In Supreme Court **C.A.D. 4117/11**

In the matter of **Hague Convention Act (1991), returning of abductees children**
Hague Convention Act

and In the matter of **The minor O. B.H., born in 2009** **The Minor**

S. S. B.H.
From New Jersey, United States

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The Petitioner

vs.

O. B.H.

By her representatives advocate
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The Respondent

Opinion of the Israeli Central Authority according to Hague Convention Act (returning of abductees children) 1991

On June 14th 2011 the department of international affairs in the state attorney's office received a copy of the honorary court's decision dated June 13th 2011, determining that: "the attorney general is hereby requested to state his opinion regarding the questions at hand", in regards to the petition for additional discussion requested by the petitioner's representative, within 15 days.

The department of international affairs acts on behalf of the attorney general as the Central Authority in Israel (hereinafter: "**the Central Authority**") according to Hague Convention Act (returning of abductees children) 1991 (hereinafter: "**Hague Convention Act**").

<u>After reviewing the abovementioned decision and the attached documents, the Central Authority is hereby honored to present its opinion as follows:</u>

1. The petitioner's (hereinafter: also "**the father**") request for additional discussion is based on article 30(b) of the courts' law [integrated], 1984, stating that:

   > **"(b) if the Supreme Court did not decide on the matter as stated in sub-article (a), each of the parties is entitled to request an additional discussion as previously described; the Supreme Court's president or a different judge or judges, as determined, may accept the request if the law decided upon in the Supreme Court contradicts a previous law determined by the Supreme Court, or if the importance, difficultness or novelty of the determined law allows in their opinion room for additional discussion."**

2. According to the Central Authority's opinion and as will be specified, the honorary court's ruling from May 17th 2011 contradicts the previous law determined by the Supreme Court regarding international abduction of children according to Hague Convention Act. In addition, in the Central Authority's opinion there is room for additional discussion due to the importance, difficultness or novelty of the law determined in the ruling.

<u>Factual background as described in the ruling</u>

3. The respondent (hereinafter: also "**the mother**") and the petitioner, both born in Israel, resided as of 2006 in New Jersey as a couple (by force of tourists' visa). On 2007 the plaintiff began studying in United States, and as a result both partners received a staying visa for student and partner. On 2008 they got married in Israel, and immediately returned to United States. On September 2009 their daughter was born there (hereinafter: also "**the daughter**").

4. About two months after birth the couple came to Israel for about two months, opened a children's clothing shop in their home town and returned to United States. On March 2010 the three of them had arrived again at Israel for Passover holiday. The mother was due to return to United States with the minor on June 20th 2010, but did not do so. It appears that the couple had experienced a crisis based on the father's newly embraced religious lifestyle, while the mother did not embrace it. On April 7th 2010, while in Israel, the parents resided separately and the mother filed a divorce claim in the Rabbinate court, to which she had attached the custodial issue.

5. In a mitigation procedure, the two parties reached a financial agreement determining the custodial issue over the daughter but this agreement was not signed, since the mother refused to sign it due to different demands

regarding possession. The father returned by himself to United States, after the mother removed the warrant detaining his and the daughter's departure from Israel. As the mother and the minor did not return to United States, the father immediately initiated procedures according to Hague Convention in United States and in Israel.

6. On December 21st 2010 the Family court in Nazareth ruled in the father's favor and determined that the minor should be returned to her habitual residence – United States. This ruling was appealed in Regional court in Nazareth, which was rejected of February 20th 2011. Later, the mother requested permission to appeal before this honorary court, which on May 17th 2011 overturned the Regional court's ruling and determined that the minor should not be returned to United States.

<u>The procedure according to Hague Convention Act</u>

7. The court's role in a procedure according to Hague Convention Act was described in C.A. 1372/95 **Stagman vs. Burk** I.r. 49(2), 431 (hereinafter "**Stagman law**") by honorary judge Goldbrg, as follows:

> **"'As the court's role in a procedure by the act, in this issue of children's return, is only "fire extinguishment" or "first aid" to reestablish the status-quo' (C.R. 1648/92 Turne vs. Meshulam, p. 45), the court should not address the issue of child's permanent custody, and even not the child's best interest in the full sense of the term. The discussion's framework is not destined to be a wide one and does not allow it. In other words, the child's best interest is not to be decided upon per se, and might arise, in case one of the defenses of the convention applies, only as a decisive consideration in a conflict between [the interest to cancel the act of abduction, which is taking the law into one's own hands by one of the parents, by reestablishing the status-quo, and the need to defend the child's best interest], which justifies avoidance from returning the child to its residence."**

8. After proving the applicability of the terms set in article 3 of the appendix to Hague Convention Act, that is a wrongful removal or retention indeed occurred, article 12 of the appendix to Hague Convention Act determines that:

> **"Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the**

authority concerned shall order the return of the child forthwith. The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment. Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child."

9. Note that the current case falls within the beginning of article 12 since the application was filed in close proximity to the date of retention. Therefore, the court as a rule should instruct the immediate return of the minor, while considering the defenses listed in articles 13 and 20 of the appendix to Hague Convention Act. The defenses claimed on the current matter by the mother are consent and acquiescing, described in article 13(a) of the appendix, determining that:

    "Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that -

    a) The person, institution or other body having the care of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention."

10. According to the ruling, both in Israel and worldwide, the defenses should be interpreted narrowly. See for example C.A. 7206/93 **Gabay vs. Gabay** I.r. 51(2) 241 (hereinafter: "**Gabay law**") in paragraph 19 of honorary judge Barak's ruling:

    "…Setting the boundaries of this defense is known to have grave importance. Its widening might nullify the Hague Convention of its content. Therefore it is acceptable to determining that the extent of the defense should be interpreted narrowly (see the abovementioned <u>C.A. 5532/93</u> [6] and the references there). The burden of proving the defense's applicability lies upon the one claiming it applies (see <u>C.A. 6327/94</u> P. Issac vs. R. Issac and others [7])."

11. Honorary judge Arbel, in paragraph 15 of the currently discussed ruling, emphasizes the balance between the defenses and the Convention's

purposes as follows:

> **"These defenses conflict to some degree with other main purposes of the convention, specifically the purposes of preventing self justice made by the abductor parent and honoring the rule of law according to universal standards. In the balance between these two purposes, it was determined that the defenses should be used under careful consideration, lest the exception will become the rule in a manner that will undermine the purposes of the convention and nullify the obligations of the contracting states. Therefore it was determined that the burden of proof carried by the one claiming the defenses apply is a heavy burden, not to be treated lightly (see: F.P.A. 672/06 *Abu Arar vs. Raguzo* (unpublished, 10.15.06); *Elisa Perez-Vera, Explanatory Report on the 1980 Hague Child Abduction Convention, Hague Conference on Private International Law, Acts and Documents of the Fourteenth Session 426, 460 (1980) 3; hereinafter: Perez-Vera report*)."**

12. Remember that even upon proving the applicability of a defense, the court has no obligation to refrain from returning the child but rather has room for court's discretion regarding the return.

13. The defenses against returning an abducted child have already been discussed by Supreme Court, in the ruling of honorary president Aharon Barak in **Gabay** law, in which paragraph 21 determines that:

> **"…A 'Consent' or 'Acquiescing' according to Article 13(a) of Hague Convention is a one-sided legal action, which requires comprehension by the other parent. It is based on the subjective desire of the parent finding its external expression in his behavior. It is enhanced when it's comprehended by the other parent, as he becomes aware that the 'abducted' parent relinquishes changing the status-quo. Therefore, if the 'abductor' parent believes that the 'abducted' parent does not relinquish the change of the status-quo, he may not claim that this parent consented nor acquiesced, even if such consent or acquiescing might be interpreted by the reasonable person. Such a claim will also contradict the bona fide principle. Furthermore, consent or acquiescing that was granted by mistake, deception, coercion or exploitation may be cancelled (see articles 14-17 of Contract Law (general), 1973 and article 61(b) of this law). Indeed, 'Consent' or 'Acquiescing' being a one-sided legal action, the one-sided legal action's laws as they develop in Israel**

will apply, considering the unique purpose underlying Hague Convention (compare: A. Barak <u>Mission Law</u> [10], p. 396)."

<u>**Consent and its establishment**</u>

14. Honorary judge Arbel saw fit to base establishment of the petitioner's consent on his conduct regarding the unsigned contract.

15. In paragraph 29 of honorary judge Arbel's ruling it was determined that:

> **"…The overall points of agreement in this agreement teaches clearly that the parties consented that each of the parties will go their own way – the respondent will return to United States and the plaintiff and the daughter will remain in Israel…"**

    Note that, as was determined by the honorary court, United States is the petitioner's habitual residence (as well as the mother's and the minor's) and place of livelihood. The Family court noted that the petitioner was forced to <u>**sign the agreement**</u> in order to cancel the detention warrant issued against him so he can return to his habitual residence – United States.

16. In paragraph 29 honorary judge Arbel also determined that one can learn of the father's consent to the minor's stay in Israel, by his return to United States by himself: **"…consent after which the respondent has returned by himself to United States"**. In this regard, it is emphasized that the couple's original plan, as shown by the facts, was that the father will return by himself to United States in April and that the mother and daughter will return in June. Therefore, the Central Authority thinks that the father's return to United States by himself attest only the fulfillment of the original plan, and does not teach anything regarding his consent to retention. Furthermore, one can learn of the father's relying on the original plan as the agreement was not signed. Obviously, a different impression of the facts does not warrant an additional discussion. However, under the matter's circumstances there is concern that the abovementioned determinations will become baselines in many other cases to recognize such actions, including the complaining parent's return to his habitual residence, as consent according to the Convention, which in the Central Authority's opinion contradicts the Convention's purpose and makes it impossible to act accordingly.

17. In this regard, and with all due respect, especially from a wide point of view, the Central Authority supports the words of honorary judge Jayyoussi in Family court in Nazareth, paragraph 28:

> **"…The plaintiff was under stress as he had a detention warrant against him leaving Israel, which would have disrupted his plans to return to USA... The plaintiff had to act fast in order to cancel that warrant and in order to**

minimize the harm caused to him and return to his job and other obligations in USA. Even if the plaintiff had agreed to the terms enlisted on the draft… the plaintiff's willingness to negotiate with the respondent and reach some agreements cannot be viewed as consent to or acquiescing with the abduction act… It is not reasonable to make such a fundamental and critical decision about their daughter, which has the potential to transform their lives all together, hastily and under pressure, and an indication of consent to leaving the daughter in Israel must not be held against the plaintiff…"

18. Note that the current case is quite common and most cases under the care of the Central Authority deal with a parent who remain in or returns to the state from which the child was abducted – even after the abduction or the retention. This procedure is supposed to be held rapidly and therefore the parent's arrival at the state to which the child was abducted is the exception and not the norm.

19. Civil Law Regulations 1984, chapter 22(1): returning of abducted children abroad, determine:

    "295.9. Summoning and interrogation witnesses (amendment: 1996)

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    (b) The court may demand, <u>for noted special reasons</u>, that one of the parties will come forth for investigation or determine another means for investigation." (The emphasis is not original)

20. One can see that according to the regulations, only in special cases the harmed parent will be required to arrive at the state to which the child was abducted. The Central Authority states that the mere fact of a parent indeed arriving at the state to which his child was abducted, whether asked to do so by the court but also due to different reasons, and later returning by himself to his habitual residence cannot be interpreted as consent or acquiescing for Convention's purposes.

    So, with all due respect, is the matter at hand: **<u>United States is the father's and the minor's habitual residence as determined by all courts, including the honorary Supreme Court.</u>** Therefore, it is the Central Authority's opinion that one cannot learn of consent by mere fact of the petitioner's return to his habitual residence, even if he has done so by himself.

21. In paragraph 32 of honorary judge Arbel's ruling it was determined that: **"…his departure from Israel… caused the plaintiff to rely on the issue of change in status-quo…"**

It seems that one may indeed infer relying if there is a signed agreement according to which the parties act or, as honorary judge Arbel says, when decision and specification are proven. Under the current circumstances, it was the respondent who created relying, as she eventually caused the petitioner to return to United States without his daughter. In honorary judge Arbel's opinion, the Family court's determination that the petitioner was under pressure is speculation and not fact. However, it seems that the determination regarding the petitioner's consent, which as abovementioned was not specified in any signed document, is similarly an assumption. Without a signed agreement, one must prove decision and specification, which the honorary court has based on the petitioner's return to United States. As emphasized above, it is inherently difficult to establish such decision on the basis of such return in cases according to Hague Convention Act, in which the parent's return to or remaining in the habitual residence is the norm. The Central Authority believes that the honorary court's determination might actually harm the status of those parents choosing to follow their children to the state to which they were abducted.

22. The Central Authority's opinion is that the appropriate approach to the consent defense interpretation and establishment according to Contract Law is the approach described by honorary judge Vogelman in paragraphs 2-4 of his ruling:

> **"As my colleague points out, contract law applies to the consent defense, including all implications of it. A fundamental principle of contract law, which has relevance to the current matter, is <u>the principle of reciprocity</u>. According to this principle, the advantage of a contract, that is the benefit received from the other party, and the disadvantage, that is the thing to be given to the other party, must be reciprocal (see Daniel Friedman and Nili Cohen Contracts 149 (volume 1, 1991) (hereinafter: Friedman and Cohen)). A situation in which the legal status of the two parties is divided, so one of them is being held for his sayings and concessions during negotiation while the other party is exempt and released of his obligations – places the parties in an uneven position, and <u>therefore does not coincide with the abovementioned principle.</u>**
>
> **The agreement draft in the current matter is a result of a negotiation between the parties, in which none of the parties fulfilled all his wishes. Examining the various ingredients of the contract suggests that each side waived and compromised until eventually they've reached consent to a draft, in which the various obligations are dependant and conditioned to each other. <u>Assuming that the respondent's consent to the plaintiff's and the</u>**

daughter's stay in Israel is a one-sided, unconditional obligation does not coincide, in my opinion, according to the factual infrastructure before us, with the various ingredients of the contract nor with its purpose – to settle all controversial issues in a manner that will allow the parties to end their marriage. Therefore, since at the end of the day the draft did not develop into a binding agreement, the obligations included in it do not stand, as they were conditioned by each party's execution reciprocally.

Indeed, as my colleague points out, "there is nothing holy about signature", and if foundations of decision and specification exist in an agreement, it is valid even without a signature. However, as she points out, these foundations, and especially that of decision, did not exist in the matter at hand and therefore the contract did not develop. In this state of affairs, I do not believe that one can separate the respondent's consent regarding one of the ingredients of the agreement's draft from the overall agreement, and view it by itself, even though the framework in which it was supposed to fit did not emerge. Furthermore, these things do not deny the possibility of creating a legally binding obligation – even one-sided by nature – even during negotiating towards a contract which did not develop at the end of the day to an agreement. Such are for example situations in which one party has reason to rely on a contract, following obligations given or presentation shown by the other party during negotiation (Friedman and Cohen, p. 519-648). However, I do not believe that in the matter at hand the factual infrastructure laid before the discussing court indicates that the respondent said or presented anything that might have brought the plaintiff to reasonably rely on it in a manner that justifies protection by law." (The emphasis is not original)

23. In the Central Authority's opinion, the legal analysis of honorary judge Vogelman regarding the consent defense, based on the case's facts, is, with all due respect, in line with the instructions and purposes of Hague Convention.

Acquiescing and its establishment

24. Honorary judge Melcer, in contrast the honorary judge Arbel's opinion but based on the same facts, determines that the applicable defense is not the consent defense but rather the acquiescing defense.

25. The customary ruling in the matter is that the acquiescing defense is examined after the date of abduction or retention (see **Gabay** law, p. 257). Honorary judge Melcer inferred the father's acquiescing from the financial agreement discussed but not signed between the parties. The Central Authority thinks that since the date of retention occurred after the negotiation, one cannot learn of acquiescing – not in regards to the date in which it was examined and not in regards to the circumstances.

26. In paragraph 2 of his ruling, honorary judge Melcer determines that: **"…by force of estoppels law – the respondent is not entitled to the temporary aid requested by him.**" As emphasized above, a parent's return to his state does not teach of consent and certainly not of acquiescing. Under the case's circumstances, and with all due respect, the Central Authority's opinion is that the father should not be addressed with estoppels just because he wished to return to his habitual residence. All the more so when he acted immediately after the act of retention in order to return the child to United States. It is for a good reason often ruled that negotiations after an act of abduction or retention do not attest acquiescing with the current status-quo (in this regard see **Gabay** law, p. 258-259, and C.A. 5532/93 **Gunzburg vs. Grinvald**, I.r. 49(3) 282).

27. Regarding acquiescing see also F.A. 1026/05 **E. A. vs. M. A.** 150-48 2005 (1) 8838. In that case, after filing a request according to Hague Convention Act, the father returned to Paraguay, his habitual residence, and negotiated with the respondent regarding the minor's alimony. The mother's claim of the father's acquiescing – was rejected.

> **"An acquiescing needs therefore to be expressed clearly and unequivocally. The way in which the appealer's 'acquiescing' is learned, that is not stating before the Rabbinate court the fact he wishes to file a claim according to Hague Convention; and since he had negotiated the minor's alimony, is insufficient. It is not a clear and unequivocal acquiescing. The appealer's actions may have many reasons. And one must not learn from his conduct that he has acquiesced with the minor's 'abduction'. Adding the extremely short time since the appealer had arrived at Israel and the date he had commenced a claim according to Hague Convention, as abovementioned 11 days prior to the pre-set date for the end of the minor's vacation in Israel, may teach us that the appealer's acquiescing does not stem from the evidential body, is not clear and unequivocal, and is not an acquiescing"** (paragraph 7 of honorary judge Stoffman's ruling).

28. Therefore, in the Central Authority's opinion, under the circumstances of the current case, applying the defenses of consent or acquiescing contradicts

existing laws and may place difficulties on addressing such issues in future cases. The Central Authority therefore recommends an additional discussion regarding the matter.

29. As abovementioned in paragraph 12, even if such defenses were proved to apply, the court still has discretion whether to instruct the child's return to her residence in United States.

Exercising court's discretion in case the defenses apply

30. It is the Central Authority's opinion that the ruling at hand does not coincide with the existing norm regarding exercising such discretion, and also created a new test in the matter which conflicts with Hague Convention's purposes.

31. This honorary Supreme Court has discussed previously the manner of exercising discretion on whether to return an abducted child to his habitual residence, in **Stagman** law. The honorary court stated that the Convention does not ignore the child's best interests and the defenses exist in the Convention in order to provide resolution when two interests conflict – the need to protect the child's best interest and the need to prevent self justice and taking the law into one's hands:

> **"However, even if we've said that the child's interest overpowers when the interests conflict, the purposes underlying the Convention requires that the abductor parent wishing to benefit from his action, must carry the burden of proving the defense. That is, doubting the defense's applicability should support returning the abducted child and not leaving him with his abductor"** (paragraph 9 of the honorary judge Goldbrg's ruling in the matter of Stagman).

32. One can also learn of exercising the court's discretion from the leading ruling of the English House of Lords in the matter of In Re M (FC) and another (FC) (Children)(FC) [2007] UKHL, in which it was determined that:

> **"The Convention itself has defined when a child must be returned and when she need not be. Thereafter the weight to be given to Convention considerations and to the interests of the child will vary enormously. The extent to which it will be appropriate to investigate those welfare considerations will also vary. But the further away one gets from the speedy return envisaged by the Convention, the less weighty those general Convention considerations must be."**

The House of Lords determined that the range of considerations depends on the claimed defense. For example, when it is proven that there is a grave risk that a child's return would expose him to grave harm, then it is inconceivable

that there shall be discretion whether to return the child. However, as for the consent or acquiescing defense, the House of Lords determined that:

> **"In consent or acquiescence cases, on the other hand, general consideration of comity and confidence, particular considerations relating to the speed of legal proceedings and approach to relocation in the home country, and individual considerations relating to the particular child might point at a speedy return so that her future can be decided in her home country."**

33. In paragraph 36 of the ruling discussed in this opinion it was determined that: **"…The best interest of the minor obligates discussing the custodial proceedings in her matter in Israel and not in United States…"** Honorary judge Arbel justifies this determination with the difficulties the mother and the minor will be faced with in United States. However, when dealing with exercising discretion, one must balance between the Convention's purposes and the minor's best interest in the wider sense. As specified above, in case of consent or acquiescing defense the balance should incline towards the Convention's purposes. With all due respect, the Central Authority sees that the manner in which the discretion was exercised in the current ruling is more relevant to the considerations of choosing the appropriate forum for custodial issues than proceedings by force of Hague Convention, destined to provide first aid and to prevent situations in which a parent can decide on his own and by taking the law into his own hands where will the custodial hearing in his matter takes place, and by doing so will gain an unjustified advantage over the parent from which the minor was abducted. As is well known, the minor's best interest in the wider sense will be examined in the state from which the minor was abducted, that is the child's habitual residence.

34. Furthermore, note that it was not uncommonly ruled that the parent's status in the state of habitual residence, whether legal or not, neither adds to or subtracts from the issue of defense's examination (see in this matter C.A. **Dagan vs. Dagan**, I.r. 53(3) 278, p. 269-270).

35. With all due respect it seems that the honorary court's reasons for exercising its discretion do not necessarily coincide with its own determinations in the ruling's beginning. So for example, it was determined legally and factually that the child's habitual residence is United States, but paragraph 36 states that their stay in United States was temporary and unsteady. It was also determined that one cannot apply defense 13(b) on the merits of the case but paragraph 36 states that the minor faces grave risk upon her return – a statement which should be based solely on that defense. The Central Authority states, with all due respect, that it is only appropriate that main claims which were rejected – will not be also used as factors in exercising judicial discretion as basis for retention.

36. It will be further noted that considerations regarding the mother's ability to support herself and the minor financially or the mother's legal status in United States cannot, in the Central Authority's opinion, be used in favor of the mother while she chose to conduct her affairs in United States nonetheless.

Concern for the ruling's implications

37. As abovementioned, in the Central Authority's opinion, the ruling may have direct implications on family laws in Israel, and in particular on cases conducted according to Hague Convention Act, and contradicts previous law regarding the defenses' examination which should be interpreted narrowly lest the Hague Convention be nullified. In the Central Authority's opinion and with all due respect, even the manner in which the honorary court has exercised its discretion does not coincide with the existing norm and with the Convention's purposes. Furthermore, there is a concern that the parties, especially in legal conflicts, will hesitate to have negotiations if such stages might be used against them. In this matter also the Central Authority agrees with honorary judge Vogelman:

> **"Using the points of agreement within a negotiation draft of an agreement, which failed at the end of the day, may carry with it negative implications regarding the willingness of parties to maintain an effective negotiation towards a contract. Note well: the parties might refrain from presentations, declarations or proposals, which include concession in favor of the other party, since they'll fear that such concessions may be held as evidence against them in a future proceeding that the parties may have…"** (Paragraph 5 of honorary judge Vogelman's ruling)

38. Note that Hague Committee for International Law frequently emphasizes the importance of mitigation and negotiation proceedings in order to obtain a resolution in pleasant manner, which will serve the child's best interest by avoiding a prolonged and cumbersome legal procedure. In addition, article 7(c) of Hague Convention Act requires that the Central Authorities take all appropriate measures "to secure the voluntary return of the child or to bring about an amicable resolution of the issues". If parties will hesitate to negotiate since something they've said or a not-signed draft during negotiations might be held against them – they will lose out, and so will the public as a whole. To the Central Authority's best knowledge, saying it in the careful manner required, the honorary court's determination regarding interpreting negotiation's procedures is unprecedented even on international level, which may harm the reciprocity of other contracting states towards Israel in Hague Convention's cases.

39. **In conclusion, based on the abovementioned, the Central Authority's recommends having an additional discussion regarding the matter.**

Issued today,
July 6th 2011

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On behalf of Israeli Central Authority according to
Hague Convention Act (returning of abductees children) 1991