

**NOTE RELATIVE À
L'OPPORTUNITÉ ET LA FAISABILITÉ D'UN INSTRUMENT JURIDIQUE POTENTIEL
SERVANT DE BASE À L'UTILISATION DES COMMUNICATIONS JUDICIAIRES DIRECTES**

établie par le Bureau Permanent

* * *

**NOTE ON
THE DESIRABILITY AND FEASIBILITY OF A POTENTIAL LEGAL INSTRUMENT
PROVIDING A BASIS FOR DIRECT JUDICIAL COMMUNICATIONS**

drawn up by the Permanent Bureau

*Document préliminaire No 3 D de décembre 2011 à l'intention de la
Commission spéciale de janvier 2012 sur le fonctionnement pratique de la
Convention Enlèvement d'enfants de 1980 et de la Convention Protection des enfants de 1996*

*Preliminary Document No 3 D of December 2011 for the attention of the
Special Commission of January 2012 on the practical operation of the
1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention*

**NOTE RELATIVE À
L'OPPORTUNITÉ ET LA FAISABILITÉ D'UN INSTRUMENT JURIDIQUE POTENTIEL
SERVANT DE BASE À L'UTILISATION DES COMMUNICATIONS JUDICIAIRES DIRECTES**

établie par le Bureau Permanent

* * *

**NOTE ON
THE DESIRABILITY AND FEASIBILITY OF A POTENTIAL LEGAL INSTRUMENT
PROVIDING A BASIS FOR DIRECT JUDICIAL COMMUNICATIONS**

drawn up by the Permanent Bureau

Table of contents

	Page
BACKGROUND	4
THE NEED FOR A LEGAL INSTRUMENT PROVIDING A BASIS FOR THE USE OF DIRECT JUDICIAL COMMUNICATION	5
Legal basis offered by existing international legal instruments	5
Responses to Question 2 of the Questionnaire on the desirability and feasibility of a protocol.....	6
Responses to the Country Profile under the 1980 Convention.....	7
Conclusions and Recommendations of Judicial Conferences	8
Discussions held during Part I of the Special Commission.....	8
Conclusion as to the need for a legal basis and binding rules for judicial communications	9
POSSIBLE FORMS AND CONTENT OF A LEGAL INSTRUMENT PROVIDING A BASIS FOR THE USE OF DIRECT JUDICIAL COMMUNICATION	10
General Principles	10
Binding legal instrument	10
SUGGESTED CONCLUSIONS AND RECOMMENDATIONS	11
ANNEX	12

BACKGROUND

1. The purpose of this document is to facilitate discussion during Part II of the Sixth Meeting of the Special Commission on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention (25-31 January 2012) of a potential international legal instrument providing a basis for the use of direct judicial communication.¹

2. The Special Commission, during Part I of its meeting (1-10 June 2011), adopted the following Conclusions and Recommendations in this respect:

“69. Where there is concern in any State as to the proper legal basis for direct judicial communications, whether under domestic law or procedure, or under relevant international instruments, the Special Commission invites States to take the necessary steps to ensure that such a legal basis exists.

70. The Special Commission notes that the question of the desirability and feasibility of binding rules in this area, including a legal basis, will be considered during Part II of the Sixth Meeting of the Special Commission.”

3. For the purpose of the discussion, it is to be understood that a legal instrument providing a basis for the use of direct judicial communication would include at a minimum a provision that would allow, where appropriate, a competent authority to engage in direct judicial communications with regard to a specific case with another competent authority of another State (*i.e.*, a legal basis for direct judicial communications). This binding provision would most likely have to be combined with one addressing the material scope of direct judicial communications.

4. The instrument could also include any of the following provisions, or a combination of them, with regard to the:

- designation of judges who can initiate and receive direct judicial communications, including the criteria for the designation of these judges;
- formalisation of the International Hague Network of Judges (IHNJ);
- roles and functions of designated judges;
- legal safeguards to be observed in relation to such communications;
- means of communications that can be used; and,
- language(s) to be used for such communications.

5. Before discussing the possible form of a binding international instrument and its possible content, it is important to examine the need for a legal instrument providing a basis for the use of direct judicial communications such as those falling under the scope of the Emerging Guidance and General Principles for Judicial Communications² (hereinafter “General Principles”). The following examination takes into account: (1) the

¹ Please note that reference to direct judicial communications in relation to specific cases in this document and other Hague Conference documents is always in relation to cross-border communications.

² Permanent Bureau, “Emerging rules regarding the development of the International Hague Network of Judges and draft general principles for judicial communications, including commonly accepted safeguards for direct judicial communications in specific cases, within the context of the International Hague Network of Judges”, Prel. Doc. No 3 A of March 2011 drawn up for the attention of the Special Commission of June 2011 on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention, available on the Hague Conference website at < www.hcch.net > under “Work in Progress” then “Child Abduction”. During Part I of the Special Commission, it was decided to change the term “rules” by the term “guidance”. The Emerging Guidance and General Principles for Judicial Communications were developed in consultation with a group of experts, the majority of whom were members of the IHNJ.

legal basis offered by existing international instruments; (2) the responses to Question 2 of the Questionnaire on the desirability and feasibility of a protocol³ (hereinafter "Questionnaire II"); (3) the responses to Question 21 of the Country Profile⁴ under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (hereinafter the "1980 Convention") with regard to direct judicial communications; (4) the Conclusions and Recommendations of recent Judicial Conferences which dealt with direct judicial communication; and (5) the discussions held during Part I of the Special Commission.

THE NEED FOR A LEGAL INSTRUMENT PROVIDING A BASIS FOR THE USE OF DIRECT JUDICIAL COMMUNICATION

Legal basis offered by existing international legal instruments

6. The General Principles as a non-binding instrument do not contain a legal basis for direct judicial communications in specific cases.

7. While the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* (hereinafter the "1996 Convention") does not expressly promote direct judicial communication, it provides a legal basis for its use in some specific and limited contexts.⁵ For example, under Articles 8 and 9, the competent authority of the State of habitual residence of the child and the competent authority of another Contracting State may proceed to an exchange of views for the purpose of a transfer of jurisdiction.

8. Furthermore, under Article 34(1) of the 1996 Convention, where a measure of protection is contemplated, the competent authorities of one Contracting State, if the situation of the child so requires, may request any authority of another Contracting State which has information relevant to ensuring the protection of the child to communicate such information. It is important to note that the communications contemplated under Article 34 cover more than communications solely between judges. However, to date, 20 Contracting States⁶ have declared under Article 34(2) that such requests can only be communicated through their Central Authorities, thus preventing the use of Article 34 for the purpose of direct judicial communications.

9. Direct judicial communications may also take place under Article 35(1) of the 1996 Convention with a view to requesting assistance in the implementation of measures taken under the Convention, especially in securing the effective exercise of rights of access of the child as well as of the right to maintain direct contact on a regular basis.

³ Permanent Bureau, "Questionnaire on the desirability and feasibility of a protocol to the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*", Prel. Doc. No 2 of December 2010 drawn up for the attention of the Special Commission of June 2011 on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention, available on the Hague Conference website, *ibid*.

⁴ Country Profiles completed by Contracting States to the 1980 Convention are available on the Hague Conference website at < www.hcch.net > under "Conventions" then "Convention No 28" and "Country Profiles".

⁵ See Permanent Bureau, "Consultations on the desirability and feasibility of a Protocol to the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* - a preliminary report", Prel. Doc. No 7 of May 2011 drawn up for the attention of the Special Commission of June 2011 on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention, available on the Hague Conference website at < www.hcch.net > under "Work in Progress" then "Child Abduction". A more detailed analysis of the legal basis offered by the 1996 Convention is described at pp. 13-14.

⁶ Albania, Armenia, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, France, Hungary, Ireland, Latvia, Lithuania, Malta, Poland, Romania, Slovakia, Slovenia, Spain and Ukraine.

Responses to Question 2 of the Questionnaire on the desirability and feasibility of a protocol⁷

10. Questionnaire II⁸ sought the views of States⁹ with regard to direct judicial communications in relation to the following three points:

- providing a legal basis for the use of direct cross-border judicial communications in respect of cases brought under the Convention;
- defining the scope of such direct communications and setting out procedural safeguards for their use;
- providing an explicit basis for the International Hague Network of Judges.

11. A great number of responses were favourable to providing a legal basis, through a binding international instrument, for the use of direct judicial communications in respect of cases brought under the 1980 Convention.¹⁰ Providing such legal basis for the use of direct judicial communications was seen as a means to encourage the use of direct judicial communications in States that have not done so thus far¹¹ and as an opportunity to clarify the role of the Central Authority in contrast to the role of judicial authorities in their co-operation and communications, including the circumstances and procedures required of Central Authorities to seek assistance through the judicial network in particular cases.¹²

12. Some responses,¹³ however, expressed the view that, despite the usefulness of direct judicial communications, it would not be necessary or appropriate to deal with this issue in a binding international instrument.¹⁴ The reasons given were that direct judicial communication was currently already possible in Hague cases,¹⁵ these issues are governed by the law of the State of the judicial authorities seized of the matter¹⁶ and that binding (international) rules could possibly affect the independence of the judiciary or fundamental principles such as due process.¹⁷ In contrast, non-binding provisions, such as the current General Principles should be promoted.¹⁸

13. Several responses found it necessary to define the scope of direct communications and / or to set out procedural safeguards for the use of direct judicial communications through an international binding instrument.¹⁹ In particular, it was viewed as necessary to provide clear binding rules on the role of the authorities involved, including Central

⁷ As of 11 November 2011, responses to Questionnaire II had been received from the European Union and 23 States: Argentina, Armenia, Australia, Bahamas, Burkina Faso, Canada, Chile, China (Mainland, Hong Kong SAR), Colombia, Dominican Republic, El Salvador, European Union, Israel, Mexico, Monaco, Montenegro, New Zealand, Norway, Panama, Switzerland, Ukraine, United States of America, Venezuela and Zimbabwe. However, the following entities have not responded to or expressed views on any of the questions under para. 10: China (Mainland, Hong Kong SAR), European Union and Norway.

⁸ See, *supra*, note 3.

⁹ The reference to "States" in the context of Prel. Doc. No 2 responses includes, where relevant, both Member and non-Member Contracting States to the 1980 and / or 1996 Conventions and the European Union.

¹⁰ Argentina, Armenia, Australia, Bahamas, Chile, China (Hong Kong SAR), Colombia, El Salvador, Israel, Montenegro, Panama, Switzerland and Ukraine. It is important to note that the question was in relation to an international legal basis to be found in a possible protocol to the 1980 Convention and not a stand-alone instrument dealing solely with direct judicial communications.

¹¹ Chile, Israel, Panama, and Ukraine.

¹² Australia, Switzerland and Zimbabwe.

¹³ Canada, New Zealand and United States of America.

¹⁴ Again this question was in relation to an international legal basis to be found in a possible protocol to the 1980 Convention and not a stand-alone instrument dealing solely with direct judicial communications.

¹⁵ Canada and United States of America.

¹⁶ New Zealand.

¹⁷ Canada.

¹⁸ Canada, New Zealand and United States of America.

¹⁹ Armenia, Australia, Bahamas, Chile, China (Hong Kong SAR), Dominican Republic, El Salvador, Israel, Monaco, Montenegro, Panama, Switzerland and Venezuela.

Authorities.²⁰ On the contrary, Ukraine did not see binding provisions defining the scope of direct judicial communications and safeguards as appropriate and would rather pursue the establishment of non-binding rules or guidance.

14. Providing an explicit legal basis through a binding international instrument for the IHNJ was considered as useful by about half of the responses.²¹

Responses to the Country Profile under the 1980 Convention

15. In the Country Profile, Contracting States to the 1980 Convention are invited to answer the following three questions:

- "21.a) Has a member of the International Hague Network of Judges been designated for your State? Yes, name(s), or No.
- 21.b) Is there a legislative basis upon which judges in your State can engage in direct judicial communications? Yes, please specify how legislation can be accessed (e.g., website) or attach a copy, or No, go to question c).
- 21.c) In the absence of legislation, can judges in your State engage in direct judicial communications? Yes, or No."

16. As of the date of drafting this note, 48 States²² have completed their Country Profile, of which 34 have designated a judge to the IHNJ, and 14²³ have not. It is important to note that 11 States²⁴ that have designated a judge to the IHNJ have not submitted a Country Profile.

17. Of the 48 States that have completed the Country Profile, only five have indicated that they have a legislative basis in their domestic laws upon which judges can engage in international direct judicial communications, of these States four²⁵ have designated a judge to the IHNJ and one²⁶ has not. Of the remaining 43 States, 39 States do not have such a legislative basis.²⁷ Four States did not answer this question.

²⁰ El Salvador and Switzerland.

²¹ Australia, Bahamas, Chile, China (Hong Kong SAR), Colombia, El Salvador, Montenegro, Switzerland, Ukraine, Venezuela and Zimbabwe.

²² As at 11 November 2011, the following States had completed their Country Profile: Argentina, Australia, Belgium, Brazil, Bulgaria, Burkina Faso, Canada (Alberta, British Columbia, Manitoba, Nova Scotia, Ontario, Prince Edward Island, Quebec, Saskatchewan), Chile, China (Hong Kong SAR), Colombia, Costa Rica, Cyprus, Czech Republic, Denmark, Dominican Republic, Ecuador, El Salvador, Estonia, Finland, France, Greece, Honduras, Hungary, Ireland, Israel, Latvia, Lithuania, Malta, Mauritius, Mexico, Norway, Panama, Paraguay, Peru, Poland, Portugal, Romania, Slovenia, Spain, Sweden, Switzerland, Thailand, Turkey, Ukraine, United Kingdom, United States of America, Uruguay and Venezuela.

²³ Burkina Faso, Estonia, Greece, Hungary, Latvia, Lithuania, Mauritius, Poland, Portugal, Slovenia, Switzerland, Thailand, Turkey and Ukraine.

²⁴ Austria, Gabon, Germany, Guatemala, Iceland, Luxembourg, Netherlands, New Zealand, Nicaragua, Singapore and South Africa.

²⁵ Canada (British Columbia), El Salvador, Spain and United States of America. In the case of British Columbia the legislative basis is provided in the Supreme Court Civil Practice Direction "Court to Court Communication in Cross Border Cases" where in the United States of America the legislative basis is found in the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) (see Prel. Doc. No 3 B – Annexes, "Report on Judicial Communications in relation to International Child Protection" of April 2011 available on the Hague Conference website at < www.hcch.net > under "Work in Progress", then "Child Abduction").

²⁶ Switzerland. In the case of Switzerland the legislative basis is found in the Federal Act on International Child Abduction and the Hague Conventions on the Protection of Children and Adults which provides in its Art. 10(1) "The court shall cooperate as required with the authorities of the state in which the child had his or her habitual residence before abduction".

²⁷ I.e., 28 States that have designated a judge to the IHNJ and 11 States that have not.

18. Of the 34 States that have completed the Country Profile and have designated a judge to the IHNJ, in 22 States²⁸ it is possible for judges to engage in direct judicial communications in the absence of a legislative basis in domestic law,³⁰ and in six States²⁹ it is not possible. A further six States did not answer this question.³⁰

19. Of the 14 States that have completed the Country Profile and have not yet designated a judge to the IHNJ, in seven States³¹ it is possible for judges to engage in direct judicial communications in the absence of a legislative basis in domestic law, and in four States it is not.³² Three States did not answer this question.³³

Conclusions and Recommendations of judicial conferences

20. The European Commission and Hague Conference Joint Conference on Direct Judicial Communications on Family Law Matters and the Development of Judicial Networks (Brussels, 15-16 January 2009), in which more than 140 judges from 54 countries³⁴ participated, concluded and recommended:

“15. Where there is concern in any State as to the proper legal basis for direct judicial communications, whether under domestic law or procedure, or under relevant international instruments, the necessary steps should be taken to ensure that such legal basis exists.”

The Inter-American Meeting of International Hague Network Judges and Central Authorities on International Child Abduction (Mexico, 23-25 February 2011), in which more than 25 judges from 21 countries³⁵ participated, concluded and recommended:

“34. Members of the Hague Network underlined the importance of having, as soon as possible, a legal basis to carry out direct judicial communications in specific cases. It was suggested that States and / or competent authorities be invited to provide for such a legal basis, where necessary. Such legal basis could be found in Guidelines issued by national judicial councils, Rules of Court, the Inter-American Model Law or domestic law. It is hoped that the endorsement of the Draft General Principles for Judicial Communications by the Sixth Meeting of the Special Commission of June 2011 will assist in that respect.”

Discussions held during Part I of the Special Commission

21. The discussions held during Part I of the Special Commission concerning the need for a legal basis were two-fold. This subject was first examined in the context of domestic law and then at the international law level. Many experts stated that the evolution of judicial communications had to be encouraged in a flexible manner.³⁶

²⁸ Argentina, Australia, Belgium, Canada, Chile, China (Hong Kong SAR), Cyprus, Denmark, Dominican Republic, Finland, France, Ireland, Malta, Mexico, Norway, Paraguay, Peru, Romania, Sweden, United Kingdom, United States of America and Venezuela.

²⁹ Brazil, El Salvador, Honduras, Israel, Panama and Uruguay.

³⁰ Bulgaria, Colombia, Costa Rica, Czech Republic, Dominican Republic and Spain.

³¹ Estonia, Latvia, Lithuania, Poland, Portugal, Switzerland and Turkey.

³² Burkina Faso, Greece, Mauritius and Ukraine.

³³ Hungary, Slovenia and Thailand.

³⁴ Australia, Argentina, Austria, Belgium, Benin, Brazil, Bulgaria, Canada, Chile, China, Costa Rica, Croatia, Cyprus, Czech Republic, Denmark, Ecuador, Egypt, El Salvador, Estonia, Finland, France, Gabon, Germany, Greece, Guatemala, Hungary, Iceland, India, Ireland, Israel, Italy, Latvia, Lithuania, Malta, Mexico, Morocco, Netherlands, New Zealand, Norway, Panama, Paraguay, Peru, Poland, Portugal, Romania, Slovak Republic, Slovenia, South Africa, Spain, Sweden, Switzerland, United Kingdom, United States of America and Uruguay.

³⁵ Argentina, Bahamas, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Trinidad and Tobago, Spain, United States of America, Uruguay and Venezuela.

³⁶ See “Conclusions and Recommendations and Report of Part I of the Sixth Meeting of the Special Commission on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention (1-10 June 2011)”, Prel. Doc. No 14 of November 2011 for the attention of the Special Commission of January 2012 on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention, para. 197. Available on the Hague Conference website < ww.hcch.net > under

22. The discussion of the need for a legal basis in a domestic law context revealed that in most common law jurisdictions, judges could undertake direct judicial communications in the absence of a national law or international instrument providing for such communications.³⁷ It was explained that in some of these jurisdictions this was a matter of judicial deployment and that it was the discretion and responsibility of the Chief Justice to allocate direct judicial communications powers to judges.³⁸ On the other hand, some experts from a variety of legal traditions, indicated the need for a legal basis in domestic law for the purpose of direct judicial communications in specific cases.³⁹

23. The discussion of the need for a legal basis for direct judicial communications at the international law level took place within the discussion of the possible development of international binding rules regarding judicial communications. Several experts felt that, while binding rules (including a legal basis) may be helpful, at this stage it would be premature to adopt such rules. They stressed the need to give States time to gain more experience in this area and thus to identify common standards.⁴⁰ During that discussion, the delegation of Switzerland submitted Working Document No 4 with a view to discussing the creation of an international legal basis for direct judicial communications.⁴¹ Switzerland was the only delegation to propose a legal basis at the international level. At the end of the discussion, it was agreed that this question should be reconsidered during Part II of the Special Commission.

Conclusion as to the need for a legal basis and binding rules for judicial communications

24. It is clear from the above that existing international legal instruments do not offer an appropriate legal basis for the purpose of direct judicial communications such as the type of communications falling under the scope of the General Principles.

25. Furthermore, the information reveals that a large number of States need a legal basis for direct judicial communications whether they have designated a judge to the IHNJ or not.⁴² On the other hand, a number of jurisdictions do not need such a legal basis.⁴³ In devising a way forward it would be desirable to hear from the Contracting

"Child Abduction Section" then "Special Commission meetings on the practical operation of the Convention" and Report of Meeting No 11 (7 June 2011, p.m.), at p. 1.

³⁷ The above analysis of the Country Profiles reveals that judges from a number of States of the civil law tradition and of mixed systems including civil law can engage in direct judicial communications in the absence of a legislative basis in domestic law, namely, Argentina, Belgium, Canada, Chile, Cyprus, Denmark, Dominican Republic, Finland, France, Malta, Mexico, Norway, Paraguay, Peru, Romania, Sweden and Venezuela.

³⁸ See Prel. Doc. No 14, *supra*, note 36, at para. 203 and Report of Meeting No 11 (7 June 2011, p.m.), at p. 2.

³⁹ See Prel. Doc. No 14, *ibid.*, at paras 188, 198, 206, 207 and 212 and Report of Meeting No 10 (7 June 2011, a.m.), at p. 2, Report of Meeting No 11 (7 June 2011, p.m.) at p. 2 and 3, and Report of Meeting No 12 (8 June 2011, a.m.) at p. 1.

⁴⁰ See Prel. Doc. No 14, *ibid.*, at para. 209 and Report of Meeting No 12 (8 June 2011, a.m.), at p. 1.

⁴¹ Work. Doc. No 4 can be found as an annex to this document.

⁴² In their response to Questionnaire II, a number of States indicated that they were favourable to providing a legal basis in a protocol (*i.e.*, Argentina, Armenia, Australia, Bahamas, Chile, China (Hong Kong SAR), Colombia, El Salvador, Israel, Montenegro, Panama, Switzerland and Ukraine, see, *supra*, note 10). However, it is important to note that the question was in relation to an international legal basis to be found in a protocol to the 1980 Convention and not a stand-alone instrument dealing solely with direct judicial communications. Furthermore, the analysis of the Country Profiles shows that 10 States cannot undertake judicial communications without a legal basis (*i.e.*, Brazil, Burkina Faso, El Salvador, Greece, Honduras, Israel, Mauritius, Panama, Ukraine and Uruguay, see, *supra*, notes 29 and 32). Finally, during the February 2011 Inter-American Meeting of International Hague Network Judges and Central Authorities, judges from 21 States of the region expressed a clear need for a legal basis in domestic law, see, *supra*, note 35.

⁴³ See, *supra*, notes 28 and 31.

States that have not completed the Country Profile nor yet expressed their views on this subject.⁴⁴

POSSIBLE FORMS AND CONTENT OF A LEGAL INSTRUMENT PROVIDING A BASIS FOR THE USE OF DIRECT JUDICIAL COMMUNICATION

26. From the outset it is important to note that direct judicial communications have taken place for more than 10 years, without a specific international framework,⁴⁵ on the basis of mutual trust and confidence of the judges involved.

General Principles

27. Since June 2011, a framework for direct judicial communications, which includes all the elements described under paragraph 4 above with the exception of a legal basis *per se*, has been endorsed in the form of a non-binding international legal instrument (*i.e.*, the General Principles). Whilst this framework does not provide for mandatory reciprocity,⁴⁶ it works on the basis of mutual trust and confidence between the judges involved in direct judicial communications. It is hoped that this framework will invite the designation of judges to the IHNJ by States that have not yet made such a designation. Furthermore, the General Principles, which may continue to evolve and be refined over time, will provide flexibility in the development of appropriate norms as States gain more experience in this area.

Binding legal instrument

28. Since the January 2009 Joint Conference on Direct Judicial Communications,⁴⁷ States have been encouraged to ensure that a legal basis exists in domestic law where there is concern as to the proper legal basis for direct judicial communications. Domestic law could include at a minimum the legal basis *per se* or could combine the provision of a legal basis with some of the elements of the framework found in the General Principles, such as the roles and functions of judges, the scope of the communications and the safeguards for such communications. However, in that latter case it would be very important when drafting national law to ensure co-ordination with the General Principles. The Permanent Bureau could offer its assistance in this respect. However, before undertaking such work, it may be advisable to seek and disseminate information from States where direct judicial communications can take place in the absence of a legal basis as to what are the bases upon which these communications can take place. This information could assist a number of States in their analysis regarding whether or not they need a legal basis under their domestic law.

29. The analysis carried out above shows that a number of States report that they have an interest in developing a binding international instrument.⁴⁸ However, it may be that the interest of these States to develop a binding international instrument which would deal solely with a legal basis for direct judicial communications may not be strong

⁴⁴ Albania, Andorra, Austria, Belarus, Belize, Bosnia and Herzegovina, Croatia, Fiji, Gabon, Georgia, Germany, Iceland, Italy, Luxembourg, Republic of Moldova, Morocco, Netherlands, New Zealand, Russian Federation, Saint Kitts and Nevis, San Marino, Serbia, Seychelles, Singapore, Slovakia, South Africa, Sri Lanka, Turkmenistan, Uzbekistan, The former Yugoslav Republic of Macedonia and Zimbabwe.

⁴⁵ With the exception of Conclusion and Recommendation No 5.6 of the 2001 Special Commission which provides as follows:

"In Contracting States in which direct judicial communications are practised, the following are commonly accepted safeguards:

- communications to be limited to logistical issues and the exchange of information;
- parties to be notified in advance of the nature of proposed communication;
- record to be kept of communications;
- confirmation of any agreement reached in writing;
- parties or their representatives to be present in certain cases, for example via conference call facilities."

⁴⁶ *I.e.*, it does not obligate Network judges to participate in direct judicial communications in specific cases where communication is sought from another State with a designated judge.

⁴⁷ See, *supra*, para. 20.

⁴⁸ See, *supra*, note 42.

enough to warrant its development at this time.⁴⁹ On the other hand, interest in such a project may grow if the provision of a legal basis is included in a broader instrument dealing with international child protection matters. Such an instrument could have the advantage of creating reciprocal obligations and designating judges in accordance with an international legal standard. A number of States, however, are of the view that the development of international binding rules regarding direct judicial communications is premature and that they would need time to gain more experience in this area in order to identify common standards.

SUGGESTED CONCLUSIONS AND RECOMMENDATIONS

30. Part II of the Special Commission may wish to consider the following possible Conclusions and Recommendations in relation to the desirability and feasibility of a potential legal instrument providing a basis for direct judicial communications.

- a) The Special Commission recommends to the Council on General Affairs and Policy to endorse the General Principles.
- b) The Special Commission recommends to the Council on General Affairs and Policy to encourage States that have not designated a judge to the International Hague Network to do so in accordance with the General Principles.
- c) Beyond including a legal basis for direct judicial communications in the relevant domestic laws, the possibility of a binding international instrument as a legal basis for direct judicial communications should most likely best be further discussed in the broader context of other related or relevant matters to the international protection of children.
- d) In relation to future work and in light of the observations made during the Part II of the Special Commission, the Permanent Bureau will:
 - i) promote the use of the General Principles;
 - ii) continue consultations with interested judges and other authorities based on Preliminary Document No 3 D;
 - iii) continue the consolidation of the International Hague Network of Judges;
 - iv) continue to develop contacts with other judicial networks and to promote the establishment of regional judicial networks;
 - v) maintain an inventory of existing practices relating to direct judicial communications in specific cases under the 1980 Convention and with regard to international child protection.

⁴⁹ See, *supra*, paras 18 and 19 and note 43. In 29 of the 48 States that have completed the Country Profile, it is possible to make direct judicial communications in the absence of a legal basis. States that do not require a legal basis may not be interested in negotiating an instrument the sole purpose of which would be to provide a legal basis for direct judicial communications.

A N N E X

**Commission spéciale sur le
fonctionnement pratique des
Conventions de La Haye de 1980 et 1996
(1 – 10 juin 2011)**



DOC. TRAV. No 4 F & E

Distribution: 7 juin 2011

Proposition de la délégation de la Suisse

La Commission spéciale soutient, sans préjudice de l'élaboration de principes plus spécifiques, l'examen, en vue d'une adoption future, de règles de droit comme suit :

1. Chaque État contractant désigne un ou plusieurs juges ayant pour tâche de promouvoir la coopération entre les autorités compétentes de cet État et de faciliter la communication et l'échange d'informations entre ces autorités et celles d'autres États contractants dans des situations auxquelles s'applique la Convention.
2. L'Autorité centrale ou l'autorité judiciaire, saisie de la demande de retour, peut, si la situation de l'enfant et l'examen des conditions de son retour le requièrent, demander à toute autorité d'un autre État contractant qui détient des informations utiles à cet égard de les lui communiquer.
3. L'Autorité centrale ou l'autorité judiciaire, saisie de la demande de retour, peut, si la situation de l'enfant et l'examen des conditions de son retour le requièrent, prendre des mesures appropriées, dans des cas particuliers, pour protéger l'enfant à la suite de son retour et s'enquérir en particulier des mesures que les autorités compétentes de l'État dans lequel l'enfant avait sa résidence habituelle immédiatement avant son déplacement ou son non-retour peuvent ordonner afin de protéger l'enfant après son retour.

* * *

The Special Commission promotes, without prejudice to more specific principles, further examination of legal rules, in view of a later approval, as follows –

1. Each Contracting State shall designate one or more judges having as task to promote co-operation amongst the competent authorities of that State and to facilitate communications and the exchange of information between these authorities and those of other Contracting States in situations to which the Convention applies.
2. The Central Authority or the judicial authority, seized with the request for return, may, if the situation of the child and the review of the conditions of its return so require, request any authority of another Contracting State which has relevant information to communicate such information.
3. The Central Authority or the judicial authority, seized with the request for return, may in individual cases, if the situation of the child and the review of the conditions of its return so require, take measures for the protection of the child upon its return and enquire in particular about the measures which the competent authorities of the State where the child was habitually resident immediately before its removal or retention can take for the protection of the child upon its return.