES

Professional associations providing services for children and families usually elaborate ethical standards or codes of conduct that provide a set of rules, guidance and principles for the conduct of professionals, based on international human rights law. Ethical

standards may be part of the legal regulation of service providers and should be promoted in professional training and development, and be handed out with formal accreditation.

¹¹² See: Kucinski, M., [The pitfalls and possibilities of using technology in mediating cross-border child custody cases](#), *Journal of Dispute Resolution*, 2010, Issue 2, pp. 297-325.

¹¹³ Hague Convention on Private International Law, [Report on the Experts' Meeting on Issues of Domestic / Family Violence and the 1980 Hague Child Abduction Convention](#), 12 June 2017, The University of Westminster, London, 2017, pp. 2, 3. See also, K. Trimmings, A. Dutta, M. Zupan (eds.), *Domestic Violence and Parental Child Abduction. The Protection of Abducting Mothers in Return Proceedings*, Intersentia, 2022.

¹¹⁴ Hague Conference on Private International Law, [Mediation](#), *Guide to good practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, 2012, p. 25.

The existing European codes of conduct and ethical standards for mediation do not refer to the rights and the best interests of the child as they were developed for a broader context of application in civil and commercial matters.¹¹⁵ **It is therefore worth examining how ethical standards or codes of conduct for family mediation services comply specifically with the rights and the best interests of the child, as**

well as child safeguarding and well-being standards. To set a benchmark for cross-border mediation in international family disputes, the International Social Service collaborated with a global drafting group of experienced mediators to develop the Charter for International Family Mediation Processes with specific attention to the rights and best interests of the child (see Box 9).

The following human rights and child rights principles are typically considered cornerstones for the development of ethical standards:

- Principle of legality: compliance with national law, in particular with regard to confidentiality and privacy, as well as reporting obligations;
- Respect for the inherent dignity of all persons;
- Respect for the human rights of the child, in particular the right to life, survival and development; respect for the child's views and making the best interests of the child a primary consideration;
- Respect for the diversity of persons, preventing discrimination and challenging it where it occurs;
- Ethical use of technology.

Adherence to ethical standards, rooted in European and international law, is essential to legitimise the services and actions of a mediator. A solid knowledge of ethical standards and how to apply them in practice in international family mediation helps the mediator in exercising the own role with confidence. The principles of neutrality, independence and impartiality are the basis for this to succeed.



BOX 9 CHARTER FOR INTERNATIONAL FAMILY MEDIATION PROCESSES

In a collaborative process involving 55 professional mediators from around the world, the International Social Service developed the Charter for International Family Mediation Processes with the aim of defining standards for the practice of international family mediation in a global context.¹¹⁶ Published in 2017, the Charter sets out the following 10 principles for international family mediation:

¹¹⁵ [European Code of Conduct for Mediators](#), 2004. Council of Europe, European Commission for the Efficiency of Justice (CEPEJ), [European Code of Conduct for Mediation Providers](#), CEPEJ(2018)24, 3-4 December 2018.

¹¹⁶ International Social Service, General Secretariat, [International Family Mediation](#). International Social Service, [Charter for International Family Mediation Processes](#), a collaborative process, 2017.

- voluntary participation
- suitability of mediation
- decision-making by the participants
- access to independent legal advice for each participant
- confidentiality
- independence
- impartiality
- consideration of rights and interests of children
- qualifications of international family mediators
- cultural awareness and sensitivity of mediators.

The Charter aims at strengthening the dialogue and cooperation between mediators and administrative and legal bodies involved in international family mediation.

NEUTRALITY, INDEPENDENCE, IMPARTIALITY AND FAIRNESS OF MEDIATION SERVICES

Mediators have to act in a neutral, independent and impartial manner and be fair and unbiased towards each of the parties and participants in the mediation process. The mediator's position,

actions and communication should reflect these principles to ensure that the parties are able to participate in mediation with equal opportunities and equal bargaining powers.¹¹⁷

According to these principles, the mediator must be guided by the human rights of the parties to the mediation process, in which the rights and the best interests of the child shall be a primary consideration, while taking into account the rights and responsibilities of the parents, as individuals and in their parental roles.

Mediation providers have to ensure that the working conditions of mediators guarantee their independence, impartiality and neutrality. To this end, mediation services should not be provided in conjunction with other services that could lead to conflicts of interests.¹¹⁸

In some countries, international family mediation is provided by specialised NGOs such as Renunite in the UK¹¹⁹, the International Child Abduction Centre in the Netherlands¹²⁰, and MiKK – International Mediation Centre for Family Conflict and Child Abduction, based

¹¹⁷ Hague Conference on Private International Law, *Mediation, Guide to good practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, 2012, p. 58.

¹¹⁸ Council of Europe, European Commission for the Efficiency of Justice (CEPEJ), *European Code of Conduct for Mediation Providers*, CEPEJ(2018)24, 3-4 December 2018, p. 3. [European Code of Conduct for Mediators](#), 2004, p. 2.

¹¹⁹ www.reunite.org

¹²⁰ www.kinderontvoering.org/en/mediation-bureau

in Germany with an international scope and a global network of specialised-mediators.¹²¹ As leading actors in this field, they have shaped the mediation landscape significantly over the past

decades, and their expertise as well as their status as non-state actors, foster trust in the independence, impartiality and neutrality of the services they offer.

TRAINING AND QUALIFICATIONS OF MEDIATORS

Mediators in international child abduction cases should be experienced family mediators, preferably with specialised training in cross-border family mediation, the rights and best interests of the child and the specifics of international child abduction cases.

The initial and continuing training of mediators should combine several disciplines to prepare the mediators for the complexity of international child abduction. A mediator requires knowledge and skills in relation to:

- the legal framework and procedural matters related to international child abduction, as well as relevant institutions, such as Central Authorities;
- rights and responsibilities of parents, as well as other family members involved in the case, such as grandparents and (step) siblings;
- the rights of the child;
- analytical skills when assessing the situation and the needs of the child from a rights-based approach;
- cross-border mediation and co-mediation;
- intercultural and child-sensitive communication, language skills and experience in working with interpreters or cultural mediators;
- experience with different methods and approaches of mediation, child-inclusive mediation and best interests determination;
- data protection and privacy rules;
- rules of confidentiality and secrecy, as well as reporting obligations;
- relevant referral mechanisms and support services for parents and children;
- ethical standards and child safeguarding.

Child-inclusive mediation in international child abduction cases should only be carried out by experienced mediators with special training. Multi-disciplinary and joint training is important to strengthen cooperation and coordination between mediators, legal and judicial professionals, Central Authority staff, guardians *ad litem* and local service providers working with parents, children and other family members involved in the case.

121 www.mikk-ev.com

Vetting procedures should preclude people with criminal records from being accredited as mediators, particularly with regard to criminal offences against children.

Mediation providers should ensure regular coaching and supervision of

mediators and that professional development opportunities are available to continue strengthening the quality of the service in accordance with the national, European and international legal frameworks and guidelines.



BOX 10 INTERNATIONAL FAMILY MEDIATION TRAINING BY MIKK

The international non-governmental organisation MiKK has been providing specialised training in the field of international and cross-border family mediation for 20 years and has trained over 400 international mediators from around 50 countries to date. MiKK offers annual cross-border family mediation training for qualified international mediators with a duration of 50 hours. The training takes place in Berlin and is provided in English and German. The courses bring together mediators and other relevant stakeholders, such as judges, lawyers, guardians, and staff of Central Authorities under the 1980 Hague Convention and the Regulation EU 2019/1111. In 2019, MiKK developed and piloted training on child-inclusive

mediation in international child abduction cases as part of the EU co-funded Voice project.¹²²

Participants in the courses come from different countries and disciplines, especially professionals with legal and psychosocial backgrounds, and have a cross-cultural and multi-disciplinary learning experience that prepares them for international family mediation practice. In addition, MiKK offers cross-border family mediation training abroad. MiKK has provided courses in Singapore and Japan, for instance, as well as shorter workshops in over 15 different countries in Europe and around the world.

¹²² See: Missing Children Europe et al., *The child in international child abduction cases, Training for lawyers, judges, court officials and social workers*, Voice Project, 2018.

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