

September 26, 2011

**Mr. William Duncan**  
**The Deputy Secretary General**  
**Hague Conference on Private International Law**  
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**Re:** Review of Israel's Systematic and Ideological  
Failure to Enforce the Hague Convention  
Risks Associated with Mediating Hague Convention in Israel

**Dear Mr. Duncan,**

I'm writing from the United States, and I am a left-behind father of a child abducted by her mother to Israel. I am writing to alert the Hague Conference of a pattern of decisions and judicial conduct in Israel, indicating the Israeli Judiciary's refusal to comply with and enforce the Hague Convention on the Civil Aspects of International Child Abduction, when the taking parent is a female.

The judgments and judicial conduct which favor female taking-parents are "inspired" by the fact that Israel is the last country in the Western World that maintains a statutory discrimination against men in family courts, and in particular the statutory presumption that favors automatic custody awards with mothers, even if they commit the crime of abduction. Judges in Israel simply can't hide their sympathy to female abductors. The three abduction cases described hereinafter should be disseminated to all experts in the area, both as a warning that Israeli Judgments are contaminated by statutory discrimination, and as a tool in the preparation of new model international guidelines.

It appears that the courts in Israel deliberately frustrate the purpose of the Hague Convention by falsifying facts, inventing interpretations of the Convention that defy common sense, and imposing tremendous financial burdens for the enforcement of the Convention. These are fundamental deviations from the clear language and spirit of the Convention.

I am asking that my letter be brought to the attention of future sessions of the Malta Process and disseminated to the readership of the Permanent Bureau's publications. It is vital to tackle the obstacles which Israel is creating in refusing to enforce the Convention against the background of the statutory Tender Years Presumption, which is ideologically shared by almost all judges of the Family Court and of the Rabbinical Court in Israel. It has yielded a batch of decisions that has made Israel a safe haven for female abductors.

### **Risks Associated with "Mediating" Hague Convention in Israel**

At this juncture, based on the **Special Commission on the practical operation of the 1980 and 1996 Hague Conventions (1-10 June 2011)** Report's endorsement of drafting a **Guide to Good Practice on Mediation under the 1980 Convention**, I am writing to alert the Permanent Bureau of special precautions that should be highlighted in the Mediation Guide to be published.

In my case, **Ben Haim v. Ben Haim**, I am a U.S. resident. The mother abducted the daughter from New Jersey, the state of habitual residence, to Israel. The case reached Israel's highest court, the Supreme Court of Justice ("SCJ") in Jerusalem. By opinion of Judge Edna Arbel, she overturned two lower court's judgments directing the return of the child. Judge Arbel's reasoning was that since the left-behind petitioner agreed to participate in negotiations to amicably resolve the Hague Convention dispute, even though the negotiations were thwarted by the abductor-mother, who refused to sign the agreement's draft, my initial willingness to "negotiate" constitutes an act of acquiescence to the abduction. The judge was joined by another judge, Judge Meltzer, and upon motion to reargue, Judge Rivlin reaffirmed Judge Arbel's Judgment, denying the return, again based on some theory of consent to the abduction via incomplete "negotiations".

Judge Arbel's Judgment was heavily criticized by the New Jersey's Superior Court's judge, Bonnie Midzol. Yet, the Israeli decision, especially since it originates from the highest court in that country, can serve as a major obstacle to any idea to introduce mediation under auspices of the Permanent Bureau. It is enough that one parent agrees to "mediate" abduction, and the other parent uses Judge Arbel's Judgment as legal basis of "acquiescence", to destroy entirely the concept of mediating international abductions.

I therefore ask you to publish Judge Arbel's Judgment in the widest amount of circulation possible, including The Judges' Newsletter on International Child Protection,

so that as many experts as possible can comment on the dangers Judge Arbel created to the safe return of children to their home state, if the left-behind parent agrees to “mediation”, and to the entire concept of international mediations. In fact, it is crucial that all practitioners worldwide be warned never to consent to any mediation or negotiations in Israel, since this may destroy their chances in court.

It is important to note that “mediation” or “negotiations” in the context of Hague Convention disputes cannot occur in coercive circumstances. In the case of Israel, coercive circumstances are engrained into the Judicial system, and they negate any possibility of effective mediation, as follows: (a) Family Court judges refuse video-conferencing, and thus coerce the left-behind parent to endure the costs of travel; (b) the left-behind parent is threatened by the judge that unless he appears in the court and is cross-examined, his petition will be dismissed; (c) once in Israel, the Rabbinical Court steps in and traps the father with ex-parte orders of arrest, and ex-parte orders of *ne exeat*, “to secure appearance in prospective divorce proceedings”, thereby abducting the father together with the child in Israel; and (d) the Family Court adds “interim child support” during the pendency of the Hague Convention proceedings, thereby forcing the left-behind parent to support the abductor and help her establish roots in the destination country.

These techniques are influenced by a radical feminist approach that is prevalent in Israel, pursuant to which custody morally belongs with the mothers, whether they committed abduction or not. These techniques negate a possibility of “free will” mediation, and they should be discussed in future panels. Therefore, future sessions on Principles for the Establishment of Mediation Structures in the context of the Malta Process (Prel. Doc. No 6) should learn from the negative experience that Israeli judges are demonstrating.

### **Israel’s departure from common rules of interpretation**

The Malta Process emphasized “the need for the courts in the different countries to apply common rules of jurisdiction (competence), and to be prepared to recognize foreign decisions on the basis of those common rules. This was a Conclusion both at the First and Second Malta Conference, and it really is a key concept for improving judicial co-operation” (Duncan Speech, The Judge’s Newsletter, XVI, Spring 2010). In this context, recent trends in Israeli abduction decisions should be reviewed and condemned in the next Malta Process meetings.

In particular, the case of **Nachom v. Nachom** serves as an example. In order to accommodate the Tender Years Presumption, which statutorily awards children's custody with the mothers, judges in Israel find every imaginable excuse to deny Hague Convention's applications, by interpreting the Convention in ways designed to frustrate the Convention, and make it difficult, if not impossible, to litigate. While most courts use a simple test of physical presence in the left-behind jurisdiction to determine the abducted child's pre-abduction "habitual residence", Israel has moved away from the test of physical location of the child, and instead it now applies the "intended habitual residence of the mother".

In **Nachom** case, a child was abducted from California to Israel when he was two months old. The child was born in California and is a U.S. citizen. The judge (**Sarit Golan**, Ashdod Family Court) found that the child lacked any habitual residence, and by way of circular legal acrobatics equated the child's habitual residence with that of the mother. Since the mother lived 11 months in California prior to the abduction, the judge conducted a full blown evidentiary hearing on the question of whether the mother intended to continue to reside there. Based on the abducting mother's self serving "intention to return within two years", Judge Sarit Golan found that neither she nor the child had habitual residence in the United States. Moreover, Judge Sarit Golan refused the father's (a U.S. citizen and resident for 20 years) request to be cross-examined by video-conference and demanded that he fly from California to Israel, so that he can be cross-examined. Upon his arrival, a legal trap was set up for him, as the Rabbinical Court issued an ex-parte *ne exeat* conditioned on a \$500,000 bond, allegedly to secure his appearance for future divorce/dissolution of marriage hearings.

Mr. Nachom is still trapped in Israel because of inability to post the outrageous \$500,000 bond. The Appellate Court's proceedings affirmed Golan's Judgment, after demanding an exorbitant bond to secure the woman's court fees on appeal.

The same thing happened in the **Ben Haim v. Ben Haim** case. Ben Haim's application for a video-conference in lieu of physical presence was denied. Upon arrival in Israel, the Rabbinical Court issued ex-parte orders of arrest and *ne exeat* injunction for 90 days. Ben Haim managed to leave Israel since the *ne exeat* injunction was not renewed. In retaliation, the Rabbinical Court issued a *ne exeat* on Ben Haim's father.

The same thing happened in the **Cohen v. Cohen** case. A mother abducted two children from Marbella, Spain to Israel. The left-behind father filed a Hague Convention

petition with the Be'er-Sheva Family Court in February 2011. The Court, Judge Geula Levin, denied the father's request to testify via video-conference. On appeal, the order denying the video-conference was affirmed, and the left-behind father was ordered to pay a fine in the amount of \$2,100. Judge Levin ordered the left-behind father to pay interim child support in the amount of \$570 per month, pending disposition of the Hague Convention proceedings. Trial was scheduled for May 2011. Upon Mr. Cohen's arrival in Israel to testify, he was arrested for 24 hours by order of the Rabbinical Court, and three guards escorted him to court from detention. In addition, a *ne exeat* order was already signed ex-parte, also by the Rabbinical Court. Eventually, on September 2011, Judge Levin denied the Hague Convention Petition based on laches of 9 months (from abduction to the filing of a complaint), and did not accept the left-behind father's explanation that Legal Aid in Israel was on an extended strike, that private attorneys charged \$35,000 which he could not afford, and that he had hopes that the woman would still change her mind. The judge "found" that failure to sue immediately, "like extinguishing a fire", constitutes acquiescence (The Convention itself allows one year to sue).

In the **Nachom** case, the court denied the Hague Petition based on interpreting habitual residence on an amorphous test "parental intended residence", and not physical presence before the abduction. A similar attempt was made in the **Cohen** case, and although "intent" (in the context of habitual residence) was fully and needlessly litigated, this defense was dismissed. The Israeli Central Authority has responded to your 2006 Questionnaire which has already warned about this practice: **"In the past Israeli courts have normally viewed habitual residence as a factual physical situation based on the location of the child...regardless of the parents' future plans or intentions. However, in recent cases there has on occasion been a shift to the 'parental intentions' test"**. The Israeli Central Authority should issue public statement cautioning judges that Parental intentions test is not in line with good practice, and it creates deviations from a unified worldwide approach. Moreover, it is simply a feministic tool to aid women in defending abduction cases by claiming that their residence overseas was merely transitory or somehow does not count. Still, this new "test" is always useful to women abductors and not even one man benefitted from it, to our knowledge.

The three cases, from different parts of the country (**Ben Haim** in Nazareth in the north, **Nachom** in Ashdod, South of Tel-Aviv, and **Cohen** in Be'er-Sheva, the southern district), show common trends in Israel that are heavily influenced by judicial

discrimination in favor of women, and Israel's strong reluctance to award custody to men, or to award joint custody.

### **Special Risks Associated with Enforcing Hague Convention in Israel Including Financial Burdens**

Fathers whose children are abducted to Israel have learned that if the court demands their appearance in person in Israel, they will not be able to leave the country, since the Rabbinical Court will trap them with a *ne exeat* injunction, together with an ex-parte order of arrest based on failure to pay child support for the abducted child or to secure appearance in the divorce proceeding itself. As a result, left-behind fathers may simply abandon the Hague Convention petition, since traveling to Israel poses a risk to their safety, liberty and property.

Still even when a court is inclined to order the return of a child to a left-behind father, the courts in Israel impose financial burdens that are unparalleled elsewhere. In the case of **Ben Haim v. Ben Haim**, the lower court's judge, at the Nazareth Family Court, while he found that the abducted minor must return to New Jersey, same judge took the liberty to impose financial conditions, including (a) payment of the abductor's airfare to U.S.; (b) prepayment of rental accommodation for six months; as well as (c) prepayment of child support to the abductor for six months after the return. Such prepayments amount to close to \$20,000, which a father must lay out in order to take the child back home.

These financial conditions make it impossible for middle class fathers to afford the return of their children to the Origin State. It also unfairly places the burden of rectifying the results of the crime of abduction, on the victim of abduction. Again, these "techniques" of discouraging fathers from prosecuting their rights under the Hague Convention are products of radical pro-feminist ideation that is supported by Israel's Tender Year Presumption. The international community should be alerted promptly of Israeli Judiciary, and in particular Judge Edna Arbel's scorn of the Hague Convention, when the victim is a father.

See also, **S.v.S.** 58309/05 (Tel-Aviv Family Court), in which the left-behind father in France was able to win a return order, but was required to prepay €10,000 for the abductor's living expenses and prepay rental expenses in France for the duration of the trial in France. A few years earlier, in **D.Y. v. D.T.** 621/04 (Appellate Court), again, an

American left-behind father was ordered to prepay \$6,000 plus rent an apartment for the wife.

The financial conditions imposed by Israeli courts as conditions to implementing safe return of children actually frustrate the purpose of the Convention. The Central Authority must educate the Judiciary in Israel that these practices are not in line with the Convention, and appear, on its face, spiteful. Needless to say, the Israeli Central Authority does not translate to Hebrew its own Questionnaire or the Good Practice Manuals. As a result, each subsequent court raises the bar in creating more and more obstacles.

### **Notes regarding Neulinger & Shuruk v. Switzerland**

The Working Committee on the Malta Process expressed concern about the ECHR's Judgment in **Neulinger & Shuruk v. Switzerland**. The Grand Chamber refused to order the return of Shuruk's child from Switzerland to Israel. The Chamber cited the mother's rights under Article 8 of the European Convention on Human Rights for family life, which may be abridged if Neulinger was compelled to return to Israel. This case created a rift between Council of Europe member states, where taking parents are entitled to the extra protection under Article 8, and the rest of the world, where Article 8 doesn't apply.

We wish to take this opportunity to explain how the **Neulinger & Shuruk** came about, and the explanation does not portray Israel's Judiciary in a positive light. At the time, the permanent Bureau was ready to state that ECHR was unfairly exercising jurisdiction with extraterritorial reach, and impact beyond the states that comprise of the Council of Europe. However, from the court's final Judgment we understand that the abductor was able to present a myriad of decisions from Family Court, including orders of protections, orders of removal of Mr. Shuruk from the marital home, orders of supervised visitations in a "contact center", and a pile of negative social workers' reports against the left-behind Israeli father. To the European judges, the collection of documents from the Israeli Family Court appeared to reflect negatively on the father, as potentially dangerous. However, the European judges did not know that in Israel, almost all divorce cases look exactly the same. It is common that every divorce case starts with bogus and fictitious domestic violence charges, which requires no evidence whatsoever. These trigger an immediate removal from home by police orders. At Family Court, women receive automatic interim custody (because of the Tender Year Presumption), and the men

are sent to interviews by state-appointed social workers. The social workers are trained to treat every man, however mild, educated or dignified, as a potential aggressor and abuser. It results in negative social worker reports and usually automatic reference to a supervised contact center. This is the face of almost every divorce case in Israel, and Shuruk was no different from the rest. This is again one of the legacies of Judge Edna Arbel, who used to be the State Attorney General, and at the time drafted Attorney General Guideline 2.5 which immunizes all women from prosecution for false police reports. It is therefore essential for the international community to put Neulinger & Shuruk in perspective. The only risk that Neulinger & Shuruk poses is for future Israeli fathers, because the corrupt pro-mothers system of Israel will enable every female abductor to arm herself with similar paperwork (orders of supervised visitations etc.), and defend the abduction proceedings in the same manner Neulinger did.

In conclusion, Judge Arbel's recent decision in the Ben Haim case should be disseminated to international practitioners, since it poses an obstacle to development of mediation in abduction contexts. Moreover, attention should be paid to the coercive circumstances in Israel, which set traps and physically imprisonments of the left-behind fathers when they come to testify. The same applies to the subjective "intended residence test", and to the practice of awarding interim child support to abductors, the orders of *ne exeat* against the left-behind fathers, and the financial conditions to return (prepayment of airfare, accommodation and child support). A new questionnaire should be requested from the Israeli Central Authority, as the current one appears to falsely describe the deviations of Israeli courts from common international practices. As to the current witch-hunt against men in divorce processes in Israel, I respectfully refer you to the English web pages at [www.ccfisrael.org](http://www.ccfisrael.org), and to CCF's report to the UN's Committee on Economic, Social & Cultural Rights (enclosed).

Sincerely,

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