

**CONCLUSIONS ET RECOMMANDATIONS ET RAPPORT DE LA PREMIÈRE PARTIE  
DE LA SIXIÈME RÉUNION DE LA COMMISSION SPÉCIALE SUR LE FONCTIONNEMENT  
PRATIQUE DE LA CONVENTION ENLÈVEMENT D'ENFANTS DE 1980 ET DE LA CONVENTION  
PROTECTION DES ENFANTS DE 1996  
(1 – 10 JUIN 2011)**

*établis par le Bureau Permanent*

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**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)**

*drawn up by the Permanent Bureau*

*Document préliminaire No 14 de novembre 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 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*

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## Table of contents

	Page
<b>AGENDA 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) .....</b>	<b>4</b>
<b>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) .....</b>	<b>12</b>
<b>Introduction .....</b>	<b>13</b>
<b>Status of the 1980 and 1996 Conventions / encouraging further ratifications / accessions.....</b>	<b>16</b>
<b>Statistical survey of 2008 cases under the 1980 Convention.....</b>	<b>16</b>
<b>Co-operation among Central Authorities under the 1980 Convention (including use of information technology).....</b>	<b>18</b>
<b>Processing of applications for return by the Central Authority under the 1980 Convention .....</b>	<b>21</b>
<b>Role of the Central Authority under the 1980 and 1996 Conventions .....</b>	<b>26</b>
<b>Training and twinning of the Central Authorities under the 1980 and 1996 Conventions.....</b>	<b>27</b>
<b>Applications concerning access / contact under the 1980 and / or 1996 Conventions.....</b>	<b>28</b>
<b>Domestic and family violence allegations and return proceedings.....</b>	<b>31</b>
<b>Issues of access to justice and fair treatment .....</b>	<b>38</b>
<b>Interpretation of key concepts under the 1980 Convention.....</b>	<b>40</b>
<b>The child's voice / opinions in return and other proceedings .....</b>	<b>42</b>
<b>Use of the other Guides to Good Practice.....</b>	<b>43</b>
<b>Consideration of the draft Practical Handbook on the 1996 Convention .....</b>	<b>43</b>
<b>Judicial networking and direct judicial communications.....</b>	<b>46</b>
<b>Consideration of the draft Guide to Good Practice on Mediation under the 1980 Convention .....</b>	<b>52</b>
<b>The Principles on Mediation developed within the Malta Process .....</b>	<b>56</b>
<b>Conclusions and Recommendations of Part I.....</b>	<b>58</b>
<b>ANNEX 1: CONCLUSIONS AND RECOMMENDATIONS.....</b>	<b>60</b>
<b>ANNEX 2: WORKING DOCUMENT NO 1.....</b>	<b>71</b>
<b>ANNEX 3: WORKING DOCUMENT NO 2.....</b>	<b>73</b>
<b>ANNEX 4: WORKING DOCUMENT NO 3.....</b>	<b>75</b>
<b>ANNEX 5: CONCLUSIONS AND RECOMMENDATIONS ADOPTED BY THE SPECIAL COMMISSION OF OCTOBER-NOVEMBER 2006.....</b>	<b>77</b>

**ORDRE DU JOUR DE LA PREMIÈRE PARTIE DE LA SIXIÈME RÉUNION DE LA  
COMMISSION SPÉCIALE SUR LE FONCTIONNEMENT PRATIQUE DE LA  
CONVENTION ENLÈVEMENT D'ENFANTS DE 1980 ET DE LA  
CONVENTION PROTECTION DES ENFANTS DE 1996  
(1 – 10 JUIN 2011)**

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**AGENDA OF PART I OF THE SIXTH MEETING OF THE  
SPECIAL COMMISSION ON THE PRACTICAL OPERATION OF THE  
1980 HAGUE CHILD ABDUCTION CONVENTION AND THE  
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(1-10 JUNE 2011)**

## **AGENDA**

### **PART I**

Part I of the Special Commission meeting will take place in The Hague from Wednesday 1 to Friday 10 June 2011.

The draft agenda will be treated with some flexibility and may need to be modified in the light of continuing discussions in the Special Commission.

Sessions will normally begin at 9.30 a.m. and end at 6.00 p.m. with a lunch break from 1.00-2.30 p.m. Breaks for coffee will normally be from 11.00 a.m. till 11.15 a.m., and tea from 4.00 p.m. till 4.15 p.m.

An advisory group will be established early during the Special Commission meeting to assist in preparing the draft Conclusions and Recommendations, to be considered for adoption on the last day. It is expected that this group will meet regularly during the meeting, including sometimes in the evenings.

### ***Wednesday 1 June 2011***

#### *Morning*

- |            |   |
|------------|---|
| 10.00 a.m. | Opening of the Special Commission by Mr Paul Vlas, President of the Netherlands Standing Government Committee on Private International Law  |
|            | Election of the Chair and Vice-Chairs of the Special Commission   |
|            | Words of welcome by Mr Hans van Loon, Secretary General   |
|            | Introduction to the draft agenda and documentation by Mr William Duncan, Deputy Secretary General   |
|            | Adoption of the agenda  |
|            | Status of the 1980 and 1996 Hague Conventions   |
|            | Encouraging further ratifications / accessions  |
|            | Use of Guide to Good Practice under the 1980 Hague Child Abduction Convention: Part II – Implementing Measures  |
|            | Introduction to the statistical survey of 2008 cases under the 1980 Hague Convention – Mr Nigel Lowe, Professor of Law at Cardiff Law School, University of Wales (Prel. Docs Nos 8 A, 8 B and 8 C) |

**1. CO-OPERATION AMONG CENTRAL AUTHORITIES UNDER THE 1980 HAGUE CONVENTION (INCLUDING USE OF INFORMATION TECHNOLOGY)**

*Afternoon*

Contactability, responsiveness and speed in initiating or facilitating return proceedings

Use of standardised forms (revised form for return applications) (Info. Doc. No 4)

Information exchange (use of the standardised country profile) (Info. Doc. No 2)

Maintenance of statistics (INCASTAT)

6.00 p.m.

Welcome drinks offered by the Permanent Bureau, at the Academy Building

**Thursday 2 June 2011**

*Morning*

**2. PROCESSING OF APPLICATIONS FOR RETURN BY THE CENTRAL AUTHORITY UNDER THE 1980 HAGUE CONVENTION**

Locating the child

Promoting agreement (see also the Guide to Good Practice on Mediation under the 1980 Hague Convention)

Facilitating judicial communications (Note: See also item 13)

Facilitating safe return (Note: See also item 7)

Immigration issues

Other issues concerning the processing of applications

Use of the Guide to Good Practice under the 1980 Hague Child Abduction Convention: Part I – Central Authority Practice

**3. ROLE OF THE CENTRAL AUTHORITY UNDER THE 1996 HAGUE CONVENTION (PREL. DOC. NO 4, CHAPTER 11)**

**4. TRAINING AND TWINNING OF THE CENTRAL AUTHORITIES UNDER THE 1980 AND 1996 HAGUE CONVENTIONS**

Note: The role of the Permanent Bureau in the provision of technical assistance and training will be taken up again in Part II of the Special Commission meeting.

*Afternoon*

**5. MEETINGS AND NETWORKING AMONG CENTRAL AUTHORITIES UNDER THE 1980 AND 1996 HAGUE CONVENTIONS**

The use of IT to support networking

**6. APPLICATIONS CONCERNING ACCESS / CONTACT UNDER THE 1980 AND 1996 HAGUE CONVENTIONS**

Relationship between the 1980 and 1996 Hague Conventions

Services, facilities provided by Central Authorities

Procedural matters, including costs

Facilitation of international contact (visa issues, etc)

Contact in the context of return proceedings

Use of General Principles and Guide to Good Practice

Note: Contact issues in the context of international family relocation will be addressed in Part II of the Special Commission meeting.

**Friday 3 June 2011**

*Morning*

**7. DOMESTIC VIOLENCE ALLEGATIONS AND RETURN PROCEEDINGS (PREL. DOC. NO 9)**

Research and case law

Evidential issues

Definition of domestic violence and relationship to Article 13 *b*) of the 1980 Hague Convention

Relevance of ability of "home" State to provide protection

Organisation and enforcement of protective measures to enable safe return of the child and accompanying parent

Promoting consistency in judicial practices

Follow-up and information exchange

Relevance of the 1996 Hague Convention

*Afternoon*

**8. ISSUES OF ACCESS TO JUSTICE AND FAIR TREATMENT**

The applicant in return proceedings

The respondent in return proceedings

The parties in proceedings following the return of the child

Role of Central Authorities

Access to justice in the context of the 1996 Hague Convention

**9. DISCUSSION OF CASE LAW UNDER THE 1980 HAGUE CONVENTION – INTERPRETATION OF KEY CONCEPTS**

*Abbott*

*Neulinger and Raban*

Other

**10. THE CHILD'S VOICE / OPINIONS IN RETURN AND OTHER PROCEEDINGS**

Impact of international and regional developments

**11. USE OF OTHER GUIDES TO GOOD PRACTICE**

Guide to Good Practice under the 1980 Hague Child Abduction Convention: Part III – Preventive Measures

Guide to Good Practice under the 1980 Hague Child Abduction Convention: Part IV – Enforcement

6.00-8.00 p.m.

Reception hosted by the Government of Canada, at the residence of the Ambassador of Canada (transport to and from the reception will be provided)

***Saturday 4 June 2011***

*Morning only*

**12. CONSIDERATION OF THE DRAFT PRACTICAL HANDBOOK TO THE 1996 HAGUE CONVENTION (PREL. DOC. NO 4)**

Introduction, objectives and methodology

General comments

Chapter-by-chapter review



**Monday 6 June 2011**

*Morning*

**12. CONSIDERATION OF THE DRAFT PRACTICAL HANDBOOK TO THE 1996 HAGUE CONVENTION (CONT'D) (PREL. DOC. NO 4)**

Chapter-by-chapter review (cont'd)

*Afternoon*

Chapter-by-chapter review (cont'd)

Follow-up

Form in which Handbook is to be published

Updating of Handbook

The development of standard forms under the 1996 Hague Convention

Extensions of INCADAT and INCASTAT to the 1996 Hague Convention

**Tuesday 7 June 2011**

*Morning*

**13. JUDICIAL NETWORKING AND DIRECT JUDICIAL COMMUNICATION (PREL. DOCS NOS 3 A, 3 B AND 3 C)**

Introduction to the Report

Progress since previous Special Commission meeting held in 2006

Development of the International Hague Network of Judges (IHNJ)

Discussion of Principles:

- emerging rules
- commonly accepted safeguards
- legal basis

Possible development of binding rules

*Afternoon*

Article 15

Use of IT to support networking and communications

Role of *The Judges' Newsletter on International Child Protection*

Judicial conferences and meetings

6.00-8.00 p.m.

Reception hosted by the Government of the Netherlands, at the Academy Building

**Wednesday 8 June 2011**

*Morning*

**14. CONSIDERATION OF THE DRAFT GUIDE TO GOOD PRACTICE ON MEDIATION UNDER THE 1980 HAGUE CONVENTION (PREL. DOC. NO 5)**

Introduction, objectives and methodology

General comments

Chapter-by-chapter review of the draft Guide to Good Practice on Mediation

*Afternoon*

Chapter-by-chapter review of the draft Guide to Good Practice on Mediation (cont'd)

**Thursday 9 June 2011**

*Morning*

**14. CONSIDERATION OF THE DRAFT GUIDE TO GOOD PRACTICE ON MEDIATION UNDER THE 1980 HAGUE CONVENTION (CONT'D) (PREL. DOC. NO 5)**

Chapter-by-chapter review of the draft Guide to Good Practice on Mediation (cont'd)

Follow up

Possible development of binding rules

*Afternoon*

**15. THE PRINCIPLES ON MEDIATION DEVELOPED WITHIN THE MALTA PROCESS (PREL. DOC. NO 6)**

Introduction to and objectives of the Principles

Discussion of the Principles

The central contact point

Next steps and the future of the Working Party

**Friday 10 June 2011**

*Morning*

## **16. CONCLUSIONS AND RECOMMENDATIONS OF PART I**

Completion of any unfinished business

Discussion of Conclusions and Recommendations and of the agenda for Part II of the Special Commission in 2012

The meeting will end no later than 2.00 p.m.

## **PART II**

Part II of the Special Commission meeting to take place in The Hague from Tuesday 24 January to Wednesday 1 February 2012 (tentative).

Part II of the Special Commission meeting will have as its principal focus the question of the feasibility and desirability of a protocol to the 1980 Hague Convention.

It will also consider the subjects of international family relocation, the future of the Malta Process, and the role of the Permanent Bureau in supporting and monitoring the 1980 and 1996 Hague Conventions, including the provision of technical assistance and training.

**RAPPORT DE LA PREMIÈRE PARTIE DE LA SIXIÈME RÉUNION DE LA  
COMMISSION SPÉCIALE SUR LE FONCTIONNEMENT PRATIQUE DE LA  
CONVENTION ENLÈVEMENT D'ENFANTS DE 1980 ET DE LA  
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(1 – 10 JUIN 2011)**

*établi par le Bureau Permanent*

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**REPORT OF PART I OF THE SIXTH MEETING OF THE  
SPECIAL COMMISSION ON THE PRACTICAL OPERATION OF THE  
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(1-10 JUNE 2011)**

*drawn up by the Permanent Bureau*

## Introduction

1. In preparation for the Sixth Meeting of the Special Commission on the practical operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (the 1980 Convention) and 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* (the 1996 Convention), it was decided that the subjects to be covered were too extensive for one meeting. The exceptional decision was made for the first time to hold the Special Commission in two separate parts, with the first part taking place from 1 to 10 June 2011 and the second part seven months later from 25 January to 31 January 2012.

2. Part I of the Special Commission ("the 2011 Special Commission (Part I)") addressed primarily the practical operation of the Conventions, including the activities of Central Authorities, the draft Practical Handbook on the 1996 Convention (Prel. Doc. No 4), judicial communications and networking (Prel. Docs Nos 3 A, 3 B and 3 C), and the draft Guide to Good Practice on Mediation under the 1980 Convention (Prel. Doc. No 5). In preparation for Part I, the Permanent Bureau carried out consultations with States Parties to the 1980 Convention as well as Members of the Hague Conference, circulating in November 2010 a questionnaire concerning specific aspects of the practical operation of the 1980 Convention and the 1996 Convention (Prel. Doc. No 1) (Questionnaire I).<sup>1</sup>

3. It was initially decided that Part II of the Special Commission ("the 2012 Special Commission (Part II)") would primarily consider the issue of the desirability and feasibility of a protocol to the 1980 Convention, allowing for the Special Commission to be informed by the discussions from Part I concerning the practical operation of the 1980 and 1996 Conventions before addressing what types of auxiliary rules might be necessary to improve the operation of the Convention. In anticipation of Part II, the Permanent Bureau circulated in December 2010 to States Parties and to Members of the Hague Conference, a questionnaire on the desirability and feasibility of a protocol to the 1980 Convention (Prel. Doc. No 2)<sup>2</sup> inquiring about several potential topics for inclusion in any protocol. The Permanent Bureau also prepared a preliminary report prior to Part I

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<sup>1</sup> "Questionnaire concerning the practical operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* and 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*", Prel. Doc. No 1 of November 2010 for the attention of the Special Commission of June 2011, available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under "Child Abduction Section" then "Special Commission meetings on the practical operation of the Convention". Please note: Prel. Doc. No 1 of November 2010 was circulated to all National and Contact Organs of Members of the Hague Conference on Private International Law, as well as to non-Member Contracting States to the 1980 and 1996 Conventions. The reference to "States" in the context of Prel. Doc. No 1 responses will therefore include, where relevant, Member Contracting States to the 1980 and / or 1996 Conventions, non-Member Contracting States to the 1980 and / or 1996 Conventions and the European Union. (It may also, on occasion, include reference to Member *non*-Contracting States, principally in relation to questions concerning the 1996 Convention where Members which are Contracting States to the 1980 Convention may have provided comments.) State responses to Questionnaire I are compiled in Prel. Doc. No 10 of May 2011 and can be consulted individually on the Hague Conference website *ibid*. The response of South Africa to Questionnaire I was received after the compilation was prepared, and is available separately on the website of the Hague Conference.

<sup>2</sup> "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 for the attention of the Special Commission of June 2011. Available on the Hague Conference website *ibid*.

(Prel. Doc. No 7),<sup>3</sup> which details the history of the request to address the possibility of a protocol and provides a summary based on the limited responses received by 1 May 2011.<sup>4</sup> As a result of the discussions that took place during Part I of the Special Commission, the responses to Prel. Doc. No 2 and consultations with Members, the 2012 Special Commission (Part II) will now consider the desirability and feasibility of specific areas of further work in connection with the 1980 and 1996 Conventions. It will also consider the matters originally scheduled for discussion at Part II of the meeting: that is, international family relocation, the future of the "Malta Process" and the role of the Hague Conference in monitoring and supporting the 1980 and 1996 Conventions. A Guide to the Proposed Draft Agenda for Part II of the Sixth Meeting of the Special Commission (Prel. Doc. No 13) is to be prepared and circulated prior to Part II.

4. The decision was made that, given the highly unusual nature of the two-part Special Commission, it would be desirable to provide States Parties and Members of the Hague Conference with a more extensive Report of Part I than is the usual practice following Special Commissions on the 1980 Convention. The Permanent Bureau was of the opinion that the Report of Part I would offer background for the continued discussions of Part II, highlighting relevant discussions of the Special Commission in Part I and providing a context for delegates who might not have attended Part I. The Permanent Bureau would anticipate preparing a Final Report of the Special Commission that would incorporate the discussion and ultimate Conclusions and Recommendations of Part II. This Final Report, in addition to the Guide to the Proposed Draft Agenda for Part II (Prel. Doc. No 13) will also provide background for the Council on General Affairs and Policy in connection with any decisions concerning further work.

### **Representation and chairmanship**

5. The 2011 Special Commission (Part I) took place in The Hague from 1-10 June 2011. The Special Commission, one of the largest ever, included more than 300 experts and observers from 69 States and 19 organisations. Of the 69 States represented, 57 were Member States of the Hague Conference, including new Members since the previous Special Commission: the European Union and Ecuador (2007), India (2008), the Philippines (2010) and Mauritius and Costa Rica (2011). 58 of the States were Contracting States to the 1980 Convention and 27 of the States were Contracting States to the 1996 Convention. Five States were neither Members of the Hague Conference nor Contracting States to either Convention, but were invited to participate in the meeting as observers, namely Indonesia, Namibia, Oman, Saudi Arabia and Zambia. Representatives of three inter-governmental organisations and 16 non-governmental organisations also participated as observers. Among the participants were 55 judges from 30 States, including 25 members of the International Hague Network of Judges from 21 States. Nine States were participating in the Special Commission for the first time: Albania, the Dominican Republic, Estonia, Namibia, Oman, Singapore, Thailand, Saudi Arabia and Zambia.

6. The meeting was opened by Mr Vlas, President of the Netherlands Standing Government Committee on Private International Law. He highlighted that it was the last meeting of the Deputy Secretary General, Mr Duncan, before retirement, and expressed his gratitude for Mr Duncan's long years of service. He proposed as Chair Mr Justice

<sup>3</sup> "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 for the attention of the Special Commission of June 2011. Available on the Hague Conference website *ibid*.

<sup>4</sup> Australia, Bahamas, Burkina Faso, Chile, China (Mainland, Hong Kong SAR), Colombia, Dominican Republic, El Salvador, the European Union, Mexico, Montenegro, New Zealand, Norway, Switzerland, Ukraine and Zimbabwe.

Chamberland, expert from Canada. Mr Justice Chamberland was elected by acclamation. The Chair proposed Mrs Borrás, expert from Spain, as Vice-Chair. Mrs Borrás was elected by acclamation.

7. Ten Preliminary Documents<sup>5</sup> drawn up by the Permanent Bureau were prepared for the Special Commission.<sup>6</sup> Six Information Documents were also made available to participants of the Special Commission.<sup>7</sup>

8. Part II of the Special Commission will take place in The Hague from 25 January to 31 January 2012.

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<sup>5</sup> Prel. Docs Nos 3 and 8 were each in three parts.

<sup>6</sup> "Questionnaire concerning the practical operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* and 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*" (Prel. Doc. No 1 of November 2010); "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); "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); "Report on judicial communications in relation to international child protection" (Prel. Doc. No 3 B of April 2011); "Collection of responses on the Draft General Principles for Judicial Communications" (Prel. Doc. No 3 C of June 2011); "Revised draft Practical Handbook on the operation of 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*" (Prel. Doc. No 4 of April 2011); "Draft Guide to Good Practice under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* – Part V – Mediation" (Prel. Doc. No 5 of May 2011); "The 'Principles for the establishment of mediation structures in the context of the Malta Process' and the accompanying Explanatory Memorandum" (Prel. Doc. No 6 of May 2011); "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); "A statistical analysis of applications made in 2008 under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* – Part I – Global report" (Prel. Doc. No 8 A of May 2011); "A statistical analysis of applications made in 2008 under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* – Part II – Regional report" (Prel. Doc. No 8 B of May 2011); "A statistical analysis of applications made in 2008 under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* – Part III – A selection of country reports" (Prel. Doc. No 8 C of June 2011); "Domestic and family violence and the Article 13 "grave risk" exception in the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*: A reflection paper" (Prel. Doc. No 9 of May 2011); "Compilation of responses to the Questionnaire concerning the practical operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* and 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*" (Prel. Doc. No 10 of May 2011). All Preliminary Documents are available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under "Child Abduction Section" then "Special Commission meetings on the practical operation of the Convention".

<sup>7</sup> Preparations for the Sixth Meeting of the Special Commission on the practical operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* and 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* (Info. Doc. No 1 of November 2010); Country Profile – Final version for completion by States (Info. Doc. No 2 of March 2011); Conclusions and Recommendations of the Fifth Meeting of the Special Commission on the practical operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* and Conclusions and Recommendations of major regional or international seminars or conferences organised or co-organised by the Hague Conference since 2006 (Info. Doc. No 3 of June 2011); Revision of the model form for applications under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (Info. Doc. No 4 of May 2011); Speech given on 14 May 2011 by Mr Jean-Paul Costa, President of the European Court of Human Rights, at an Irish-British-French symposium on family law (Info. Doc. No 5 of May 2011); Model Law on Procedure for the Application of the Conventions on International Child Abduction developed by a Latin American expert group gathered by the Hague Conference on Private International Law and the Inter-American Children's Institute and presented at the Second Meeting of Government Experts "Inter-American Program of Co-operation for the Prevention and Remedy of Cases of International Abduction of Children by one of their Parents", Buenos Aires, Argentina, 19-21 September 2007 (Info. Doc. No 6 of May 2011). All Information Documents are available on the Hague Conference website *ibid*.

## **Status of the 1980 and 1996 Conventions / encouraging further ratifications / accessions**

9. The Permanent Bureau provided an update as to the status of the 1980 and 1996 Conventions. There were nine new Contracting States to the 1980 Convention since 2006,<sup>8</sup> bringing the total to 85. Several States were also known to be moving towards ratification / accession, including Russia, Japan and Korea. There were 19 new Contracting States to the 1996 Convention,<sup>9</sup> bringing the total to 32, with a further seven signatory States (the remaining six European Union Member States and the United States of America). Several States had indicated in the replies to Questionnaire I that they were considering ratification of / accession to the 1996 Convention.<sup>10</sup>

10. The Permanent Bureau highlighted the interesting suggestions provided by the responses to Questionnaire I with regard to encouraging further ratifications and / or accessions.<sup>11</sup> The suggestions included the provision of assistance, international and bilateral expert meetings, meetings organised by the Permanent Bureau, collaborative advocacy initiatives with the support of the Permanent Bureau, and the establishment of an information network to discuss strategies and difficulties in implementation. These suggestions clearly showed the importance and necessity of the involvement and co-operation of the Permanent Bureau in promoting the Conventions. Lastly, the Permanent Bureau noted that the responses to Questionnaire I indicated that the *Guide to Good Practice under the 1980 Convention – Part II – Implementing Measures* remains very useful.<sup>12</sup>

11. Experts from Russia, Japan and Korea reported on the steps taken with regard to the 1980 Convention in their respective States and the significant progress made towards becoming Contracting States.

12. An expert from Andorra highlighted the importance of the acceptance of accessions and invited other States to accept Andorra's accession to the 1980 Convention. Some experts reminded newly acceding States of the importance of completing the Standard Questionnaire for newly acceding States.

## **Statistical survey of 2008 cases under the 1980 Convention<sup>13</sup>**

13. The statistical survey of 2008 cases under the 1980 Hague Convention (the statistical survey) was presented by Mr Lowe, Professor of Law at Cardiff University Law School. He thanked the Central Authorities for having provided the required information and particularly thanked Ms Stephens for her assistance.

14. Mr Lowe reminded the experts that it was difficult to speculate on the basis of statistics, especially given that this analysis was a snapshot of Hague applications initiated in 2008. However, he noted there was a greater number of applications (a 45% increase in return applications and a 41% increase in access applications since 2003), a marginally lower number of returns (a return rate of 46%, down from 51% in 2003), an increase in the number of withdrawn applications (18%, compared to 15% in 2003) and

<sup>8</sup> Albania, Andorra, Armenia, Gabon, Morocco, San Marino, Seychelles and Singapore.

<sup>9</sup> Armenia, Austria, Croatia, Cyprus, Dominican Republic, Finland, France, Germany, Ireland, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Spain, Switzerland, Ukraine and Uruguay.

<sup>10</sup> See the responses to Question 14.2 of Questionnaire I.

<sup>11</sup> See responses to Question 20.3.

<sup>12</sup> See responses to Question 11.1.

<sup>13</sup> Prel. Docs Nos 8 A, 8 B and 8 C.



longer time periods to process applications (166 days on average to conclude return cases, from 125 days in 2003).

15. Mr Lowe said that he believed that these observations represented warning signs that the 1980 Convention may not be reaching its fullest potential. In response, the Permanent Bureau reminded experts that the effective operation of the Convention could not solely be measured by the number of returns, as the proper application of a defence was also a successful application of the Convention.

16. A few experts noted that there could be a range of reasons for the larger number of withdrawn applications, including an increase in the number of cases in which the parties reached a voluntary agreement. Similarly, experts from the United States of America and Germany noted that the statistics on the length of proceedings in their countries may be misleading.

17. An expert from the United Kingdom suggested that the regional statistics on the operation of the 1980 Convention within the European Union, where the application of the Convention was modified by Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (the Brussels IIa Regulation), could reveal whether the Regulation was effective in improving outcomes. An expert from the European Union noted that the Brussels IIa Regulation had only entered into force in 2005 and still needed time for its implementation to develop.

18. Several experts expressed concern over the length of time taken to resolve cases. An expert from Israel pointed out that some States did not have the necessary implementing legislation and procedural rules for expeditious proceedings in Hague cases. Experts from Uruguay and Brazil spoke of the difficulty of modifying internal procedures to comply with the six-week timeframe, and noted the increased time needed to deal with complex cases, for example cases in which domestic violence allegations were raised. The expert from Uruguay mentioned that the Model Law on Procedure for the Application of the Conventions on International Child Abduction was approved in 2007 and reported that some States are working towards adopting this law.<sup>14</sup>

19. An expert from South Africa suggested that further research was necessary as to the impact of mediation and conciliation on the length of proceedings.

20. An expert from Switzerland outlined the law of Switzerland of July 2009 to implement the 1980 Convention which concentrates jurisdiction, allows only one appeal and includes a mandatory requirement to attempt mediation and to give the child a right to be heard. The expert also mentioned the publication of a handbook dealing with implementation issues.

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<sup>14</sup> See the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under "Child Abduction Section" then "Judicial Seminars on the International Protection of Children" and "Latin America". The Model Law was developed by an expert group gathered by the Hague Conference on Private International Law and the Inter-American Children's Institute. The expert group was co-ordinated by Dr. Ricardo Pérez Manrique (Uruguay) and participants were: Dra. María Lilian Bendahan Silveira (Uruguay), Dr. Eduardo Cavali Asole (Uruguay), Dra. Raquel Gonzalez (United States of America), Dra. Graciela Tagle (Argentina), Dr. Dionisio Nuñez Verdín (Mexico), Dra. Delia Cedenios Palacios (Panama), and Dra. Luz María Capuñay Chavez (Peru).

## **Co-operation among Central Authorities under the 1980 Convention (including use of information technology)**

### ***Contactability, speed and responsiveness in initiating or facilitating return proceedings***

21. The Permanent Bureau emphasised that contactability, speed and responsiveness in initiating or facilitating return proceedings were crucial in securing the effective operation of the 1980 Convention (see Arts 2 and 7). However, the Permanent Bureau noted that the responses to Questionnaire I raised some serious concerns about the practical implementation of these principles.<sup>15</sup> A large majority of States reported problems in communicating with other Central Authorities. In particular, States reported failures or delays in receiving responses to requests for information or in receiving information on the progress of matters, especially information on the progress or outcome of court hearings to allow an appeal within prescribed time limits. Other problems included: Central Authorities who do not use e-mail / fax, but insist on the use of ordinary mail; lack of reliable technological infrastructure such as phone and internet; address and contact details not being up to date; language barriers, such as problems with translation of documents and general communication difficulties where there was no English-speaking support staff; and incomplete, illegible or otherwise defective applications. A number of responses also suggested concern over the speed at which applications were processed and return proceedings initiated. Lack of resources, lack of training and lack of internal timelines and guidelines on the processing of applications were identified as some possible reasons for these problems.

22. The Permanent Bureau highlighted the fact that these problems persisted, despite having been dealt with in previous meetings of the Special Commission.<sup>16</sup> Reference was made to the *Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance* (the 2007 Hague Child Support Convention), Article 12 of which provides a detailed timetable for the processing of applications by Central Authorities, as well as to the discussion on co-operation at the February 2011 Inter-American Experts Meeting on International Child Abduction (2011 Inter-American Experts Meeting),<sup>17</sup> which included several concrete measures for co-operation.

23. An expert from Germany highlighted the problems caused when the Central Authority contact details listed on the Hague Conference website are not up to date and suggested that the Permanent Bureau contact Central Authorities once a year to obtain current contact information. The Permanent Bureau agreed with the suggestion, but stressed that it was important that the Central Authorities inform the Permanent Bureau of any changes to contact details immediately, rather than waiting for a yearly reminder. The importance of Central Authorities responding to requests from other Central Authorities was also emphasised, even if merely to acknowledge receipt of their request. One expert suggested creating standards for co-operation.

24. Several States noted the importance of being able to access examples of legislation implementing the 1980 Convention to help future Contracting States prepare for accession to the Convention. The Permanent Bureau explained that this information

<sup>15</sup> See responses to Questions 2.1 and 3.1-3.2.

<sup>16</sup> See "Conclusions and Recommendations of the Fourth Meeting of the Special Commission to Review the Operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (22-28 March 2001)" (the "2001 Special Commission"), Conclusions and Recommendations Nos 1.1-1.5. See also *Guide to Good Practice under the 1980 Convention – Part I – Central Authority Practice*, under "Key Operating Principles". Both publications are available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under the "Child Abduction Section".

<sup>17</sup> The Conclusions and Recommendations of that meeting are set out in Info. Doc. No 3 and are available on the Hague Conference website.

would now be available through the new Country Profiles,<sup>18</sup> which asked States to provide a copy or link to their implementing legislation. Country Profile responses would be put on the Hague Conference website. It would be up to the Central Authorities to keep them updated.

25. The Chair concluded the discussion by stressing that there were recurring problems with contactability and co-operation to which a solution must be found.

***Use of standardised forms (revised form for return applications)***<sup>19</sup>

26. The Permanent Bureau noted that the use of the model form for return applications, recommended and adopted at the time the 1980 Convention was adopted, was an important tool for Central Authorities. The Permanent Bureau presented Information Document No 4, a preliminary study of 34 existing forms available on Central Authority websites. It found that the existing forms were largely based on the model form, but many had been adapted so that they could also be used for access applications and / or to seek more detailed information. It was also observed that some States in their responses to Questionnaire I<sup>20</sup> had suggested promoting the harmonisation of forms and the development of multilingual forms.

27. The Special Commission was invited to discuss the opportunity for the Permanent Bureau to continue its work based on the preliminary study, taking into account developments in information technology such as the electronic file management system iChild and the work done to create electronic forms under the 2007 Hague Child Support Convention. It was stated that the information in the Country Profiles would further assist in reviewing the model form.<sup>21</sup>

28. Several experts stressed the importance of having a standard form available in different languages easily accessible in one place. However, some experts expressed a certain reserve with regard to a multilingual form. Several experts did not support the idea of one form combining return and access applications, as it could be confusing for applicants to identify which questions were relevant to their application. Several experts noted problems in reading handwritten documents and supported the idea of a PDF file format that can be completed electronically. An expert from the European Union noted that under the Brussels IIa Regulation there was an obligation to use a standardised form for return.

29. An expert from Canada welcomed expanding the basic existing model form to ensure that it includes all relevant information. This expert also suggested that changes be made to the form to reflect differences in the definition of "family", for example, to accommodate same-sex couples.

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<sup>18</sup> See Questions 4 and 5. The role of the Country Profiles in information exchange is discussed below at paras 30-32.

<sup>19</sup> Info. Doc. No 4.

<sup>20</sup> Responses to Question 23.2.

<sup>21</sup> Question 6.2 of the Country Profile asks States about the form required for return applications, and for States to provide a copy of the form.

### ***Information exchange (use of standardised country profile)***<sup>22</sup>

30. The Permanent Bureau emphasised the importance of effective information exchange for the successful practical operation of the 1980 Convention. This was recognised in the Convention itself (see, e.g., Art. 7(2) e) and i)). The new standardised Country Profile (Info. Doc. No 2), which contained detailed information about a State's relevant laws and procedures, was a valuable tool that would assist Central Authorities in their day-to-day work and ameliorate some of the difficulties faced by Central Authorities in obtaining basic information about other States.

31. The Permanent Bureau thanked those States that had already returned their completed Country Profile. The Permanent Bureau made three proposals to the Special Commission for discussion: first, that all States should be encouraged to complete the Country Profile; secondly, that States should be encouraged to update their Profile regularly, perhaps by way of an annual reminder; finally, that new signatory States to the 1980 Convention should be encouraged to complete the Country Profile as soon as possible after acceding to or ratifying the Convention.

32. Several experts welcomed the new Country Profile. The Chair concluded that the Special Commission was satisfied with the proposals made by the Permanent Bureau.

### ***Maintenance of statistics (INCASTAT)***

33. The Permanent Bureau recalled a number of Conclusions and Recommendations adopted by the 2006 Special Commission encouraging the maintenance of accurate statistics and the making of annual returns of statistics to the Permanent Bureau.<sup>23</sup> It noted that some of the reasons reported in the responses to Questionnaire I for not using INCASTAT<sup>24</sup> included lack of resources and high turnover of personnel, making it difficult to ensure training. However, the Permanent Bureau pointed to the crucial role of accurate global statistics in showing how the 1980 Convention was being implemented and in identifying potential problems in its application and solutions. It demonstrated to the experts how the INCASTAT system operated, referring to the modifications that had recently been made to the database with a view to making it more user-friendly and increasing its usage.

34. A few experts confirmed that they did not submit statistics through INCASTAT because of limited resources, with priorities given to other areas. Several experts had reservations regarding the use of INCASTAT because there was already a different questionnaire provided by Professor Lowe. An expert from Switzerland thought that the use of statistics was unclear. Most experts, however, agreed that statistics were very useful in providing an indication of how the Convention was operating, but found it unnecessary to have two systems to record such statistics.

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<sup>22</sup> For a more general discussion on information exchange and networking, see below at paras 184-224 (meetings and networking among Central Authorities under the 1980 and 1996 Conventions). The Country Profile is available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under "Child Abduction Section" then "Country Profiles" (Information Document No 2 of March 2011). The document is in a 'form' format for Contracting States to complete electronically. The completed Country Profiles of Contracting States are also available on the Hague Conference website *ibid*.

<sup>23</sup> See "Conclusions and Recommendations of the Fifth Meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* and the practical implementation of 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* (30 October – 9 November 2006)" (the "2006 Special Commission"), available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under "Child Abduction Section" then "Special Commission meetings on the practical operation of the Convention", Recommendations Nos 1.1.16-1.1.21.

<sup>24</sup> Responses to Question 3.14.

35. The Special Commission concluded that the experts were generally in favour of the maintenance of statistics but that they would prefer that one statistical questionnaire be developed that is capable of being completed online, and that combined the data currently sought for INCASTAT with the data sought by Professor Lowe for the statistical analyses like that done for the 2008 applications. The Special Commission recommended that the Permanent Bureau, in conjunction with certain interested States Parties, explore the possibility of automated data migration to INCASTAT.<sup>25</sup>

## **Processing of applications for return by the Central Authority under the 1980 Convention**

### ***Locating the child***

36. The Permanent Bureau recalled that Central Authorities are under an obligation to take all appropriate measures to locate an abducted child (Art. 7(2) *a*)). It highlighted that the responses to the Country Profile<sup>26</sup> indicated that co-operation between Central Authorities and other bodies such as the police, other government agencies and INTERPOL was working well.

37. However, the Permanent Bureau noted that the responses to Questionnaire I raised some problems.<sup>27</sup> In some cases, the child could not be found at all. The statistical survey indicated that this was only a very small number of cases (14 cases out of a total of 1,965 cases), and it was unclear if the inability to locate the child in those cases was because the taking parent went into hiding, or because of the Central Authority's limitations. Other problems raised by Questionnaire I included that locating a child may still take time, that in some cases criminal proceedings must be initiated to commence further searches or access information, and that there were also problems related to communication and available resources.

38. The Permanent Bureau recalled that these issues had previously been addressed in the Conclusions and Recommendations of the 2001 Special Commission,<sup>28</sup> as well as in the *Guide to Good Practice under the 1980 Convention – Part I – Central Authority Practice*.<sup>29</sup>

39. Several experts highlighted the importance of developing points of contact between the Central Authorities and other agencies to locate the child as quickly as possible. Experts noted that it is also very important that the requesting State provided the requested State with as much information as possible.

40. Many experts raised the issue of taking action as soon as a child is located to protect the best interests of the child and to prevent the removal of a child to another State. Several experts highlighted the range of measures available to avoid re-abduction of the child once proceedings had commenced, such as surveillance of the taking parent or, in very rare circumstances, provisionally placing the child in a foster family.

41. The Permanent Bureau agreed that preventing the re-abduction of the child is an important issue, and noted that this is an issue for which guidance is provided in the

<sup>25</sup> See Conclusion and Recommendation No 23 of the 2011 Special Commission (Part I).

<sup>26</sup> See Question 7. Analysis of particular parts of the Country Profiles was completed at different stages. As Country Profiles continued to be received in the lead-up to, and during, the 2011 Special Commission (Part I), the number of Country Profiles analysed may vary between different questions.

<sup>27</sup> See responses to Questions 3.2, 3.6-3.10.

<sup>28</sup> Conclusion and Recommendation No 1.9 of the 2001 Special Commission.

<sup>29</sup> See para. 4.10 and Appendix 5.1, setting out measures that can be used by Central Authorities to locate a child.

*Guide to Good Practice under the 1980 Convention – Part III – Preventive Measures*, developed in 2005. The Permanent Bureau noted that the time between the making of a return order and its enforcement was a particularly dangerous time for re-abductions.

42. The Chair concluded the discussion by noting the work that was being undertaken in this regard and all the suggestions made by experts regarding locating the child.

### **Promoting agreement**<sup>30</sup>

43. The Permanent Bureau recalled that Article 7 of the 1980 Convention provides for co-operation between Central Authorities and competent authorities for the voluntary return of the child. The responses to the Country Profile<sup>31</sup> indicated that Central Authorities are increasingly promoting agreements in an effective way, with measures including contacting the taking parent where appropriate, giving information on alternative dispute resolution including mediation, referring parties to accredited bodies or organisations to assist in finding an agreement, and engaging in mediation or negotiation themselves. The statistical survey showed that about 20% of cases end in voluntary return.

44. The Permanent Bureau also drew attention to former Conclusions and Recommendations of Special Commission meetings, which reiterated that attempts to promote agreement should not cause undue delay.<sup>32</sup>

45. Some experts expressed concern that efforts to reach an agreement should not unduly delay the proceedings, and emphasised that efforts to reach agreement should take place in parallel with preparations for court proceedings. An expert from China (Hong Kong SAR) noted that where mediation is used or a voluntary return is secured, it is important for the Central Authority to remain involved. An expert from Uruguay also noted the importance of Central Authorities taking necessary measures to ensure that the taking parent did not flee from the jurisdiction with the child while a voluntary return was being pursued. An expert from Switzerland highlighted that it is important to include the child and / or the child's representative in the process.

46. An expert from the European Union pointed out that Article 46 of the Brussels IIa Regulation provides that an agreement concluded in a Contracting State which is enforceable in that State is enforceable in other Member States. In this context, a number of experts noted the importance of the agreement being enforceable in the different States concerned. Some experts expressed an interest in discussing questions of jurisdiction that arise when courts are asked to confirm an amicable agreement which addresses issues other than the return, for example custody or access following the return. The Chair noted that there would be an opportunity for this discussion to take place later during the meeting of the Special Commission.

47. The Permanent Bureau, in relation to non-Hague Convention cases, mentioned the Principles for the Establishment of Mediation Structures in the Context of the Malta Process,<sup>33</sup> which considered it important that parents had access to information on structures to reach an agreed solution.

<sup>30</sup> See also Prel. Doc. No 5 and the discussion on the draft Guide at paras 225-256 below.

<sup>31</sup> Questions 6.2(h) and 19.3(b).

<sup>32</sup> Conclusion and Recommendation No 1.3.1 of the 2006 Special Commission, reaffirming Conclusions and Recommendations Nos 1.10 and 1.11 of the 2001 Special Commission.

<sup>33</sup> See Prel. Doc. No 6, as well as the discussion at paras 259-269 below.

48. The Special Commission noted the increasingly important role played by Central Authorities, including through the use of mediation, but re-emphasised that these measures should not delay the result.<sup>34</sup>

### ***Facilitating judicial communications***

49. In relation to the Central Authority's role in facilitating judicial communications,<sup>35</sup> the Permanent Bureau referred to page 10 of Preliminary Document No 3 A. It acknowledged that judicial communications can be facilitated by Central Authorities in different ways and that the quality of the exchange largely depends on the co-operation between Central Authorities and judges. The Permanent Bureau highlighted the importance of continuing to encourage meetings involving judges and Central Authorities at national, bilateral, regional and multilateral levels, as a necessary part of building a better understanding of the respective roles of the actors.

50. Many experts noted that effective judicial communication assisted in expediting cases, identifying solutions and improving communication between States. Experts outlined various ways in which Central Authorities promote and facilitate judicial communications.

51. The Chair recalled the Conclusions and Recommendations of the 2006 Special Commission which remain relevant today.<sup>36</sup> The Special Commission noted the increasing co-operation and enhanced operation of the Convention within States where members of the International Hague Judicial Network and the relevant Central Authority communicate.<sup>37</sup>

### ***Facilitating safe return***<sup>38</sup>

52. The Permanent Bureau referred to Article 7(2) *h*) of the 1980 Convention, which imposes an obligation on both the requesting and requested Central Authorities to co-operate to secure the safe return of the child. The Permanent Bureau noted that, given that in 72% of cases the taking parent was also the child's (sole or joint) primary care-giver, safe return issues could also arise in relation to the taking parent. The Permanent Bureau referred to the Conclusions and Recommendations of the 2001 Special Commission, which noted some measures that could be taken by Central Authorities under Article 7(2) *h*).<sup>39</sup>

53. The Permanent Bureau noted that the responses to Questionnaire I<sup>40</sup> indicated that an increasing number of Central Authorities are playing a role in facilitating co-operation between child protection agencies in different States where there are concerns for the child's safety upon return. It was very common for Central Authorities in the requested State to ask Central Authorities in the requesting State to contact relevant child protection bodies in their State. In addition, more Central Authorities were asked to

<sup>34</sup> See Conclusion and Recommendation No 15 of the 2011 Special Commission (Part I).

<sup>35</sup> In relation to judicial networking and direct judicial communications generally, including discussion of principles and safeguards for direct judicial communications, see below at paras 184-224.

<sup>36</sup> See Conclusions and Recommendations Nos 1.6.4 and 1.6.5 of the 2006 Special Commission.

<sup>37</sup> See Conclusion and Recommendation No 8 of the 2011 Special Commission (Part I).

<sup>38</sup> See also the discussion at paras 110-119 below in relation to the organisation and enforcement of protective measures to enable the safe return of the child and accompanying parent in the context of domestic violence allegations.

<sup>39</sup> See Conclusion and Recommendation No 1.13 of the 2001 Special Commission, reaffirmed by Conclusion and Recommendation No 1.1.12 of the 2006 Special Commission.

<sup>40</sup> Responses to Question 6.

provide information about the implications of criminal charges and / or to provide assistance in having criminal charges withdrawn in parental child abduction cases.

54. The Permanent Bureau invited discussion on the role of Central Authorities in providing support for the safe return of the child and whether they should play a more active role. It highlighted a proposal made in the response by China (Hong Kong SAR) to Questionnaire I that Central Authorities should continue to play an active role in monitoring and ensuring the welfare of the child (often pursuant to provisional protective measures) following the return of the child, until the authorities in the requesting State were effectively seised with any relevant issues.<sup>41</sup> It was also noted, however, that some States had opposed this proposal.<sup>42</sup>

55. Some experts indicated that there was an ongoing role for Central Authorities to obtain information on the well-being of the child after return. Other experts saw that the role of the Central Authority ends with the return of the child, with the authorities of the requesting State being competent to protect the child's well-being after the child's return.

56. An expert from Brazil noted that the safe return of the child and parent was a major area of concern, given that the mother was the taking parent in the majority of cases. Several experts noted that judges often request information from Central Authorities on the measures that will be taken in the requesting State to ensure a safe return, including whether criminal proceedings will be pursued, and often impose relevant conditions in return orders. The significant role of direct judicial communications in this regard was noted. The Permanent Bureau also noted that information on safe return, including whether it was possible to waive or discontinue criminal proceedings in the requesting State, was also available in the Country Profile.

57. The Special Commission acknowledged the importance of the assistance by Central Authorities and others in obtaining information from the requesting States on measures of protection and arrangements available in the State of return.<sup>43</sup> The Special Commission also noted the importance of the 1996 Convention in providing a jurisdictional basis, in cases of urgency, for taking measures of protection in respect of the child, including in return proceedings under the 1980 Convention. Such measures would be recognised and could be declared enforceable or registered for enforcement in the State to which the child was returned provided that both States concerned are Parties to the 1996 Convention.<sup>44</sup>

### ***Immigration issues***<sup>45</sup>

58. With respect to immigration issues, the Permanent Bureau noted that responses to Questionnaire I<sup>46</sup> revealed that this is a priority for several States. It indicated that a number of States reported visa / immigration issues in relation to the child and / or taking parent re-entering the requesting State, including delays and complexities in procedures to obtain visas. States noted that a taking parent's inability to return with the

<sup>41</sup> Response to Question 3.15 Questionnaire I. See also responses of Albania, Argentina, Chile, Czech Republic, Dominican Republic, Finland, Georgia, Hungary, Mauritius, Montenegro, the Netherlands, Panama and Portugal to Question 6.8, also supporting a recommendation that Central Authorities continue to provide follow-up information after return.

<sup>42</sup> See responses of Australia, Canada, Cyprus, Israel, Mexico, New Zealand and the United Kingdom.

<sup>43</sup> See Conclusion and Recommendation No 39 of the 2011 Special Commission (Part I).

<sup>44</sup> See Conclusion and Recommendation No 41 of the 2011 Special Commission (Part I).

<sup>45</sup> See further at paras 84-91 below in relation to immigration issues relating to access and contact applications.

<sup>46</sup> Responses to Question 9.



child, or the prospect of the taking parent being deported after return, could also be relevant to an Article 13(1) *b*) defence. The Permanent Bureau also noted that some difficulties had been reported in dealing with child abduction cases which also concerned asylum applications.

59. The Special Commission was invited to discuss whether Central Authorities could play a more active role in these cases. The Permanent Bureau noted, however, that there were difficult policy issues involved. There was also a danger that the taking parent may try to take advantage of the situation by claiming a status to which he or she was not otherwise entitled.

60. An expert from Mexico noted that cases often arose as a result of immigration processes in the requesting State, for example where a parent was deported from the requesting State and took the child with him / her.

61. Several experts noted the role of embassy and consular officials in facilitating a safe return or providing assistance with immigration issues. The importance of Central Authorities co-operating with immigration authorities in their State to address visa issues and avoid undue delays in the return of the child was also acknowledged. Some experts warned that delays in obtaining travel documents could lead to return orders being set aside. However an expert from Israel emphasised that it was not the role of the Central Authority to apply for a visa for the taking parent, and an expert from the United States of America highlighted that a visa could only be granted in accordance with domestic immigration laws.

62. The Chair acknowledged the positive work being done on this issue and concluded that the Conclusions and Recommendations of the 2006 Special Commission on this topic remain relevant, in particular, in relation to the role of judges and judicial communications.<sup>47</sup> The Special Commission noted that where there is any indication of immigration difficulties which may affect the ability of a (non-citizen) child or taking parent to return to the requesting State or for a person to exercise contact or rights of access, the Central Authority should respond promptly to requests for information to assist a person in obtaining from the appropriate authorities within its jurisdiction without delay such clearances or permissions (visas) as are necessary. States should also act as expeditiously as possible when issuing clearances or visas.<sup>48</sup>

### ***Other issues concerning the processing of applications***

63. The Permanent Bureau also addressed another issue in the processing of applications: the approach of Central Authorities to rejecting applications under Article 27 of the 1980 Convention. Article 27 allows a Central Authority to reject an application when it is manifest that the requirements of the Convention are not met or that the application is otherwise not well-founded. The Permanent Bureau referred to Conclusions and Recommendations of the 2006 Special Commission, recommending that the discretion to reject an application should be exercised with extreme caution.<sup>49</sup> It noted concerns with present Central Authority practice, and drew attention to the 2007 Hague Child Support Convention, which provides that an application cannot be rejected solely on the basis that additional documents or information are needed (Art. 12(9)). The

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<sup>47</sup> See Conclusions and Recommendations Nos 1.6.3-1.6.5 of the 2006 Special Commission.

<sup>48</sup> See Conclusion and Recommendation No 31 of the 2011 Special Commission (Part I).

<sup>49</sup> See Conclusion and Recommendation No 1.1.3 of the 2006 Special Commission.

Permanent Bureau suggested that, using the 2007 Hague Child Support Convention as an example of good practice, the Central Authorities under the 1980 Convention should, when an application is deficient due to a need for additional documents, exchange the necessary information rather than reject the application.

64. The majority of experts emphasised that requested Central Authorities should not reject applications unless they are manifestly unfounded or outside the scope of the Convention, for example when the child had reached 16 years of age or where the Convention was not in force between the two States. A number of experts emphasised that the Central Authority should not replace the role of the court. Some experts, however, considered that Central Authorities were the first filter on applications and that Central Authorities should reject applications that the court would not accept.

65. The Special Commission re-emphasised that, in exercising their functions with regard to the acceptance of applications, Central Authorities should respect the fact that evaluation of factual and legal issues is, in general, a matter for the court or other competent authority deciding upon the return application. The discretion of a Central Authority under Article 27 to reject an application when it is manifest that the requirements of the Convention are not fulfilled or that the application is otherwise not well founded should be exercised with extreme caution.<sup>50</sup>

### ***Use of the Guide to Good Practice under the 1980 Hague Child Abduction Convention – Part I – Central Authority Practice***

66. The Permanent Bureau noted that the State responses to Questionnaire I indicated that the Guide to Good Practice has been very useful<sup>51</sup> and asked the Special Commission whether, as it was published in 2003, the Permanent Bureau should update it. In the absence of intervention by the experts, the Chair concluded that the Guide should be updated.

### ***Role of the Central Authority under the 1980 and 1996 Conventions***<sup>52</sup>

67. The Permanent Bureau explained the similarities and differences between the role of Central Authorities under the 1980 Convention and the 1996 Convention. Central Authorities under both Conventions are the focal points for achieving co-operation to protect certain categories of children at risk in cross-frontier situations, and for the exchange of information between States on the laws and services available for the protection of children. Certain forms of assistance are also common to both Conventions, such as discovering the whereabouts of the child, facilitating agreed solutions and assisting in the effective exercise of access rights. However, the categories of children subject to the Conventions differ. The 1980 Convention covers children until age 16, while the 1996 Convention covers children until age 18. Central Authorities under the 1996 Convention have fewer responsibilities to facilitate or process applications and greater possibilities for Central Authority functions to be performed by other bodies. Nonetheless, there were strong arguments in favour of the same Central Authority being designated for both Conventions, given the overlapping competences, similarities of functions, and similar skills required.

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<sup>50</sup> See Conclusions and Recommendations of the 2011 Special Commission (Part I), para. 13.

<sup>51</sup> Responses to Question 11.1.

<sup>52</sup> See Prel. Doc. No 4, Chapter 11.

68. The Chair called on States to share their experiences regarding the creation of Central Authorities for the 1996 Convention and whether a separate Central Authority was designated or whether the same Central Authority was designated under both the 1980 and 1996 Conventions.<sup>53</sup>

69. Several experts described the advantages in having one Central Authority for both Conventions, particularly in light of the experience that had already been gained by the Central Authority in applying the 1980 Convention, and the complementary roles of the two Conventions. An expert from Germany noted that answering queries about the 1996 Convention often gave rise to the opportunity to educate people about the 1980 Convention.

70. Experts from Switzerland and Slovakia shared their countries' experiences in having multiple Central Authorities under the two Conventions. The expert from Switzerland noted that, where there were different Central Authorities under the two Conventions, it was important for them to co-ordinate and work closely together on an internal level.

71. Several experts noted that the 1996 Convention came into force only recently and therefore there is limited experience regarding its operation.

### **Training and twinning of the Central Authorities under the 1980 and 1996 Conventions**<sup>54</sup>

72. The Special Commission discussed the need for a formal system of mentoring for newly acceding States, or for the Permanent Bureau to develop a training programme for newly acceding States, as suggested by Norway in its response to Questionnaire I. An expert from Norway explained that when new States accede to the 1980 Convention they should be offered the opportunity to visit a Central Authority where the Convention is already in force. The expert also proposed that the Permanent Bureau could contact Member States when there had been evasion of the Convention, and suggest training or a visit to another State.<sup>55</sup>

73. An expert from Sweden supported the suggestion of the expert from Norway of new States Parties visiting other Central Authorities and described their successful experience hosting a delegation from Georgia. The expert expressed Sweden's willingness to host visits from other States.

74. An expert from Canada expressed concern about the Permanent Bureau having a policing role, preferring that the Permanent Bureau maintain its neutrality. The expert also suggested the development of an informal e-mail network of experts to discuss strategies and challenges in the implementation of the 1996 Convention to help States prepare for ratification and implementation.

75. The Permanent Bureau expanded the original proposal of Norway to include States considering acceding to the Convention and stated that this proposal could apply to both the 1980 and 1996 Conventions. The Permanent Bureau asked States prepared to accept visits of other States to contact the Permanent Bureau.

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<sup>53</sup> See also responses to Question 15 of Questionnaire I.

<sup>54</sup> The role of the Permanent Bureau in the provision of technical assistance and training will be taken up again in the 2012 Special Commission (Part II).

<sup>55</sup> See further Norway's response to Question 23 of Questionnaire I.

76. The Permanent Bureau's Liaison Legal Officer for Latin America reported on the experience in Latin America. He noted the efforts for regional co-operation between the Central Authorities of different States, with a number of judicial seminars, meetings between Central Authorities and conference calls, as well as bilateral meetings to deal with particular problems. He stressed the importance of dialogue between judges and the Central Authorities and the need to hold bilateral or multilateral meetings for the proper functioning of the Convention. Opening dialogue between Central Authorities and judges had been very helpful and improved results in the region.

77. The Permanent Bureau explained that similar networking activities had also taken place around the world: on a bilateral level, such as annual meetings between Germany and the United States of America; on a regional level, for example, European Judicial Network meetings; and on a national level, such as in federations like Canada.<sup>56</sup>

78. The Special Commission recommended that immediately following a State becoming Party to the 1980 Convention (or, in an appropriate case, where a State is preparing to do so or has expressed a strong interest in doing so), the State in question should be offered, by way of a standard letter from the Permanent Bureau, the opportunity to visit an experienced Contracting State to the 1980 Convention for the purpose of gaining knowledge and understanding regarding the effective practical operation of the 1980 Convention.<sup>57</sup>

79. The Permanent Bureau was directed to maintain a list of all experienced Contracting States willing to accept such a visit and, when a newly acceding / ratifying (or interested) State responded positively to an offer, the Permanent Bureau would provide details of Contracting States prepared to receive the newly acceding / ratifying (or interested) State for the two States concerned to organise and arrange the visit.<sup>58</sup>

### **Applications concerning access / contact under the 1980 and / or 1996 Conventions**

80. The Permanent Bureau emphasised two problems regarding access under the 1980 Convention. First, there are no provisions under the 1980 Convention dealing with jurisdiction to make access or contact orders and no provisions for their enforcement. Uniform rules on jurisdiction, and recognition and enforcement are, however, available under the 1996 Convention for Contracting States.

81. Second, the Permanent Bureau addressed the problem of the ambiguity in Article 21 of the 1980 Convention as to what services each Central Authority is required to provide. It was unclear whether the Central Authority was obliged to provide a customised procedure for international contact applications, and under what conditions assistance should be provided. The 1996 Convention is no more specific in this respect. The result, as indicated by the responses to Questionnaire I,<sup>59</sup> is that the level of assistance provided by Central Authorities in access cases differed markedly. Some Central Authorities did not provide much assistance, while some would only give advice, and some would bring proceedings. The conditions under which access applications would

<sup>56</sup> See further responses to Question 3.11 of Questionnaire I.

<sup>57</sup> See Conclusions and Recommendations Nos 28-29 of the 2011 Special Commission (Part I).

<sup>58</sup> *Ibid.*

<sup>59</sup> Responses to Question 18. See also Question 13 of the Country Profile.

be accepted also varied, e.g., some required an existing access order while some did not.<sup>60</sup> The Country Profiles<sup>61</sup> presented a more positive picture – in most States, Central Authorities gave assistance in the preparation of outgoing access applications, and in about half of the States a specific form for access applications was available. The overall impression was that more efforts were being made to facilitate access, although there was still a great variation in the services provided and therefore problems with reciprocity.

82. In relation to procedural matters, the Permanent Bureau stated that there were also marked differences in how judicial or administrative authorities dealt with access applications once the application had been accepted by the Central Authority. Some States had customised procedures for access applications under the 1980 Convention, while others dealt with such applications in the same manner as domestic access applications. The statistical survey showed that of 18 States that provided information on this point, nine used the same procedure as for domestic access applications, and nine used a dedicated Hague application procedure. Information from the Country Profiles<sup>62</sup> showed that of 37 States, 26 States used domestic law processes, while nine States had a dedicated Hague application procedure.

83. Whatever procedure was used, however, the Permanent Bureau highlighted that the speed of proceedings was a real issue. Responses to Questionnaire I<sup>63</sup> suggested that the time taken to resolve access applications was a problem, and this was supported by the statistical survey, which showed that access cases took on average 339 days to reach an outcome. The statistical survey also showed that, on average, access applications processed under dedicated Hague application procedures actually took longer to conclude than access applications decided under normal domestic procedures.<sup>64</sup>

84. Finally, the Permanent Bureau highlighted the difficulties in international contact cases caused by immigration and visa issues.<sup>65</sup> Responses to Questionnaire I<sup>66</sup> described cases where an applicant parent was unable to exercise contact because he or she was unable to obtain a visa to travel to the State where the child was habitually resident. There was also a case reported where the child was unable to leave the State of his habitual residence to exercise contact with his non-resident parent due to his uncertain immigration status in his State of habitual residence.

85. A few experts noted the importance of preserving access for the taking parent following return. An expert from Venezuela explained that a court would not return a child unless it could be assured that the taking parent would be able to resume contact after return. An expert from Brazil expressed concern about the length of time taken to

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<sup>60</sup> See the *General Principles and Guide to Good Practice on Transfrontier Contact Concerning Children* stating that this should not be necessary (para. 4.6.1): "The Central Authority should make its services available in all circumstances where cross-frontier contact rights of parents and their children are in issue. This includes cases where a foreign parent seeks to establish a contact order, as well as cases in which the application is to give effect to an existing contact order made abroad."

<sup>61</sup> Question 13.2.

<sup>62</sup> Question 17.2(a).

<sup>63</sup> Responses to Question 18.3.

<sup>64</sup> Where access was granted, Hague applications took on average 369 days and domestic applications 304 days. Where access was denied, Hague applications took on average 292 days and domestic law applications 255 days.

<sup>65</sup> See also at paras 58-62 above in relation to immigration issues arising in the context of return.

<sup>66</sup> Responses to Question 9.4.

resolve immigration issues in such cases, describing a case where the taking parent experienced difficulties re-entering the country of the child's habitual residence and the case had remained pending for years.

86. As these issues relating to the procedure and facilitation of international contact cases had been dealt with in previous Special Commission meetings,<sup>67</sup> and in the *General Principles and Guide to Good Practice on Transfrontier Contact Concerning Children* (the "Transfrontier Contact Guide"), the meeting was invited to consider whether any more specific recommendations would be useful, and whether binding rules should be the next step. However, the Permanent Bureau stressed that the underlying problem in access cases would always be resource issues, given the drawn out and difficult nature of access proceedings.

87. Several experts described the approach taken by their Central Authorities in processing access applications. Some experts considered that a broad approach should be taken to the interpretation of Article 21, while others considered that it only applied to existing rights of access.<sup>68</sup> Several experts noted that their Central Authorities treat access and return applications in the same manner but one expert described the different issues involved in access applications compared with return applications. Experts from Israel and Mexico noted that it was unclear whether Article 21 extended to access applications from extended family members such as grandparents.

88. Several experts expressed concerns with the different levels of assistance provided by Central Authorities. An expert from Spain stressed that the level of assistance provided should not be more favourable than that provided to domestic applications of the same nature.

89. A few experts compared the access provisions under the 1980 and 1996 Conventions, observing that only the 1980 Convention imposed obligations on Central Authorities, whereas the 1996 Convention merely provided a legal framework for rules to be implemented.

90. Several experts stressed the importance of interim access during return application proceedings. Some experts considered that Article 21 does not address access during return proceedings. An expert from Germany explained that contact in the context of return proceedings was considered to be a provisional protective measure to prevent further harm to the child, in accordance with Article 7(2) *b*) of the 1980 Convention.

91. The Special Commission reaffirmed the principles set out in the Transfrontier Contact Guide and encouraged Central Authorities under the 1980 and / or the 1996 Conventions to take a pro-active approach in carrying out their respective functions in international access / contact cases.<sup>69</sup>

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<sup>67</sup> See Conclusions and Recommendations Nos 6.1-6.2 of the 2001 Special Commission, and Conclusions and Recommendations Nos 1.7.1-1.7.3 of the 2006 Special Commission.

<sup>68</sup> See also sections 4.6 and 9.6 of the Transfrontier Contact Guide, which support a broad approach to the interpretation of Art. 21.

<sup>69</sup> See Conclusions and Recommendations Nos 18-19 of the 2011 Special Commission (Part I).

### **Domestic and family violence allegations and return proceedings<sup>70</sup>**

92. The Special Commission considered Preliminary Document No 9 concerning domestic and family violence in the context of return proceedings. Domestic violence issues have increasingly been raised as an area of concern in case law, in *The Judges' Newsletter on International Child Protection* and academic literature.<sup>71</sup> While the subject had been discussed at previous Special Commission meetings, discussion had focused only on the issue of securing safe return.

93. The Permanent Bureau noted that the subject of domestic violence could present difficult challenges in the operation of the 1980 Convention. For example, how should a balance be achieved between the need to maintain expeditious procedures and to avoid examination of the merits of the underlying custody dispute while also allowing proper consideration of a defence under Article 13(1) *b*)?

94. The discussion on domestic violence within the context of the Article 13 "grave risk" exception was divided into three parts. The initial part focused on the existing research and case law, the evidentiary aspects and the definition of domestic violence within the context of Article 13(1) *b*). The second part considered issues of protection, including protective measures for the safe return of the child and accompanying parent. The last part considered potential further actions and means to promote consistency.

### **Existing research and evidentiary aspects**

95. The Permanent Bureau referred experts to some relevant figures from the Lowe statistical survey of 2008 cases. Fifteen percent of return applications resulted in judicial refusal of return. Of those cases, 27% were based on the grave risk exception, while 17% were based on the child's objections. The research in Preliminary Document No 9 also indicated that those were the two most common exceptions raised in cases of family or domestic violence. However, domestic violence was also sometimes alleged or present when other exceptions were satisfied.

96. The Permanent Bureau indicated that its research presented in Preliminary Document No 9 was limited, given the length of the document. Also, it was reported that there is general statistical uncertainty as to the number of global Hague proceedings which involve domestic violence issues, due to the lack of focused research in this area. However, States' responses to Questionnaire I provided some useful information.<sup>72</sup> Sixteen States noted that the issue of domestic violence or abuse was "often raised" under Article 13(1) *b*) as an exception to the return of the child. Two States noted that allegations were raised "very often" and three States reported that such allegations were raised "quite often". A further three States specified that such allegations were regularly raised, but constituted a minority of cases, or that the seriousness of the allegations varied. Five States reported that such allegations were raised on occasion, sometimes or "sporadically", a further five States reported that such allegations were not often raised, and six reported having no cases of this type to date. Some States gave specific figures of cases where such allegations were raised: the United Kingdom (England and Wales)

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<sup>70</sup> Prel. Doc. No 9.

<sup>71</sup> At the meeting of the Council on General Affairs and Policy in 2011, the topic of the recognition of foreign civil protection orders made, for example, in the context of domestic violence cases, was added to the Agenda of the Conference: see para. 23 of the Conclusions and Recommendations adopted by the Council.

<sup>72</sup> See responses to Question 5.1.

reported that these allegations were present in less than 20% of return cases, while Germany noted that academic studies of the applications handled by the Central Authority showed that between 10% and 14% of its Article 13(1) *b*) cases had involved allegations of domestic violence or child abuse.

97. The Permanent Bureau explained the approach of Preliminary Document No 9, noting that it was a limited reflection paper, providing a snapshot of judicial practices and approaches through a limited sample of case law from 19 jurisdictions. It did not have space to include a further study of national practices or developments such as national implementing legislation, concentration of jurisdiction or specialised courts, or the use of experts or multidisciplinary teams, other than what was reflected in the case law.<sup>73</sup> The Permanent Bureau noted also that there was no opportunity to cover all aspects of the operation of the 1980 Convention that could be affected by domestic violence issues, such as mediation, access applications, and other exceptions to return.

98. The Permanent Bureau highlighted some key issues raised by the study, which included: the desirability of involving experts on the dynamics of family violence in developing appropriate policy; the manner in which harm towards a taking parent is addressed under the 1980 Convention; the potential effect of certain narrow interpretations of Article 13(1) *b*) in cases of family violence; and the question of how, in practice, to ensure a balance between expeditious proceedings and adequate attention to the safety and well being of an affected parent and child.

99. The Permanent Bureau also emphasised the need to give consideration to the cross-border nature and the importance of expeditious proceedings in Hague abduction cases. In that context, a number of evidentiary issues were present, including the types of evidence used in determining domestic violence claims (*e.g.*, police or medical reports), the role of the International Hague Network of Judges and Central Authorities in sharing information or evidence, the evidentiary standard to be applied and the role of expert evidence.

100. The experts agreed that domestic violence is a complex issue that requires a focused approach. Many confirmed that there was an increase in the number of cases alleging domestic violence as an exception to return under Article 13(1) *b*) and that domestic violence claims were always or should always be taken very seriously. An expert from Spain suggested that more reliable statistics were needed about how often domestic violence claims were raised. A number of experts shared the view that effectively addressing issues of domestic and family violence was an area of significant policy priority in their jurisdictions.

101. Recognising that the overall goal of the Convention was to protect the child, the experts agreed with the need to balance expeditious proceedings with the investigation into allegations of domestic violence. Some experts noted that the Article 13(1) *b*) exception should not stand in the way of speedy resolution. Others distinguished between “speed” and “haste”, and explained that the integrity of the proceedings should not give way to expedience: taking slightly more time to gather evidence to make a proper decision in such cases was not considered a problem if it avoided exposing the

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<sup>73</sup> For further information, see responses to Question 5 of Questionnaire I. The responses to the Country Profile also contain details of implementing legislation and the operation of return proceedings.



child to further harm. Many experts offered examples of good practices and practical solutions whereby the goals of expedition and appropriate investigation into allegations were balanced.

102. The experts offered perspectives on the extent and nature of evidence necessary to prove allegations of domestic and family violence. Some noted that the taking parent had the burden of proving allegations of domestic violence, although an expert from Switzerland noted that it was the duty of authorities to investigate further once serious allegations have been made, to ensure the protection of the child. Given the nature of a taking parent's departure from the requesting State, some observers underlined that proof could be difficult to produce in the requested State and therefore it was often useful to utilise expert evidence, especially in courts where jurisdiction was not concentrated and the judges did not have much experience in the dynamics of family disputes. However, many experts underlined that expert evidence is used in exceptional cases only, and could be prohibitively expensive if the costs were to be borne by the parties. They noted that direct judicial communications and exchange of information between the Central Authorities were crucial in such cases. Some experts highlighted the advantages of video and communications technology in facilitating the gathering of evidence. A number of experts added that hearing the views of the child was an important element.

103. Recognising that a mere allegation of domestic violence was insufficient to justify the application of the Article 13(1) *b*) exception, experts indicated that the level of proof required should be substantial and appropriate in order to determine that the allegations are well-founded. Some experts referred to *prima facie* evidence. An expert from Canada emphasised the importance of the Article 13(1) *b*) defence being proven with sufficient evidence, given that the application of Article 13(1) *b*) may result in a permanent break between the child and the left-behind parent.

104. A number of experts shared additional good practices to ensure speedy proceedings in relation to evidentiary issues.<sup>74</sup> In some States, Central Authorities quickly gather as much information and evidence as possible, such as measures of protection available in the requesting State and police, medical and social workers' reports, before filing the return application with the court. An expert from Switzerland indicated that, very often, readily available evidence is sufficient and such cases do not require additional evidence.

105. A number of experts emphasised the mutual trust between States and shared the view that the courts of the requesting State should be the best placed to determine whether domestic violence occurred, as they would be in the best position to appreciate all the circumstances and in particular the evidence. Several experts reaffirmed in this regard that the courts of the State of habitual residence of the child are the most competent to make long-term decisions concerning the protection of the child and the primary care-giver, including relocation.

106. In the case of a return application where allegations of domestic violence have been raised, a number of experts indicated that the role of the court of the requested State is to assess, in light of the availability and efficacy of measures of protection in the requesting State and the evidence on file, the risk that the return of the child would expose him or her (and the accompanying parent, most often the primary care-giver) to

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<sup>74</sup> See further responses to Question 5.2 of Questionnaire I in relation to how delays are minimised.

physical or psychological harm or otherwise place the child in an intolerable situation. An expert from Australia emphasised the need for a judge in the requested State to assess whether protective legislation in the requesting State would function and was implemented in practice, not just in theory.

107. A few observers noted that the return could cause further psychological harm to the child, outweighing the advantages that the courts in the State of habitual residence would have in weighing the evidence, particularly where modern technology could enable the requested State to access evidence, for example by hearing witnesses through video-link.

108. Additionally, many experts highlighted the importance of training judges and Central Authority personnel in order to increase awareness of issues related to family violence dynamics within the operation of the 1980 Convention. Several experts expressed the concern that some taking parents may raise domestic violence allegations as a way to circumvent the international relocation procedures which should take place in the State of habitual residence of the child.

109. The Permanent Bureau also raised the issue of how harm to the taking parent should be treated. It noted established social science research on the mental harm caused to children from exposure to domestic violence, and the issue of whether it was appropriate to separate the harm caused to the child and parent when applying the exception. Some experts emphasised the use of a broad definition of domestic violence, including notions of "intra-familial violence" or violence in the home, in order to capture the diversity of circumstances which may be implicated. Several experts and an observer noted the interdependence of harm towards a parent, especially a primary care-giver, and towards a child in the context of domestic violence, particularly in connection with the "intolerable situation" aspect of the Article 13(1) *b*) defence.

### ***Protective measures to enable safe return of the child and accompanying parent***

110. The Permanent Bureau explained that the case law sample showed a number of approaches to this issue. Questions included who had the burden of proving the ability of the State of the child's habitual residence to provide protection, how that question was investigated and by whom and how the existence of laws or more concrete measures was relevant.

111. A number of experts outlined national and regional measures which had been implemented to address domestic and family violence including prevention, protection, access to justice and support available for victims. The experts noted the importance of measures allowing for the safe return of the child, including not separating the child from the taking parent, who is often the sole or joint primary care-giver. The experts explained that this implied the necessity of ensuring effective measures of protection for the taking parent in the requesting State.

112. An expert from the European Union explained that under Article 11(4) of the Brussels IIa Regulation, a court hearing a return application from another Brussels IIa State cannot refuse to return the child under the Article 13(1) *b*) exception if it is established that adequate arrangements have been made to secure the protection of the child after his or her return. An expert from the United Kingdom noted that the 1980 Convention was based on mutual trust and confidence and encouraged all States to adopt the approach taken by the Brussels IIa Regulation.

113. Several experts acknowledged the positive steps taken by courts in some States in cases where allegations of domestic and family violence are raised, e.g., seeking evidence on the substantive application of measures of protection available in the requesting State and maintaining a list of experts available to provide evidence expeditiously.

114. The Permanent Bureau highlighted the important role of Central Authorities (Art. 7(2) *h*) of the 1980 Convention), the International Hague Network of Judges and the information in the completed Country Profiles<sup>75</sup> in organising protective measures to enable safe return under the 1980 Convention.

115. The Permanent Bureau also drew attention to some of the key issues in this area. First, in relation to voluntary undertakings, research to date showed that undertakings were commonly not respected where they were not enforceable or where there was no monitoring or follow-up after return. It suggested discussion on how undertakings should be employed and how undertakings and / or conditions to return could be made enforceable. Second, it noted access to justice issues that could arise after the return of the taking parent, relating to fair custody proceedings and financial resources to participate in custody proceedings.<sup>76</sup> Third, the Permanent Bureau raised the issue of follow-up and information exchange after return: that is, what follow-up should be pursued after return, and whether Central Authorities, judges, or other authorities in the requested or requesting State should be responsible.

116. Finally, in relation to the 1996 Convention, the Permanent Bureau explained that there was nothing to prevent judges from considering harm to parents when determining whether, and if so which, necessary protective measures should be made in respect of a child in "cases of urgency" (see Art. 11).<sup>77</sup> Other provisions in the 1996 Convention could also be helpful, for example Articles 30(2) and 34 with respect to information exchange.

117. An expert from the European Union outlined a new European Commission proposal which would ensure that measures of protection made in one Member State would be recognised and enforced in another Member State, using a multilingual certificate.

118. Several experts raised the issue of the need for a proper legal framework for the recognition and enforcement of protective measures in international cross-border situations so that a return order under the 1980 Convention would not give rise to a new flight.<sup>78</sup> A number of experts noted that the 1996 Convention may provide some useful tools in this respect. The importance of securing legal effect for the measures of protection in all the States concerned was emphasised. The importance of mutual trust and support between the authorities concerned was also underscored in relation to the availability and efficacy of the measures of protection put in place to protect the child and the accompanying parent upon return.

119. Several experts noted that the safe return of the child was the joint responsibility of both the requested State and the requesting State. Where domestic violence is concerned, it is important that States do all in their power to ensure that the child does not suffer harm.

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<sup>75</sup> See Question 11.2.

<sup>76</sup> See also the discussion below at paras 136-141 on access to justice following return.

<sup>77</sup> Art. 1 of the 1996 Convention makes clear that any protective measures taken must be measures "directed to the protection of the person or property of the child".

<sup>78</sup> See *supra* note 71.

### ***Promoting consistency in judicial practices***

120. The Chair referred to three proposals which had been made: Working Document No 1, proposing, among other things, the drafting of a Guide to Good Practice; Working Document No 2, proposing a Working Group of judges; and, in Preliminary Document No 9, paragraph 151, proposing the establishment of a group of experts, including in particular judges, Central Authority experts and experts in the dynamics of domestic violence, to develop principles or a practice guide on the treatment of domestic violence allegations in Hague return proceedings.

121. An expert from Uruguay presented Working Document No 1<sup>79</sup> containing a proposal by several Latin American delegations on domestic violence, in particular inviting the Special Commission to recommend the adoption of four criteria to treat domestic violence allegations (items 1-4 of the proposal) and the drafting of a Guide to Good Practice on the implementation and operation of Article 13(1) *b*) (item 5 of the proposal). With regard to the second paragraph in Working Document No 1, an expert from Argentina clarified that the term "conclusive" should be replaced by "relevant enough".

122. Several experts welcomed the idea of developing such a guide. However, concerns were expressed by a number of experts regarding the development of a guide. An expert from Switzerland expressed caution in the development of such a guide, stating that the implementation of Article 13(1) *b*) was an issue of interpretation and application and not one of good practice. Of particular concern to many experts was that the judicial function in exercising discretion where a defence is raised under Article 13(1) *b*), given the facts of a specific case, should not be minimised. It was noted that judges are experienced in weighing the evidence before them concerning questions of possible harm to the child and the principles of the 1980 Convention. However, many experts expressed their views as to the great potential utility of such a guide.

123. An expert from Uruguay clarified that while the proposal supported the development of a Guide to Good Practice regarding Article 13(1) *b*) exceptions, it did not seek to exclude judges from the process. The expert noted the benefit of principles "created by judges, for judges" as outlined in the proposal from the delegation of Canada (Work. Doc. No 2).<sup>80</sup> Furthermore, the expert sought clarification with respect to the proposal in Working Document No 1. It seemed that only item 5 had been considered rather than the whole proposal. He requested that items 1 to 4 also be considered. It was agreed that the proposal in Working Document No 1 be recorded in the minutes of the meeting and reproduced in whole in the Report on Part I of the Special Commission meeting, and be considered during Part II.

124. An expert from Canada introduced Working Document No 2, suggesting that work on this issue may be best carried out in the context of the judiciary, in particular, as a working group composed primarily of members of the International Hague Network of Judges, assisted by Central Authority experts and other experts on the dynamics of domestic violence. The expert suggested that the development of an appropriate tool or tools, which may include, for example, principles, a Guide to Good Practice and training modules, to assist in the consideration of Article 13(1) *b*) may be more influential if developed by those who are called upon to apply the Convention. It should also be considered whether situations other than domestic violence which are raised as a defence under Article 13(1) *b*), such as alcohol and drug abuse, should form a part of this investigation and further research on this issue might be necessary.

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<sup>79</sup> See Annex 2.

<sup>80</sup> See Annex 3.

125. Some experts supported the possibility of the Permanent Bureau combining elements of Working Documents Nos 1 and 2 and Preliminary Document No 9 with a view to developing a proposal that could be acceptable to the Special Commission. A number of experts agreed with the suggestion that any Working Group which might be convened could or should include experts in the area of domestic and family violence or abuse, and also practitioners.

126. An expert from the United Kingdom noted that the application and interpretation of Article 13 had been the subject of appellate jurisprudence, and it was unclear how Principles or any other document produced by a Working Group would interact with the existing case law.

127. An expert from Switzerland indicated that, while he was supportive of the proposal of the delegation of Canada and sympathetic towards the one from the Latin American delegations, judges are not bound by guides to good practice. He noted also that his State had not designated a judge to the International Hague Network of Judges and that the Working Group to be established under the Canadian proposal should not be limited to Network judges. While open to the development of a Guide to Good Practice, he stressed the importance of having binding rules in this area. Furthermore, he mentioned that the work of a working group on this issue should not foreclose the discussion to take place during the 2012 Special Commission (Part II), to deal with, *inter alia*, these matters. A few experts agreed that it was important to wait and see what emerged from Part II of the Special Commission.

128. The Permanent Bureau indicated that it was available to assist in implementing recommendations but that the extent of work required in order to convene a group of experts and perhaps complete a report on such a group's initial conclusions according to any of the proposals would not be feasible before the 2012 Special Commission (Part II), given the limited time and resources available to the Permanent Bureau. The Permanent Bureau suggested that, as this topic overlapped with issues to be discussed in Part II, particularly on the question of a possible protocol, it would be prudent to postpone a decision until Part II. The role of the Council on General Affairs and Policy in determining whether to embark on work on a protocol was also recalled.

129. The Chair concluded that there was a general desire among experts to promote greater consistency and good practice in cases where there are allegations of domestic violence, but sufficient discussion had not yet taken place in order to reach conclusions regarding the precise mechanisms which should be used in order to achieve these goals. The Chair further concluded that all experts had demonstrated a commitment to this topic and that there is no doubt that domestic violence can and should be considered in the application of Article 13(1) *b*). The question remained open as to what specific future action would be taken on this topic.

130. It was agreed that the proposal in Working Document No 1 be recorded in the Minutes of the meeting and reproduced in whole in the Report on Part I of the Special Commission meeting,<sup>81</sup> and be considered, along with the proposals in Working Document No 2 and Preliminary Document No 9, paragraph 151, during the 2012 Special Commission (Part II).

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<sup>81</sup> See Annex 2.

## Issues of access to justice and fair treatment

131. The Permanent Bureau recalled Articles 7(2) *g*) and 26 of the 1980 Convention, relating to legal aid. The Permanent Bureau reported that 41 of 85 Contracting States had made a reservation under Article 26.<sup>82</sup> However, the Country Profiles showed that there were differences even among those States.<sup>83</sup> Some States, although they had made reservations, provided free representation to the applicant, for example by prosecuting the return proceedings on behalf of the applicant. In the majority of cases, the applicant had to rely on the existing system of legal aid, which also varied widely – the scheme in some States was favourable towards granting assistance, while other schemes had strict conditions or additional conditions such as residence or nationality. In addition, some States noted that even where legal aid was available it was insufficient for return proceedings.

132. The responses to Questionnaire I<sup>84</sup> also indicated serious concern about difficulties faced by applicants in obtaining legal aid. It was clear from the responses that the lack of legal aid, or insufficient legal aid, prevented applicants from starting or continuing return proceedings, particularly in States where legal costs were exorbitant. It was also noted in the responses to Questionnaire I that the assistance provided by Central Authorities in obtaining legal aid varied widely from State to State. Applicants faced practical difficulties such as a lack of information about the legal aid available and the system of legal representation,<sup>85</sup> difficulties in finding specialist lawyers, and communication difficulties, particularly language barriers. It was also reported by some States that in some cases the process of applying for legal aid and / or finding legal representation caused delays, although other States reported that these processes did not lead to particular delays.

133. The Permanent Bureau recalled the Conclusions and Recommendations of the 2006 Special Commission which emphasised the importance of the applicant having effective access to legal aid, and which stated that this is in the interests of both the child and the parents.<sup>86</sup>

134. Finally, the Permanent Bureau noted that in some States, the taking parent in return proceedings was at a disadvantage to the applicant, as he / she was unable to get access to legal aid, or could access legal aid but on less favourable terms than the applicant.<sup>87</sup> Some judicial authorities had expressed the importance of providing equal access to legal aid to the taking parent to reduce this imbalance, and questioned the fairness of treatment of the parties in circumstances where this did not occur.

135. Many experts expressed the desire for the removal of barriers to legal aid in other Contracting States. There were reports of instances where applications were withdrawn because the costs to the applicant were prohibitive. A number of experts stressed the

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<sup>82</sup> Albania, Andorra, Armenia, Belarus, Belize, Bulgaria, Canada (most provinces), China (Hong Kong SAR), Czech Republic, Denmark, El Salvador, Estonia, Finland, France, Germany, Greece, Guatemala, Honduras, Iceland, Israel, Lithuania, Luxembourg, Mauritius, Moldova, Monaco, the Netherlands, New Zealand, Norway, Panama, Poland, Singapore, Slovak Republic, South Africa, Sri Lanka, St Kitts and Nevis, Sweden, the United Kingdom, the United States of America, Uzbekistan, Venezuela and Zimbabwe.

<sup>83</sup> See Question 8.

<sup>84</sup> Responses to Question 3.5.

<sup>85</sup> Information on legal representation and assistance can now be found in Question 8 of the new Country Profiles.

<sup>86</sup> See Conclusions and Recommendations Nos 1.1.4-1.1.6 of the 2006 Special Commission.

<sup>87</sup> See, *e.g.*, the responses to Question 8.2 of the Country Profile.

importance of taking this issue seriously in order to ensure the proper implementation of the Convention. Disparities between States in respect of access to justice may undermine the principle of reciprocity within the framework of the Convention. An observer from ISFL noted access to justice issues also arose where cases went before the European Court of Human Rights, as left-behind parents were usually not entitled to legal aid since they were not parties to the case.

136. The Special Commission also considered the question of access to justice following the return of the child. The Permanent Bureau noted that the responses to the Country Profiles<sup>88</sup> indicated that the vast majority of States provided legal aid to the parties (subject to financial means and / or merits tests) in custody proceedings following the return of the child. However, the responses to Questionnaire I<sup>89</sup> indicated broader concerns about the fair treatment of the parties in custody or access proceedings after return.

137. Many experts acknowledged the importance of both parties having access to legal aid in custody proceedings following the return of the child. Some experts observed that a lack of access to justice often precipitates the abduction from the country of origin and that this problem remains upon the return of the child and the accompanying parent. Some experts also stressed the importance of the child being separately represented in these proceedings or having other procedures in place to ensure that the views of the child are heard.

138. Several experts highlighted the importance of providing effective access to justice because it may be closely related to exceptions to return under Article 13(1) *b*) in the return proceedings in the requested State. If legal aid or assistance is not available to the taking parent on return to the requesting State it may give rise to a situation where a defence is raised under Article 13(1) *b*).

139. The Permanent Bureau noted that the 1996 Convention briefly refers to the issue of legal assistance and it may be appropriate that the Practical Handbook on the 1996 Convention<sup>90</sup> address this topic.

140. The Chair concluded the discussion on access to justice by stressing the importance of ensuring effective access to justice for both parties in return and access proceedings, as well as for the child, where appropriate. He acknowledged that reservations under Article 26 of the 1980 Convention might pose problems and that this may be a topic for further consideration or study.

141. The Special Commission acknowledged that the means of ensuring such effective access may vary from State to State, particularly for Contracting States that have made a reservation under Article 26.<sup>91</sup>

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<sup>88</sup> Question 8.2(k).

<sup>89</sup> See, e.g., responses to Questions 6.7 and 23.1.

<sup>90</sup> The draft Practical Handbook on the 1996 Convention is discussed below at paras 169-176.

<sup>91</sup> See Conclusion and Recommendation No 32 of the 2011 Special Commission (Part I).

## Interpretation of key concepts under the 1980 Convention

142. The Permanent Bureau presented the case of *Abbott v. Abbott*,<sup>92</sup> a decision of 2010 by the Supreme Court of the United States of America. It recalled that the Court held that a parent's *ne exeat* right – i.e., a right to consent to (and therefore also to veto) a child's removal from the jurisdiction – was a "right of custody" for Convention purposes. The Permanent Bureau noted that this interpretation was in line with the Conclusions and Recommendations of previous Special Commission meetings,<sup>93</sup> as well as the Transfrontier Contact Guide,<sup>94</sup> which was approved by the 2006 Special Commission.

143. The Special Commission considered Working Document No 3, the proposal of the delegations of Argentina, Brazil, Chile, Colombia, Dominican Republic, Guatemala, Mexico, Panama, Paraguay, Uruguay and Venezuela concerning rights of custody.<sup>95</sup> The proposal was presented by an expert from Argentina.

144. Many experts noted the differences in rights of custody in domestic law between different States, particularly between Latin American and Anglo-Saxon States. In particular, certain jurisdictions distinguish the concept of custody from parental responsibility, while others have only one concept. Some experts thought that return applications had been rejected by other States applying their own domestic definitions of custody rights rather than examining the content of rights of custody under the law of the State of the habitual residence of the child.

145. Many experts noted the importance of uniform and consistent interpretation of Convention terms. Some experts pointed out the autonomous definition of the concept of "rights of custody" in the Convention which must be respected.

146. However, many experts noted difficulties they had with Working Document No 3. Experts expressed concern about the role of the Special Commission in the interpretation of Hague Conventions and thought that it was important that the Special Commission did not encroach on the role of the judiciary. Some experts considered that the purpose and effect of "noting" a decision was unclear. The inclusion of references to specific model legislation and case law in Working Document No 3 was also questioned.

147. An expert from Switzerland raised concerns about situations where the parent requesting the return of the child had access rights combined with a *ne exeat* right, but the taking parent, the child's primary care-giver, could not or did not want to return to the requesting State.

148. Several experts stressed the need for good co-operation between the Central Authorities, in particular for the exchange of documents and information about the law of the requesting State.

149. The Permanent Bureau explained the role of the Special Commission with regard to the interpretation of the Convention. It reminded experts that it is a well-accepted principle that, in the interpretation of the Convention, regard shall be given to its international character and to the need to promote uniformity in its application.

<sup>92</sup> 130 S.Ct. 1829 (2010). See also the INCADAT entry for *Abbott v. Abbott*: HC/E/US 1029.

<sup>93</sup> See Conclusion and Recommendation No 4.1 of the 2001 Special Commission.

<sup>94</sup> See p. 43 ("9.3 Veto on removal – A custody right under the 1980 Convention?").

<sup>95</sup> See Annex 4.



150. Furthermore, the Permanent Bureau mentioned that the Special Commission has, on a number of occasions, noted the interpretation given to certain terms or provisions of the Convention when there is a consistent line of interpretation in the case law of the States Parties. It also noted the importance of the new Country Profile for the 1980 Convention, regarding the provision of information on a State's national law in this area.<sup>96</sup>

151. The Chair concluded that the experts supported the spirit of the proposal from the Latin American delegations but that it could not be accepted in its current form. He emphasised that the Special Commission should reiterate the importance of an autonomous interpretation of "rights of custody" in the 1980 Convention and promote efforts to harmonise its application.

152. The Special Commission emphasised the autonomous nature of the term "rights of custody". The Special Commission recognised the considerable utility of the Country Profile and direct judicial communications in helping to determine the law of the State of the child's habitual residence for the purpose of establishing whether an applicant in return proceedings has "rights of custody" within the meaning of the Convention.<sup>97</sup>

153. The Permanent Bureau introduced two cases decided before the European Court of Human Rights in Strasbourg, namely, *Neulinger and Shuruk v. Switzerland*<sup>98</sup> and *Raban v. Romania*.<sup>99</sup> It noted that certain passages in the judgments of these cases had caused some concern, as they could be read as suggesting that a court deciding a return application should undertake a full examination of the merits of the custody dispute.

154. The Permanent Bureau referred to the extrajudicial comments of Mr Costa, President of the Court of Human Rights, to help with the interpretation of those cases (Info. Doc. No 5). In particular, it drew attention to President Costa's position that *Neulinger* and *Raban* should be read in conjunction with other decisions by the Court of Human Rights, which were supportive of the philosophy underlying the 1980 Convention – i.e., "that a child who has been abducted should be returned to the jurisdiction best-placed to protect his [or her] interests and welfare, and it is only there that his [or her] situation should be reviewed in full". The Permanent Bureau emphasised that it was important to read *Neulinger* and *Raban* in the context of previous decisions, and noted that the 1980 Convention has previously been upheld as being consistent with human rights by other supreme courts.

155. Some experts were concerned that the time taken for the *Neulinger* case to be concluded provided in itself a basis for the conclusion that the child should not be returned. Several experts welcomed the conclusions of President Costa's speech and agreed that the cases should be looked at as part of a series of cases from the Court of Human Rights.<sup>100</sup> All experts agreed that the cases should not be interpreted so as to endorse an assessment of the merits of the custody issue in the case of return applications.

156. Several experts noted that these cases were recently decided and that developments in both the European Court of Human Rights and the Court of Justice of the European Union should be monitored carefully.

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<sup>96</sup> See Question 9.

<sup>97</sup> See Conclusions and Recommendations Nos 44-46 of the 2011 Special Commission (Part I).

<sup>98</sup> Grand Chamber, No 41615/07, 6 July 2010.

<sup>99</sup> No 25437/08, 26 October 2010.

<sup>100</sup> See also *Maumousseau and Washington v. France* (No 39388/05, 6 December 2007), which preceded *Neulinger* and *Raban*, and *Van den Berg and Sarri v. Netherlands* (No 7239/08, 2 November 2010), which followed those cases.

### **The child's voice / opinions in return and other proceedings**

157. The Permanent Bureau indicated that there has been an important movement towards protecting children's rights in legal proceedings in the past decades, as reflected in international and regional instruments adopted since the 1980 Convention.<sup>101</sup> While the 1980 Convention, drafted 30 years ago, did not contain an explicit reference to the child's right to be heard, case law showed that Article 13(2) was now seen in the broader context of the child's right to be heard. This was confirmed by the responses to the Country Profiles.<sup>102</sup> Of the 43 responses to the Country Profiles, 10 States indicated that the child is always heard in return proceedings. In 24 States, it depended on the circumstances of the case and the discretion of the judge. Only a few States limited hearing the voice of the child to cases where an Article 13(2) defence is raised.

158. However, the way in which the child was heard differed. The child could be interviewed directly, either by an independent expert or through a child's own representative. Also, the age as of which a child may be interviewed directly differed from State to State. A majority of States stated in the Country Profile that it was possible to appoint a separate representative for the child in return proceedings. The case law on INCADAT also reflected an increased awareness of the need for separate representation of the child in difficult abduction cases.

159. With respect to when the child's views were taken into account, there was no uniform approach to this issue. Secondly, there was the question as to what extent the child's views were taken into consideration under Article 13(2). Again, it was difficult to make general statements, as this depended on the facts on a case-by-case basis.

160. Finally, it was reported that, in Questionnaire I,<sup>103</sup> almost all States agreed that there was no delay of the proceedings resulting from allowing the child to be heard, except when an independent expert might need to interview the child. In those cases, it was for the judge to ensure expeditious proceedings.

161. The Permanent Bureau recalled the Conclusions and Recommendations of the 2006 Special Commission highlighting that the provisions of the 1980 Convention supported measures to be taken, where appropriate in a particular case, to provide an opportunity for the child to be heard, unless this appears inappropriate having regard to the child's age or degree of maturity.<sup>104</sup>

162. The experts agreed on the importance of hearing the child during proceedings. A number of experts explained that, where the child asked to be heard, the judge had an obligation to hear the child, although the judge still had the discretion to weigh the views according to the child's age and maturity. An expert from the European Union explained that it is possible, under the Brussels IIa Regulation, to oppose recognition and enforcement of a decision if the child is not heard.

163. Experts explained the various methods of hearing a child under domestic law. An expert from the United States of America stressed that what was important was that the child's voice be heard, and not necessarily the method by which the child's voice was heard. A number of experts underlined the importance of training judges to hear and deal with children in legal proceedings.

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<sup>101</sup> See, e.g., the *Convention on the Rights of the Child* (Art. 12), *African Charter on the Rights and Welfare of the Child* (Art. 4(2)), or the *Brussels IIa Regulation* (Art. 11(2)).

<sup>102</sup> Question 10.4. See also responses to Questions 7.3-7.5 of Questionnaire I.

<sup>103</sup> Responses to Question 7.5.

<sup>104</sup> See Conclusions and Recommendations of the 2006 Special Commission, Appendix.

164. The Special Commission welcomed the overwhelming support for giving children, in accordance with their age and maturity, an opportunity to be heard in return proceedings under the 1980 Convention independently of whether an Article 13(2) defence has been raised. The Special Commission noted that States follow different approaches in their national law as to the way in which the child's views may be obtained and introduced into the proceedings. At the same time the Special Commission emphasised the importance of ensuring that the person who interviews the child, be it the judge, an independent expert or any other person, should have appropriate training for this task where at all possible. The Special Commission also recognised the need for the child to be informed of the ongoing process and possible consequences in an appropriate way considering the child's age and maturity.<sup>105</sup>

### **Use of the other Guides to Good Practice**

165. The Permanent Bureau noted that the *Guide to Good Practice under the 1980 Convention – Part IV - Enforcement* which had recently been published, covered a broad range of enforcement issues. It suggested that it was important for all officials involved in the enforcement process to have access to the Guide.

166. Following the earlier discussion at the Special Commission, the Permanent Bureau reminded States that, as well as general preventive measures, the *Guide to Good Practice under the 1980 Convention – Part III – Preventive Measures* set out measures which could prevent re-abductions. The Permanent Bureau noted that Article 7(2) *b*) of the 1980 Convention explicitly provided for the taking of provisional measures to prevent further harm being caused to the child.

167. The Special Commission recognised the value of all parts of the Guide to Good Practice under the 1980 Convention and the Transfrontier Contact Guide under the 1980 and 1996 Conventions. It encouraged the wide dissemination of the Guides. The Special Commission encouraged States to consider how best to disseminate the Guides within their States and, in particular, to the persons involved in implementing and operating the Conventions.<sup>106</sup>

168. The Permanent Bureau recalled the mandate<sup>107</sup> given to the Permanent Bureau to work on a standard consent form for a child to travel outside the country and indicated that this issue would be discussed during Part II of the Special Commission. It asked experts to submit any suggestions to it in writing.

### **Consideration of the draft Practical Handbook on the 1996 Convention<sup>108</sup>**

#### ***Review of the draft Practical Handbook***

169. The Permanent Bureau recalled the Conclusions and Recommendations of the 2006 Special Commission,<sup>109</sup> inviting the Permanent Bureau to begin work on the preparation of a practical guide to the 1996 Convention. The Permanent Bureau explained that an Implementation Checklist had been prepared and a first draft of the Handbook circulated in 2009.

<sup>105</sup> See Conclusion and Recommendation No 50 of the 2011 Special Commission (Part I).

<sup>106</sup> See Conclusion and Recommendation No 52 of the 2011 Special Commission (Part I).

<sup>107</sup> See Conclusion and Recommendation No 1.2.3 of the 2006 Special Commission.

<sup>108</sup> Prel. Doc. No 4.

<sup>109</sup> See Conclusions and Recommendations Nos 2.2–2.3.

170. Reminding the experts of the non-binding nature of the Handbook, the Permanent Bureau welcomed the experts' comments on Preliminary Document No 4, particularly on the structure and the substance of the Handbook, including any errors or omissions, as well as on the follow-up steps to be taken. The Permanent Bureau emphasised that the Handbook was of a different nature from the Guides to Good Practice. It was intended to be a practical tool for Central Authorities, judges, lawyers and other child protection officials.

171. The majority of experts agreed that the Handbook was a useful implementation tool. Some experts stressed the value of the Handbook from their points of view as newly implementing States or as judges interpreting the 1996 Convention, with some noting that they had already used the draft Handbook in preparing for implementation.

172. Detailed discussions took place regarding the Handbook on a chapter-by-chapter basis. These discussions led to interesting debate on certain matters relating to the practical operation of the 1996 Convention, including:

- the provisions on transfer of jurisdiction (Arts 8 and 9 of the 1996 Convention) and, in particular, the practical aspects of a transfer including judicial and Central Authority co-operation;
- the scope of Article 11 of the 1996 Convention, particularly in the context of return proceedings brought under the 1980 Convention;
- the scope of Article 33 of the 1996 Convention and, in particular, the meaning of the term "placement" within Article 33; and
- the role of the Central Authority under the 1996 Convention and the similarities / differences in comparison with the 1980 Convention.

173. The Permanent Bureau thanked the experts for the many helpful comments and suggestions and welcomed further written suggestions or comments of an editorial nature. The Permanent Bureau advised that it would make amendments to the Handbook in light of discussions at the Special Commission, noting areas of continuing uncertainty and the need to clarify the relationship between the Explanatory Report and the Practical Handbook. In doing this work the Permanent Bureau will consult with certain experts. Experts interested in being involved in the consultations should contact the Permanent Bureau.

174. An expert from Switzerland requested that the Handbook be the subject of approval by the Council on General Affairs and Policy of the Conference. The Permanent Bureau noted that this was not the usual procedure followed for other non-binding guides developed by the Permanent Bureau, especially when developed in consultation with experts. Rather, a full report of the Special Commission with Conclusions and Recommendations, which refers to relevant documents, is made available for the Council to consider.

175. The Chair recalled that the Council on General Affairs and Policy is aware of the work on the Handbook but he did not see that it was appropriate for the Council to be asked to approve the substantive content of the publication. The Chair opened the floor to see if there was support for the proposal of Switzerland. No support was expressed.

176. The Special Commission recommended that the Permanent Bureau, in consultation with experts, amend the Handbook, in light of comments provided at the Special

Commission. The Special Commission expressed its expectation that the Handbook would be published following this final revision process.<sup>110</sup>

### ***Development of standard forms under the 1996 Convention***

177. The Permanent Bureau reminded the experts of the benefits of using standard forms and discussed the possibility of developing standard forms for use under the 1996 Convention. It indicated that if forms were to be developed they should be in the first place for the purpose of communications or requests between Central Authorities. A number of responses to Questionnaire I<sup>111</sup> indicated that States would find standard forms useful, but only one provision in particular was identified (Art. 40). As experience under the Convention developed, it would also be possible to see which provisions were more commonly used and if some required repetitive processing for which a standard form might be useful.

178. A number of experts reported their experience in developing and using forms for applications under the 1996 Convention.

179. The Permanent Bureau noted that the work on forms will continue to be considered. It invited States to send to the Permanent Bureau examples of forms they may develop or use under the 1996 Convention so this information can be shared with other States, possibly through the website of the Hague Conference.

### ***Extension of INCADAT and INCASTAT to the 1996 Convention***

180. The Permanent Bureau noted the desirability of extending INCADAT to include cases under the 1996 Convention to assist in promoting consistent interpretation. This would, however, have significant resource implications and might need further study.

181. The Permanent Bureau also sought views from the experts on extending INCASTAT to include information on specific elements of the 1996 Convention.

182. Mr McEleavy, Legal Consultant to INCADAT, expressed his gratitude to States which had contributed to INCADAT and noted the desire to increase the number of jurisdictions covered. He recognised the important work of the correspondents for INCADAT as well as the considerable contribution of Ms Ely (former Senior Legal Officer at the Permanent Bureau) and the work of the Permanent Bureau in this regard.

183. The Special Commission welcomed the further exploration of extending INCADAT to the 1996 Convention and suggested further exploration of the desirability and feasibility of extending INCASTAT to the 1996 Convention.

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<sup>110</sup> See Conclusion and Recommendation No 55 of the 2011 Special Commission (Part I).

<sup>111</sup> Responses to Question 15.1.

## Judicial networking and direct judicial communications<sup>112</sup>

### *Development of the International Hague Network of Judges*

184. The Permanent Bureau introduced the development of the International Hague Network of Judges, noting that the Network had more than tripled in the last five years, with more than 60 judges from 45 States. It also noted that a number of States such as Argentina, Canada and Mexico had implemented national networks, and in one State, the Netherlands, there had been legislation to create an office of the liaison judges. The Permanent Bureau made reference to the joint conference of the European Commission and the Hague Conference on Direct Judicial Communications on Family Law Matters and the Development of Judicial Networks, held in Brussels (15-16 January 2009) and the time devoted by the Permanent Bureau to consolidating the network.

185. Several experts reported new designations to the Network or steps being taken to make such a designation. An expert from the United States of America reminded States of the importance of notifying the Permanent Bureau of new contact details where there was a change of liaison judge. Some experts also explained the operation of national networks in their respective countries and noted additional networks in which their judges had participated, such as IberRed and the European Judicial Network.

186. Those States in which direct judicial communications have taken place as a result of liaison judges found this practice to be successful in assisting with the safe return of children. For example, an expert from Australia noted that direct judicial communications were used to obtain mirror orders or complementary orders to ensure safe return, to obtain evidence, including oral evidence, and to discuss the timetable of matters in the other jurisdiction.<sup>113</sup> Several experts commented that the Network judges helped to resolve applications more quickly.

187. Many experts thought that exchanging information was important at an international and regional level, as well as between Central Authorities and judges at a national level. An expert from Belgium noted the importance of inter-network co-operation, for example with the European Judicial Network. Some experts stated that judges who are members of the Network had an important role in providing help to other national judges who had limited prior experience with the 1980 Convention. An expert from the United Kingdom thought that it was also important to have contact with judges in States that were not Party to the 1980 Convention.

188. Experts from Switzerland and Monaco indicated with regard to judicial communications *per se* that judges in their respective States can engage in direct judicial communications in relation to specific cases. On the other hand, the Expert from Switzerland indicated that these judges do not handle the liaison part of the work as it is an administrative function, for which they rely on the Central Authority. He indicated that his State was not opposed to the idea of a liaison judge if it was in the interest of other States that Switzerland have one. He concluded by emphasising the need for a legal basis.

189. Some experts voiced concerns about protecting the confidentiality of information when judges exchanged information concerning specific cases. A few experts thought that the independence of judges could also be jeopardised. In this respect, a number of

<sup>112</sup> Prel. Docs Nos 3 A, 3 B, 3 C.

<sup>113</sup> See also responses to Question 6.4 of Questionnaire I for further examples.

experts did not consider this an issue since judges respect the principles of judicial independence and impartiality and protect confidential information.

190. A few experts discussed the support and resources needed for liaison judges, noting the heavy workload of judges.

191. The Chair concluded the discussion by taking note of the numerous developments both at the international and the national levels in relation to the development of the International Hague Network of Judges and the use of direct judicial communications. He underlined the existing efforts of co-operation between Central Authorities and judges and emphasised the need for them to understand each other's role.

### ***Discussion of principles: emerging rules***

192. The Permanent Bureau explained the methodology followed in developing these principles, emphasising the methodical and careful approach that had been taken. It indicated that the emerging rules and principles could be separated and that States could choose the relevant parts and adapt them to their needs. Concerning the discussion of emerging rules, the Permanent Bureau noted that they reflect current practice and take into account the Conclusions and Recommendations of previous Special Commissions as well as the conclusions of other judicial seminars.<sup>114</sup> It outlined comments received on the draft emerging rules from various States.<sup>115</sup>

193. Several experts preferred that the title of Preliminary Document No 3 A be amended by replacing the word "rules" with "guidance". Experts also noted that some sentences in the document should be less affirmative and that "must" could be replaced by "should".

194. Some experts were concerned with the wording of paragraphs 1.2 to 1.6 of Preliminary Document No 3 A, in particular paragraph 1.3, in relation to the appointment of judges to the Network. To account for the differences between national laws, it was suggested that several changes should be made in particular to avoid references to the involvement of a judicial authority in the appointment of liaison judges when, in some States, this would be the role of the executive.

195. All experts agreed on the need to protect the independence of judges.

### ***Discussion of principles: principles for direct judicial communications in specific cases including commonly accepted safeguards***

196. The Permanent Bureau presented the relevant introductory sections of Preliminary Document No 3 A on the topic of Principles for Direct Judicial Communications in specific cases including commonly accepted safeguards and highlighted that these principles are of a non-binding nature.

197. Many experts stated that judicial communication was a reality and that its evolution had to be encouraged in a flexible manner to accommodate different legal traditions, as well as new developments. An expert highlighted that the real focus of the discussions should be on how to enhance co-operation in Hague cases to ensure expeditious proceedings. However other experts also noted the importance of having guidelines: to

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<sup>114</sup> See further Prel. Doc. No 3 B and Info. Doc. No 3.

<sup>115</sup> See further Prel. Doc. No 3 C.

provide a basis for direct judicial communications, for the confidence of the parties, and particularly for States new to using direct judicial communications.

198. An expert from Switzerland asked what the difference was between paragraphs 6.2 and 6.3 and stated that paragraph 6.2 could be deleted in favour of paragraph 6.3. He also wondered whether the question of impartiality of the judge, as opposed to independence, was deliberately omitted. Additionally, he highlighted the need for civil law jurisdictions to have a legal basis for the purpose of engaging in direct judicial communications in specific cases. Some experts noted that the confusion over these issues stemmed from the lack of experience of many States Parties with direct judicial communications and that in practice the independence of the judiciary was not called into question. Many experts stated that the rules contained in points 6.1, 6.2 and 6.3 were essential principles even though they were self-evident.

199. An expert from Canada suggested that paragraph 6.4 include that communications in general were to be limited to logistical issues, except where the parties consented to broaden the scope of the communications. An expert from France expressed her discomfort with the degree of formality in paragraph 6.4. Several experts wished to see paragraph 6.4 drafted in a more general way.

200. The Permanent Bureau highlighted the flexible nature of the wording of paragraph 6.4 and explained that these procedural safeguards were meant to give guidance to the parties and to judges who were not yet comfortable with direct judicial communications.

201. The Chair stated that it was evident through the interesting discussions that there was concrete support for the object of Preliminary Document No 3 A. He highlighted that this document summarised good practice from experience with direct judicial communications. He added that there was still some work ahead since the document still appeared to pose some concerns which needed to be addressed prior to distribution. He indicated that the Permanent Bureau would finalise the document, taking into account the discussion held during the meeting.

### ***Legal basis for judicial communications / development of binding rules***

202. The Permanent Bureau stated that the responses to the Country Profiles<sup>116</sup> revealed some confusion as to what was meant by a "legal basis" for direct judicial communications. The Permanent Bureau explained that the question was whether a judge could undertake direct judicial communications in the absence of a domestic law which provides for such communication. It suggested that work may be necessary on the determination of a legal basis within jurisdictions and invited experts to restrict their comments on their domestic rules.

203. An expert from the United Kingdom explained that in common law jurisdictions this was a matter of judicial deployment and that it was the discretion and responsibility of the Chief Justice to allocate direct judicial communication powers to judges. He added that it would be helpful if each State could establish a mechanism and, in the event that they could not, an international instrument could provide a foundation for this.

204. An expert from Argentina mentioned that one of the leading conclusions from the 2011 Inter-American Experts Meeting was that a legal framework for direct judicial communications should be established. She added that such rules had been established on a national level and disseminated to all courts.

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<sup>116</sup> Question 21.



205. Several experts wondered whether it was really necessary to create a formal legal basis for direct judicial communications and whether strict rules would be conducive to the promotion of direct judicial communications. They explained that each State had its own procedures and that such communications were already taking place on an informal basis. An expert from Uruguay stated that there appeared to be no consensus and that the States needed to be guided by the Hague Conference.

206. The Chair concluded that there were States that did not need a legal basis, but also States that needed a formal legal basis, for which development of domestic legislation should be encouraged.

207. An expert from Switzerland introduced Working Document No 4,<sup>117</sup> indicating that it was based upon co-operation and reciprocity. He indicated that States may need a legal basis at the international level to allow direct judicial communications.

208. The Permanent Bureau proposed a preliminary discussion among experts on the merits of developing a legal basis for direct judicial communications. It indicated that sometimes reform of domestic law found its source in international Conventions. In this respect, it referred to powers of attorney ("powers of representation") as they are provided for in the 2000 Hague Adults Convention, without which States such as Switzerland, France and Italy might not have legislated domestically to give life to that concept. Leaving aside the specific question of what form a legal basis should take, it proposed the following provision as an example: "Where appropriate, a competent authority may engage in direct judicial communications with regard to a specific case with another competent authority of another State".

209. Several experts felt that, while binding rules on judicial communications may be helpful, at this stage it would be inappropriate to adopt such rules to facilitate judicial communications. They stressed the need to give States time to gain more experience in this area to identify common standards.

210. With regard to the Swiss proposal, many experts felt that its consideration was premature and preferred that this discussion be postponed to Part II of the Special Commission. An expert from Canada also recalled that the approval of the Council on General Affairs and Policy of the Conference would be needed to commence any work on binding rules.

211. The Chair concluded the discussion by highlighting that experts recognised the need to explore the development of binding rules, but they almost unanimously felt that the consideration of binding rules would be premature. For this reason, it was more appropriate to discuss the matter during Part II of the Special Commission. The Chair

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<sup>117</sup> It provided:

"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."

noted that the need for a legal framework enabling direct judicial communications appeared to be largely a domestic legal matter.

212. An expert from Switzerland agreed that the discussion be postponed to Part II of the Special Commission. He underlined that there is a need for a legal basis, but not necessarily for binding rules to facilitate direct judicial communications, and requested that States continue to reflect on the proposal for the discussion in January.

### ***Use of IT to support networking and communications***

213. The Permanent Bureau presented the outcome of research undertaken by it on secure communications systems (e-mail and video-conferencing systems). It had consulted with the Network as to its needs and found that the Network wanted a secure platform through the Internet to exchange messages, to build a virtual library to archive and file documents, for example templates for communication such as requests for Article 15 declarations, and to conduct secure video-conferencing.

214. It identified the existing systems that would achieve some of these objectives (IberRed, the Organization of American States (OAS) secured communications system and Skype). Network judges had agreed with the proposal that a pilot project be launched based on, and supported by, IberRed. The IberRed system was able to provide a secure system for judicial communications, although it did not provide the possibility of a document library or video-conferencing. While the OAS system had the advantage of allowing video-conferencing on secure channels, it would have to be installed on all relevant computers because it is not a web-based interface and this might conflict with domestic government policies. At present, it was not possible to establish secure channels using Skype, although this was being further explored. It was noted that discussions were taking place between Eurojust and the European Judicial Network and IberRed.

215. The Permanent Bureau suggested evaluating the potential use and implementation of the IberRed system, with future discussion of further possibilities to identify or build a more sophisticated system if finances allowed.

### ***The role of The Judges' Newsletter on International Child Protection***

216. The Permanent Bureau recalled the importance of *The Judges' Newsletter*, which is distributed in 115 States to over 800 recipients, including judges, Central Authorities and practitioners, in promoting the development of international judicial communication and co-operation. The Permanent Bureau thanked States for their positive feedback on the Newsletter in the responses to Questionnaire I, and noted the suggestions for improvement.<sup>118</sup> It also highlighted some recent improvements to the format of the printed and electronic versions of the Newsletter, and noted that attempts would be made for the Newsletter to be published more regularly.

217. The Permanent Bureau thanked all those who have contributed to the development of the Newsletter, in particular those who have contributed articles to the Newsletter, the publishers LexisNexis, who provide free printing and distribution, and Lord Justice Thorpe (United Kingdom) for his important role in supporting the Newsletter.

218. Finally, the Permanent Bureau noted that, since 2009, the Permanent Bureau had not published a Spanish version of the Judges' Newsletter due to insufficient funding for translation. The Permanent Bureau stressed that it would be pleased to receive support

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<sup>118</sup> Responses to Question 22.1(b).

from States in order to resume translation in Spanish of the Judges' Newsletter, but noted that contributors could nevertheless continue to send their submissions to the Permanent Bureau in Spanish for translation into English and French. An expert from Uruguay reported that the Newsletter was widely used in his State, and emphasised the importance of it being made available in Spanish.

### ***Judicial conferences and meetings***

219. The Permanent Bureau referred to Information Document No 3 and to the annexes of Preliminary Document No 3 B, which provide the Conclusions and Recommendations of major regional and international seminars and conferences organised or co-organised by the Hague Conference since 2006. The Permanent Bureau stressed the importance of these seminars in exchanging knowledge and information, and encouraged the organisation of future judicial conferences as they provide an excellent vehicle to increase trust and confidence between judges and Central Authorities of different States.

220. The Special Commission highlighted the importance of interdisciplinary judicial conferences and seminars and emphasised their importance for the effective functioning of the 1980 and 1996 Conventions.<sup>119</sup>

### ***Article 15 of the 1980 Convention***

221. The Permanent Bureau introduced Article 15 of the 1980 Convention, which allows the judicial or administrative authorities of the requested State to request that the applicant obtain from the "authorities" of the State of habitual residence a "decision or other determination" that the removal or retention was wrongful within the meaning of Article 3. A majority of the responses to the Country Profiles<sup>120</sup> indicated they would respond to requests under Article 15, with 36 out of 44 responses indicating that such a decision or determination could be made,<sup>121</sup> and only eight responses indicating that it was not possible.<sup>122</sup> Determinations were made mainly by judicial authorities, and occasionally the Central Authority.

222. The Permanent Bureau noted that in the responses to Questionnaire I<sup>123</sup> most States reported that they had not encountered any problems or that Article 15 was rarely used. However, some responses also revealed some practical problems in the operation of Article 15. These problems included delays, especially in relation to States where issuing an Article 15 determination required adversarial proceedings; cases where the Article 15 declaration could not be used because it arrived too late; jurisdictional problems in proceedings under Article 15; unnecessary requests for Article 15 declarations, in situations where the information provided was complete and there was no real question about custody rights; inconclusive declarations, or declarations being received from private lawyers, which in some cases were not correct; and the cost of obtaining Article 15 declarations. It was suggested that better procedures may be needed to facilitate the use of Article 15.

<sup>119</sup> See Conclusions and Recommendations Nos 2.10 and 5.6 of the 2001 Special Commission, Conclusion and Recommendation No 1.6.6 of the 2006 Special Commission and Conclusion and Recommendation No 75 of the 2011 Special Commission (Part I).

<sup>120</sup> Question 10.2.

<sup>121</sup> Argentina, Australia, Belgium, Brazil, Canada (British Columbia, Manitoba, Nova Scotia, Prince Edward Island, Quebec, Saskatchewan), Chile, China (Hong Kong SAR), Costa Rica, Cyprus, Czech Republic, Denmark, Dominican Republic, Finland, France, Honduras, Ireland, Israel, Latvia, Mauritius, Mexico, Norway, Paraguay, Portugal, Romania, Spain, Sweden, Switzerland, Turkey, Ukraine, the United Kingdom (England and Wales) and the United States of America.

<sup>122</sup> Bulgaria, El Salvador, Estonia, Greece, Lithuania, Peru, Poland and Uruguay.

<sup>123</sup> Responses to Question 8.

223. An expert from Germany noted the problems with using Article 15 and expressed the view that using direct judicial communication was preferable, as it was faster and allowed further clarification if necessary.

224. The Special Commission recommended that the Permanent Bureau give further consideration to the steps that might be taken to ensure more effective use of Article 15.<sup>124</sup>

### **Consideration of the draft Guide to Good Practice on Mediation under the 1980 Convention<sup>125</sup>**

#### ***Review of the draft Guide to Good Practice on Mediation***

225. The Permanent Bureau drew attention to the Hague Conference's work in the field of cross-border family mediation including the publication of two studies on cross-border family mediation published in 2006 and 2007 for which the work of Ms Vigers, former Legal Officer, was recognised. The Permanent Bureau outlined the background and development of the Guide, and thanked the experts who had contributed to the drafting of the Guide for their work and commitment. The Permanent Bureau indicated that revision of the draft Guide would take place in light of the discussions at this meeting and the information received through the responses to the Country Profile.<sup>126</sup>

226. The Permanent Bureau stated that the purpose of the Guide was to describe and promote good practices in mediation. It noted that while the Guide made recommendations, it was of a non-binding nature. It outlined that the Guide targeted a broad audience, including judges, lawyers, mediators, parties to cross-border disputes and other interested parties. The Permanent Bureau sought the experts' views on the Guide and in particular, whether more detail on issues of jurisdiction and applicable law was required.

227. Many experts welcomed the development of the draft Guide in promoting amicable solutions in the context of cross-border family matters, noting that an amicable solution was often less traumatic for the child. Several experts referred to initiatives and practical solutions in their States with respect to mediation and noted that the Guide will contribute to developing better practice.<sup>127</sup> Some experts recalled the need to ensure the child's best interests were protected.

228. A number of experts discussed the point in time at which it was appropriate to commence mediation. The comments by experts indicated that practices varied across States. Several experts reported that, in their jurisdiction, return proceedings would first be initiated and mediation would run in parallel or while the proceedings were stayed. At the same time, many experts noted that it was important that the option of mediation be made available to the parties at an early stage.

229. Several experts noted the usefulness of mediation in reducing the time taken for resolving applications under the 1980 Convention. Experts further noted that mediation in proceedings under the 1980 Convention should not lead to delays.

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<sup>124</sup> See Conclusion and Recommendation No 63 of the 2011 Special Commission (Part I).

<sup>125</sup> Prel. Doc. No 5.

<sup>126</sup> See Questions 19 and 20.

<sup>127</sup> For further information about mediation schemes in individual States, see the responses to Question 19 of the Country Profile.

230. The Special Commission proceeded to consider the Guide chapter by chapter, providing comments for revision of the Guide.

#### *Specialised training for mediation*

231. The Permanent Bureau presented information about specialised training for mediation in international child abduction cases and safeguarding the quality of mediation. It noted that of 37 responses to the Country Profiles,<sup>128</sup> 11 States indicated that they had legislation dealing with mediator accreditation, and 11 States indicated that they regulated the qualifications of mediators. The overall picture was that standards for mediator qualification and accreditation were not widely legislated, especially in relation to specialised training for family and international disputes. The Permanent Bureau indicated that, given the different approaches taken by States this was not yet an area where consensus could be found. Therefore, the Guide sought only to give guidance as to the result of initiatives to promote specialised training, without prejudice as to how this would be achieved (legislation, accreditation, etc.).

232. The Permanent Bureau drew attention to the recommendation that only experienced family mediators who had undergone specific training in international child abduction cases should conduct mediation in those cases. Several experts supported the idea that mediators in cases under the 1980 Convention should have specific training for mediation in international child abduction cases. At the same time, several experts noted that specialised training for international family mediation was still to be developed in many States.

233. A few experts considered it important that mediators also had language skills and an appreciation of the different cultures involved so that they could properly understand the issues surrounding these disputes. One expert thought that mediation sessions could also work well with an interpreter. Several experts also mentioned the importance of IT in distance mediation and suggested that the use of programmes such as Skype, as well as the implications of distance mediation on the dynamics of the mediation process, should be included in the training.

#### *Safeguarding the quality of mediation*

234. An expert from Belgium suggested establishing common standards for evaluating the quality of mediation. An observer from IPCAS thought that it was important that the services which provide the mediation also help with monitoring by getting feedback from parties involved. An observer from ISS supported the idea of evaluation by a neutral body.

#### *Access to mediation and assessment of suitability*

235. Observers from various mediation organisations noted the importance of assessing a case's suitability for mediation. Several experts suggested that ideally a mediator should conduct this assessment. Experts had differing views as to whether the assessment of suitability could be conducted by the Central Authority, who represents one of the parties.

236. The Permanent Bureau drew attention to the suggestion made in the Guide that States should consider making legal aid available for mediation in child abduction cases. Of the 37 Country Profiles<sup>129</sup> analysed, only five States indicated that legal assistance

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<sup>128</sup> Question 19.2.

<sup>129</sup> Question 19.3.

was available for mediation, and five indicated that free mediation services were available. However, the Permanent Bureau noted the distinction between providing assistance for legal proceedings and for mediation, having regard to Article 26 of the 1980 Convention, as well as the fact that mediation costs could differ immensely among States.

237. An expert from Switzerland considered that a clear statement should be made to indicate that Article 26 of the 1980 Convention should also be applied to mediation. An expert from Monaco agreed that Article 26 could be used to cover mediation costs.

238. The Permanent Bureau responded that it would be reluctant to give a definitive interpretation of Article 26. However, it noted that Article 26 applies when there are judicial proceedings, while mediation can exist outside of judicial proceedings. It also noted that it was important to encourage States to consider the means by which they could help to subsidise mediation.

239. An expert from Germany suggested that the Guide should draw more attention to the fact that it is not the role of the mediators to give legal advice and that the parties should be strongly encouraged to have legal representatives and to consult with them on the legal implications.

240. The Permanent Bureau drew attention to the importance of the child's involvement when it came to rendering the agreement legally binding in some jurisdictions. It noted that out of 37 Country Profiles,<sup>130</sup> two States indicated that mediators must see the child and two States responded that the views of the child must be taken into consideration. Eleven States replied that it was up to the discretion of the mediator. In three States, the child's views played no role. All experts insisted on taking into account the interests of the child and, in particular, the need to reassure the child.

241. Mr Justice Jillani (Consultant to the Permanent Bureau) drew attention to the fact that the child's views may be influenced by the taking parent, which needed to be taken into account.

#### *Mediation and domestic violence*

242. The Permanent Bureau noted the discussion in the Guide on mediation and accusations of domestic violence.

243. An expert from Switzerland wished to have attention drawn to the direct or indirect violence suffered by the child. He also added that he did not believe it was the role of the Hague Conference to establish substantive procedural rules in mediation matters such as the qualifications of mediators.

244. A few experts were concerned that mediation may not be suitable in cases involving domestic violence, as the victim often finds himself or herself in a position of inferiority which may affect his or her bargaining power and in such cases, the mediator would not have the judicial power to ensure application of safeguards. However a few observers insisted that parties, including vulnerable parties, must be given autonomy to decide whether to take part in mediation and noted that mediators were experienced in redressing power imbalances and putting safeguards in place.

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<sup>130</sup> Question 19.4.

*Rendering the mediated agreement legally binding*

245. The Permanent Bureau drew attention to the importance of properly preparing an agreement to make it legally binding in the different legal systems concerned and noted the practical importance of drafting realistic, practical terms, highlighting the fact that the Guide recommended allowing limited time for the parties to obtain legal advice before finalising the agreement.

246. An expert from Canada suggested further clarifying in Chapter 11 that the agreement should not include conditions that were not the direct responsibility of the parties and over which they have no control, such as withdrawal of criminal charges.

*Issues of jurisdiction and applicable law*

247. The Permanent Bureau outlined a typical situation, where the mediation would take place in the State to which the child had been taken and an agreement reached covering issues such as custody, contact and relocation. The parties would typically want the agreement to be rendered binding in that State. The 1980 Convention does not contain jurisdictional rules. Further, Article 16 of the 1980 Convention prohibits the requested State from making decisions on the merits of a custody dispute, arguably also impeding the requested State's courts' ability to convert the mediated agreement into a court order. The Permanent Bureau mentioned that the 1996 Convention rules permitting transfer of jurisdiction might offer potential solutions. It also added that the many regional and bilateral jurisdictional rules may need to be analysed.

248. An expert from Sweden suggested that the matter should not be regulated in too much in detail in the Guide, pointing out that these issues were more problematic in theory than in practice and that in individual cases often a good solution could be found by the lawyers and the judges involved. A few experts and observers also considered that in practice these issues were easy to resolve, as both parties were committed to the agreement.

249. An expert from Switzerland disagreed and said that certain legal questions had to be addressed in the Guide in a general manner, since the parties would need certainty that their agreement would be recognised in other jurisdictions. He said that the Guide to Good Practice might not be the right place to spell out the legal background in detail but suggested that more detail should be included in the Practical Handbook on the 1996 Convention (Prel. Doc. No 4). The role of Article 16 of the 1980 Convention as an impediment to jurisdiction in the requested State could also be explored in more detail in the Handbook. He considered furthermore that the transfer of jurisdiction under Article 7 of the 1996 Convention was problematic where the child had not acquired strong ties to the new State. He stated that this problem underscored the need for supplementary rules to those available in the 1980 and 1996 Conventions.

250. An expert from the Netherlands was of the view that Article 11 of the 1996 Convention could also play a role, and reference to that could also be added to the Handbook.

251. An expert from Germany pointed out that paragraph 287 should consider Article 8 in addition to Article 9 of the 1996 Convention. Another expert from Germany highlighted that, as a judge, she would see the biggest problems in those cases where the parties agreed to a bigger package, over part of which the judge in the return proceedings did not have jurisdiction. She gave the example of parents agreeing on the return of the child and at the same time on sharing parental responsibility in a certain way following the return. She explained that the only choice the parties had in such situations was to

trust the court in the other State to respect their agreement. The option of rendering the agreement binding in the other State would often mean lengthy proceedings, for which the Hague return proceedings could not be stayed due to the need for expeditiousness.

252. An expert from Australia referred to some cases in which they were able to use the International Hague Network of Judges to help with these issues. She explained that they had in some cases managed to get a parenting order overseas with the assistance of the parties' representatives in the other State reasonably quickly and then to close the return proceedings and immediately afterwards render the agreement binding.

253. Many experts highlighted the need for co-operation between the authorities of both States.

### ***Follow-up***

254. The Special Commission requested that the Permanent Bureau revise the draft Guide in light of the discussions and that a final version of the Guide be distributed for consultation to all Contracting States and Members of the Hague Conference prior to publication.

255. The Permanent Bureau suggested that careful consideration was required as to how the Guide should be published. An electronic format might be best suited to easily allow for future updates. It also mentioned the possibility of an annex listing new developments, and including some examples of mediation agreements. It explained that anything intended to be included in the Guide would be included in the further circulation of the Guide for consultation.

256. An expert from Switzerland asked whether the Guide would be subject to approval by the Council on General Affairs and Policy. The Chair noted that this was a similar question as had already been dealt with in relation to the Practical Handbook on the 1996 Convention.

### ***Possible development of binding rules***

257. The Permanent Bureau indicated that Part II of the Special Commission would consider the need for and feasibility of developing binding rules on mediation. It noted the development of mediation structures within the existing treaty framework. It also noted that national legislation or rules could be used in those countries that required a legislative framework.

258. The Special Commission indicated that the issue would be addressed again in Part II.

## **The Principles on Mediation developed within the Malta Process<sup>131</sup>**

### ***Introduction to and objectives of the Principles / discussion of the Principles / the Central Contact Point***

259. The Permanent Bureau provided the background to the Malta Process. It recalled that the Process had commenced with a study revealing that the operation of a number of bilateral arrangements between Contracting States to the 1980 Convention and non-

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<sup>131</sup> Prel. Doc. No 6. Further information about the Malta Process is available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under "Child Abduction Section" then "Cross-border family mediation".



Contracting States that followed Shariah law fully or in part was not satisfactory.<sup>132</sup> This had led to the realisation that a greater dialogue between Contracting and non-Contracting States was needed to assist in exploring solutions for cross-border family disputes.

260. The Permanent Bureau referred to the Malta Conferences, held in 2004, 2006 and 2009, involving judges and government officials from a balanced representation of both Contracting and non-Contracting States to the 1980 Convention which sought to increase knowledge and understanding of how different legal systems operated as well as identifying ways of administrative and legal co-operation. Following a proposal of Canada at the Third Malta Conference in 2009, the Council on General Affairs and Policy had given the Permanent Bureau the mandate to establish a Working Party on Mediation in the context of the Malta Process, promoting the development of mediation structures to help resolve cross-border disputes concerning custody of, or contact with, children. It was noted that the development of mediation services did not replace the development of legal structures, but was seen as complementary.

261. The Working Party was formed of experts from six Contracting States to the 1980 Convention<sup>133</sup> and six non-Contracting States,<sup>134</sup> as well as two independent experts, and was co-chaired by Ms Thomsen (Canada) and Mr Justice Jillani (Pakistan). The Permanent Bureau referred to Preliminary Document No 6 and gave further details as to the Working Party's activities and steps towards the finalisation, in November 2010, of the "Principles for the establishment of mediation structures in the context of the Malta Process" and the "Explanatory memorandum".

262. Ms Thomsen emphasised the increasing number of child abduction cases with non-Convention States, and the important role that mediation can play in helping to resolve cross-border family disputes. She introduced the Principles, emphasising that they were aspirational, and recalled that in relation to non-Hague States the ultimate goal remained encouraging those States to join the relevant Hague Conventions.

263. Mr Justice Jillani highlighted the significance of the Malta Process. He observed that the work of the Working Party on Mediation had been a catalyst for developments in Pakistan such as the designation of a Central Contact Point within the Ministry of Law and Justice to facilitate the implementation of the Malta Principles and to provide assistance to left-behind parents whose children were taken to Pakistan, programmes for judicial training in mediation and other forms of alternative dispute resolution and the dissemination of information through judicial bulletins.

264. A number of experts congratulated the Working Party on its work and welcomed the Principles and the invitation for the establishment of Central Contact Points for international family mediation.

265. An expert from Slovakia emphasised that in the future the information given by these contact points should go beyond mediation and include other remedies for the left-behind parent. An observer from ISS noted that mediation would not often be the first priority for left-behind parents in these cases but that they would need help with locating

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<sup>132</sup> See C. Gosselain (for the Permanent Bureau), "Child Abduction and Transfrontier Access: Bilateral Conventions and Islamic States – A Research Paper", Prel. Doc. No 7 of August 2002 for the attention of the 2002 Special Commission, available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under "Child Abduction Section" then "Special Commission meetings on the practical operation of the Convention".

<sup>133</sup> Australia, Canada, France, Germany, the United Kingdom and the United States of America.

<sup>134</sup> Egypt, India, Jordan, Malaysia, Morocco and Pakistan. Morocco has since become a State Party to the 1980 Convention.

the child, information about the well-being of the child, support in establishing contact, assistance with language barriers and access to the foreign legal system, and that Central Contact Points should therefore facilitate a broader range of services.

266. Ms Thomsen noted that ideally Central Contact Points should be developed in the future in non-Hague States to create an international network for co-operation similar to that established among Central Authorities under the framework of the 1980 Convention. She also noted that while mediation may not be the first option for left-behind parents, it might be the only option.

267. The Permanent Bureau recognised that the development of the Principles and the establishment of the Central Contact Points was only the first step. It referred to the Conclusions and Recommendations of the Council on General Affairs and Policy of April 2011 mandating the Working Party to: (i) facilitate wider acceptance and implementation of the Principles as a basic framework for the process; and, (ii) consider further elaboration of the Principles.<sup>135</sup> It noted that the Working Party would report on the progress of its work at the next Council on General Affairs and Policy.

268. The Permanent Bureau thanked Mr Justice Jillani and Ms Thomsen for their work and their enthusiasm. It also thanked all the members of the Working Party, particularly the independent experts, Ms Carter and Ms Fillion, as well as the Governments of Australia and Canada for providing funding that had enabled the Working Party to hold two telephone meetings and one in-person meeting.

269. The Special Commission noted the efforts being made in Contracting States to establish a Central Contact Point in accordance with the Principles and encouraged States to consider establishing such a Central Contact Point or designating their Central Authorities as a Central Contact Point.

## **Conclusions and Recommendations of Part I**

270. The Chair introduced Working Document No 6 containing the draft Conclusions and Recommendations. The final Conclusions and Recommendations adopted by the Special Commission appear at Annex 1.

### ***Conclusion***

271. The Chair thanked all participants including the Central Authorities, government representatives, observers, legal academics and individuals for their active participation. He also thanked the Advisory Group chaired by Justice Victoria Bennett (Australia), the Permanent Bureau, the recording secretaries, the administrative and support staff and the interpreters. Several experts thanked the Chair and the staff at the Permanent Bureau.

272. After the closure of the meeting, the Chair and the Secretary General commented on this being the last Special Commission before the retirement of the Deputy Secretary General, William Duncan. They expressed sincere thanks to him for the great contribution he had made to the Hague Conference and congratulated him on the many accomplishments during the time he had been working with the Permanent Bureau. The Deputy Secretary General responded, expressing his admiration and thanks to the delegates and to all of those with whom he had worked.

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<sup>135</sup> Conclusion and Recommendation No 8, Council on General Affairs and Policy, 5-7 April 2011.

## **ANNEXES**

## **ANNEXE 1 : CONCLUSIONS ET RECOMMANDATIONS**

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## **ANNEX 1: CONCLUSIONS AND RECOMMENDATIONS**

**Special Commission on the  
practical operation of the  
1980 and 1996 Hague Conventions  
(1-10 June 2011)**



**Conclusions and Recommendations**

***adopted by the Special Commission***

**New Contracting States**

1. The Special Commission welcomes the increase since the 2006 meeting of the Special Commission in the number of Contracting States to the 1980<sup>1</sup> (from 76 to 85) and 1996<sup>2</sup> (from 13 to 32) Conventions, and the number of States that have signed the 1996 Convention (7). The Special Commission calls for further efforts by Contracting States and by the Permanent Bureau, through the provision of advice and assistance, to extend the numbers of Contracting States.
2. The Special Commission suggests that an informal network of experts be arranged to discuss strategies and challenges in the implementation of the 1996 Convention, for example, with discussion carried out through a "listserv" (a closed electronic list).

**Central Authority co-operation and communication under the 1980 Convention**

3. Efforts should be made to ensure that Central Authorities act as a focal point for the provision of services or the carrying out of functions contemplated under Article 7 of the 1980 Convention. When the Central Authority does not itself provide a particular service or carry out a particular function, it should preferably itself engage the body which provides that service or carries out that function. Alternatively, the Central Authority should at least make available information regarding the body, including how to make contact with the body.
4. The Special Commission re-emphasises the crucial importance of the Central Authorities' active role in locating the child who has been wrongfully removed or retained. Where the measures to discover the whereabouts of the child within a Contracting State are not taken directly by the Central Authority but are taken by an intermediary, the Central Authority should remain responsible for expediting communications with the intermediary and informing the requesting State of the progress of efforts to locate the child, and should continue to be the central channel for communication in this regard.
5. Contracting States that have not already done so are asked to provide their Central Authorities with sufficient powers to request, where needed for the purpose of locating the child, information from other governmental agencies and authorities, including the police and, subject to law, to communicate such information to the requesting Central Authority.
6. The Special Commission draws attention to the serious consequences for the operation of the 1980 Convention of failure to inform the Permanent Bureau promptly of changes in the contact details of Central Authorities. In addition, the Permanent Bureau should undertake to remind Central Authorities of their duty in this respect once a year.

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<sup>1</sup> The *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (hereinafter, the "1980 Convention").

<sup>2</sup> 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").

7. The Special Commission re-emphasises the need for close co-operation between Central Authorities in the processing of applications and the exchange of information under the 1980 Convention, and draws attention to the principles of “prompt responses” and “rapid communication” set out in the *Guide to Good Practice under the 1980 Convention – Part I – Central Authority Practice*.

8. The Special Commission welcomes the increasing co-operation within States between the member(s) of the International Hague Network of Judges and the relevant Central Authority resulting in the enhanced operation of the Convention.

9. Central Authorities are encouraged to continue to provide information about and facilitate direct judicial communications including, where there are language difficulties, through the provision of translation services where appropriate and feasible.

10. The Special Commission encourages the Permanent Bureau to continue its work (described in Info. Doc. No 4) to modernise the recommended Request for Return model form and to create a form that can be completed electronically. The Special Commission also requests that the Permanent Bureau continue its work to develop a standardised Request for Access form. The Special Commission requests that different language versions of the forms should be made available on the Hague Conference website. For this purpose, States are encouraged to provide the Permanent Bureau with translations.

11. The Special Commission encourages the use of information technology with a view to increasing the speed of communication and improving networking between Central Authorities.

12. The requesting Central Authority should ensure that the application is complete. In addition to the essential supporting documents, it is recommended that any other complementary information that may facilitate the assessment and resolution of the case accompany the application.

13. The Special Commission re-emphasises that –

- (a) in exercising their functions with regard to the acceptance of applications, Central Authorities should respect the fact that evaluation of factual and legal issues (such as habitual residence, the existence of rights of custody, or allegations of domestic violence) is, in general, a matter for the court or other competent authority deciding upon the return application;
- (b) the discretion of a Central Authority under Article 27 to reject an application when it is manifest that the requirements of the Convention are not fulfilled or that the application is otherwise not well founded should be exercised with extreme caution. The requested Central Authority should not reject an application solely on the basis that additional documents or information are needed. Close co-operation between the Central Authorities involved to ensure that relevant documentation is made available and to avoid undue delay in processing applications is strongly encouraged. The requested Central Authority may ask the requestor to provide these additional documents or information. If the requestor does not do so within a reasonable period specified by the requested Central Authority, the requested Central Authority may decide that it will no longer process the application.

14. Central Authorities are reminded of the valuable role that the Country Profile for the 1980 Convention is expected to play in enabling States to exchange information on the requirements for making an application in the requested State.

15. The Special Commission welcomes the increasingly important role played by Central Authorities in international child abduction cases to bring about an amicable resolution of the issues including through mediation. At the same time, the Special Commission recognises that the use of measures to this end should not result in delay.

16. The requested Central Authority should, as far as possible, keep the requesting Central Authority informed about the progress of proceedings and respond to reasonable requests for information from the requesting Central Authority. When the requested Central Authority has knowledge of a judgment or decision made in return or access proceedings, it should promptly communicate the judgment or decision to the requesting Central Authority, together with general information on timelines for any appeal, where appropriate.

#### **Rights of access / contact cases in the context of the 1980 Convention and / or 1996 Convention**

17. The Special Commission notes that in many Contracting States to the 1980 Convention applications concerning access under Article 21 are now processed in the same way as applications for return.

18. Central Authorities designated under the 1980 and / or 1996 Conventions are encouraged to take a pro-active and hands-on approach in carrying out their respective functions in international access / contact cases.

19. The Special Commission reaffirms the principles set out in the *General Principles and Guide to Good Practice on Transfrontier Contact Concerning Children* and strongly encourages Contracting States to the 1980 and 1996 Conventions to review their practice in international access cases in light of these principles, where necessary.

20. The Special Commission recognises that, pursuant to Articles 7(2) *b*) and 21 of the 1980 Convention, during pending return proceedings a requested Contracting State may provide for the applicant in the return proceedings to have contact with the subject child(ren) in an appropriate case.

#### **Statistics relating to the 1980 Convention**

21. The Special Commission acknowledges the great value of the "Statistical analysis of applications made in 2008 under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*" (Prel. Doc. No 8) carried out by Nigel Lowe and Victoria Stephens, and notes the increase in the number of Hague return applications, the marginally lower proportion of returns and the apparent increase in the time taken to conclude Hague return proceedings.

22. The Special Commission reaffirms Recommendation No 1.14 of the 2001 meeting of the Special Commission and Recommendation No 1.1.16 of the 2006 meeting of the Special Commission –

"Central Authorities are encouraged to maintain accurate statistics concerning the cases dealt with by them under the Convention, and to make annual returns of statistics to the Permanent Bureau in accordance with the standard forms established by the Permanent Bureau in consultation with Central Authorities."

23. The Special Commission recommends that one statistical questionnaire be developed that is capable of being completed online, and that combines the data currently sought for INCASTAT (the International Child Abduction Statistical Database) with the data last sought for the statistical analysis of cases arising in 2008. The Special Commission recommends that the Permanent Bureau, in conjunction with certain interested States Parties, explore the possibility of automated data migration to INCASTAT.

### **Country Profile for the 1980 Convention**

24. The Special Commission welcomes the development of the Country Profile for the 1980 Convention and the important improvement it makes to the exchange of information between Central Authorities.

25. All Contracting States that have not yet completed the Country Profile are strongly encouraged to do so as soon as possible.

26. The Special Commission recommends that Contracting States regularly update their Country Profile to ensure that the information remains current. The Permanent Bureau will send an annual reminder to Contracting States in this regard.

27. The Country Profile does not replace the Standard Questionnaire for Newly Acceding States. However, all newly acceding and ratifying States are encouraged to complete the Country Profile as soon as possible following their accession to or ratification of the 1980 Convention.

### **Information and training visits for newly acceding / ratifying States and States considering accession to or ratification of the 1980 Convention**

28. Immediately following a State becoming Party to the 1980 Convention (or, in an appropriate case, where a State is preparing to do so or has expressed a strong interest in doing so), the State in question should be offered, by way of a standard letter from the Permanent Bureau, the opportunity to visit an experienced Contracting State to the 1980 Convention for the purpose of gaining knowledge and understanding regarding the effective practical operation of the 1980 Convention.

29. The Permanent Bureau will maintain a list of all experienced Contracting States willing to accept such a visit and, when a newly acceding / ratifying (or interested) State responds positively to an offer, will provide details of Contracting States prepared to receive the newly acceding / ratifying (or interested) State for the two States concerned to organise and arrange the visit.

### **Immigration issues in the context of the 1980 Convention**

30. In order to prevent immigration issues from obstructing the return of the child, Central Authorities and other competent authorities should where possible clarify the child's nationality and whether the child is in possession of the necessary travel documents as early as possible during the return procedure. When making a contact order, judges should bear in mind that there might be immigration issues that need to be resolved before contact can take place as ordered.

31. Where there is any indication of immigration difficulties which may affect the ability of a (non-citizen) child or taking parent to return to the requesting State or for a person to exercise contact or rights of access, the Central Authority should respond promptly to requests for information to assist a person in obtaining from the appropriate authorities within its jurisdiction without delay such clearances or permissions (visas) as are necessary. States should act as expeditiously as possible when issuing clearances or visas for this purpose and should impress upon their national immigration authorities the essential role that they play in the fulfilment of the objectives of the 1980 Convention.

### **Access to justice in the context of the 1980 Convention**

32. The Special Commission highlights the importance of ensuring effective access to justice for both parties in return and access proceedings, as well as for the child where appropriate, while recognising that the means of ensuring such effective access may vary from State to State, particularly for Contracting States that have made a reservation under Article 26 of the Convention.



33. The Special Commission emphasises that the difficulty in obtaining legal aid at first instance or an appeal, or of finding an experienced lawyer for the parties, may result in delays and may produce adverse effects for the child as well as for the parties. The important role of the Central Authority in helping an applicant to obtain legal aid quickly or to find experienced legal representatives is recognised.

34. The Special Commission acknowledges the importance of ensuring effective access to justice for both parties, as well as the child where appropriate, in custody proceedings following the return of the child, while recognising that the means of ensuring such effective access may vary from State to State.

### **Domestic and family violence in the context of the 1980 Convention**

35. The Special Commission notes that a large number of jurisdictions are addressing issues of domestic and family violence as a matter of high priority including through awareness raising and training.

36. Where Article 13(1) *b*) of the 1980 Convention is raised concerning domestic or family violence, the allegation of domestic or family violence and the possible risks for the child should be adequately and promptly examined to the extent required for the purposes of this exception.

37. The Special Commission affirms its support for promoting greater consistency in dealing with domestic and family violence allegations in the application of Article 13(1) *b*) of the 1980 Convention.

38. The Special Commission considered three proposals for future work with a view to promoting consistency in the interpretation and application of Article 13(1) *b*) of the 1980 Convention, and in the treatment of issues of domestic and family violence raised in return proceedings under the Convention. These were –

- (a) a proposal that includes, among others, the drafting of a Guide to Good Practice on the implementation of Article 13(1) *b*) (Work. Doc. No 1);
- (b) a proposal to establish a working group, drawn in particular from the International Hague Network of Judges, to consider the feasibility of developing an appropriate tool to assist in the consideration of the grave risk of harm exception (Work. Doc. No 2);
- (c) a proposal to establish a group of experts, including in particular judges, Central Authority experts and experts in the dynamics of domestic violence, to develop principles or a practice guide on the management of domestic violence allegations in Hague return proceedings (Prel. Doc. No 9, para. 151).

Further consideration of these proposals was deferred until Part II of the meeting of the Special Commission.

### **Facilitating the safe return of the child and the accompanying parent, where relevant (1980 and 1996 Conventions)**

39. The Special Commission recognises the value of the assistance provided by the Central Authorities and other relevant authorities, under Articles 7(2) *d*), *e*) and *h*) and 13(3), in obtaining information from the requesting State, such as police, medical and social workers' reports and information on measures of protection and arrangements available in the State of return.

40. The Special Commission also recognises the value of direct judicial communications, in particular through judicial networks, in ascertaining whether protective measures are available for the child and the accompanying parent in the State to which the child is to be returned.

41. It was noted that the 1996 Convention provides a jurisdictional basis, in cases of urgency, for taking measures of protection in respect of a child, also in the context of return proceedings under the 1980 Convention. Such measures are recognised and may be declared enforceable or registered for enforcement in the State to which the child is returned provided that both States concerned are Parties to the 1996 Convention.

42. In considering the protection of the child under the 1980 and 1996 Conventions regard should be given to the impact on a child of violence committed by one parent against the other.

43. The Special Commission welcomes the decision of the 2011 Council on General Affairs and Policy of the Hague Conference "to add to the Agenda of the Conference the topic of the recognition of foreign civil protection orders made, for example, in the context of domestic violence cases, and ... [to instruct] the Permanent Bureau to prepare a short note on the subject to assist the Council in deciding whether further work on this subject is warranted." The Special Commission recommends that account should be taken of the possible use of such orders in the context of the 1980 Convention.

#### **Rights of custody (1980 Convention)**

44. The Special Commission reaffirms that Convention terms such as "rights of custody" should be interpreted having regard to the autonomous nature of the Convention and in the light of its objectives.

45. In relation to the autonomous Convention meaning of the term "rights of custody", the Special Commission takes notice of *Abbott v. Abbott*, 130 S.Ct. 1983 (2010), which supports the view that a right of access combined with a right to determine the residence of the child constitutes a "right of custody" for the purposes of the Convention and acknowledges that it is a significant contribution towards achieving consistency on an international level regarding its interpretation.

46. The Special Commission recognises the considerable utility of the Country Profile and direct judicial communications in helping to determine the law of the State of the child's habitual residence for the purpose of establishing whether an applicant in return proceedings has "rights of custody" within the meaning of the Convention.

#### **Jurisprudence of the European Court of Human Rights (1980 Convention)**

47. The Special Commission notes that the European Court of Human Rights has in decisions taken over many years expressed strong support for the 1980 Convention, typified by a statement made in the case of *Maumousseau and Washington v. France* (No 39388/05, ECHR 2007 XIII) that the Court was "entirely in agreement with the philosophy underlying the Hague Convention".

48. The Special Commission notes the serious concerns which have been expressed in relation to language used by the court in its recent judgments in *Neulinger and Shuruk v. Switzerland* (Grand Chamber, No 41615/07, 6 July 2010) and *Raban v. Romania* (No 25437/08, 26 October 2010) in so far as it might be read "as requiring national courts to abandon the swift, summary approach that the Hague Convention envisages, and to move away from a restrictive interpretation of the Article 13 exceptions to a thorough, free-standing assessment of the overall merits of the situation" (per the President of the European Court of Human Rights, extra-judicially (Info. Doc. No 5)).

49. The Special Commission notes the recent extrajudicial statement made by the President of the European Court of Human Rights (see above) in which he states that the decision in *Neulinger and Shuruk v. Switzerland* does not signal a change of direction for the court in the area of child abduction, and that the logic of the Hague Convention is that a child who has been abducted should be returned to the State of his / her habitual residence and it is only there that his / her situation should be reviewed in full.

#### **The child's voice / opinions in return and other proceedings (1980 and 1996 Conventions)**

50. The Special Commission welcomes the overwhelming support for giving children, in accordance with their age and maturity, an opportunity to be heard in return proceedings under the 1980 Convention independently of whether an Article 13(2) defense has been raised. The Special Commission notes that States follow different approaches in their national law as to the way in which the child's views may be obtained and introduced into the proceedings. At the same time the Special Commission emphasises the importance of ensuring that the person who interviews the child, be it the judge, an independent expert or any other person, should have appropriate training for this task where at all possible. The Special Commission recognises the need for the child to be informed of the ongoing process and possible consequences in an appropriate way considering the child's age and maturity.

51. The Special Commission notes that an increasing number of States provide for the possibility of separate legal representation of a child in abduction cases.

#### **Guides to Good Practice (1980 and 1996 Conventions)**

52. The Special Commission recognises the value of all parts of the Guide to Good Practice under the 1980 Convention and the *General Principles and Guide to Good Practice on Transfrontier Contact Concerning Children* under the 1980 and 1996 Conventions. It encourages the wide dissemination of the Guides. The Special Commission encourages States to consider how best to disseminate the Guides within their States and, in particular, to the persons involved in implementing and operating the Conventions.

#### **The Practical Handbook on the 1996 Convention**

53. The Special Commission welcomes the revised Draft Practical Handbook on the 1996 Convention (Prel. Doc. No 4) as a valuable document which provides beneficial guidance to persons involved in implementing and operating the Convention.

54. The Special Commission recommends that the Permanent Bureau, in consultation with experts, make amendments to the revised Draft Practical Handbook, in light of the comments provided at the Special Commission meeting.

55. The Special Commission looks forward to the publication of the Practical Handbook on the 1996 Convention following this final revision process.

#### **INCADAT (the International Child Abduction Database) and INCASTAT: extension to the 1996 Convention**

56. The Special Commission recognises the great value of INCADAT and welcomes further exploration of the extension of INCADAT to the 1996 Convention. The Special Commission suggests further exploration of the desirability and feasibility of the extension of INCASTAT to the 1996 Convention.

## **Mediation**

57. The Special Commission notes the many developments in the use of mediation in the context of the 1980 Convention.

58. The Special Commission welcomes the draft Guide to Good Practice on Mediation under the 1980 Convention. The Permanent Bureau is requested to make revisions to the Guide in light of the discussions of the Special Commission, taking account also of the advice of experts. Consideration will be given to the inclusion of examples of mediated agreements. The revised version will be circulated to Members and Contracting States for final consultations.

59. The Guide will be published in a form which allows updating.

60. The Special Commission expresses appreciation for the work carried out by the Working Party on Mediation in the context of the Malta Process and welcomes the *Principles for the establishment of mediation structures in the context of the Malta Process* (Prel. Doc. No 6).

61. The Special Commission notes the efforts already being made in certain States to establish a Central Contact Point in accordance with the Principles. States are encouraged to consider the establishment of such a Central Contact Point or the designation of their Central Authority as a Central Contact Point. The contact details of Central Contact Points are available on the Hague Conference website.

62. The Special Commission notes the request of the 2011 Council on General Affairs and Policy of the Hague Conference that the Working Party should continue to work on the implementation of mediation structures and, in particular, with the support of the Permanent Bureau, and in light of discussions in the Special Commission –

- “to facilitate wider acceptance and implementation of the Principles as a basic framework for progress;
- to consider further elaboration of the Principles; and,
- to report to the Council in 2012 on progress”. (See the Conclusions and Recommendations adopted by the Council on General Affairs and Policy of the Conference (5-7 April 2011).)

## **Article 15 of the 1980 Convention**

63. The Special Commission records the problems, including delays, that were identified in the operation of Article 15. It recommends that the Permanent Bureau give further consideration to the steps which may be taken to ensure a more effective application of the Article.

## **Judicial communications (1980 Convention)**

64. The Special Commission welcomes the extraordinary growth in the International Hague Network of Judges in the period from 2006 to 2011 which now includes more than 65 judges from 45 States. States that have not yet designated Hague Network judges are strongly encouraged to do so.

65. The Special Commission also welcomes the actions taken by States and regional organisations nationally and regionally regarding the establishment of judicial networks and the promotion of judicial communications.

66. The Special Commission emphasises the importance of direct judicial communications in international child protection and international child abduction cases.

*Respective roles of judges and Central Authorities*

67. The Special Commission reaffirms Recommendations Nos 1.6.4 and 1.6.5 of the 2006 meeting of the Special Commission –

“The Special Commission recognises that, having regard to the principle of the separation of powers, the relationship between judges and Central Authorities can take different forms.

The Special Commission continues to encourage meetings involving judges and Central Authorities at a national, bilateral or multilateral level as a necessary part of building a better understanding of the respective roles of both institutions.”

*Emerging Guidance and General Principles for Judicial Communications*

68. The Special Commission gives its general endorsement to the Emerging Guidance and General Principles for Judicial Communications contained in Preliminary Document No 3 A, subject to the Permanent Bureau revising the document in light of the discussions within the Special Commission.

*Legal basis for direct judicial communications*

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.

*Effective secured electronic communications*

71. The Special Commission notes the exploratory work of the Permanent Bureau regarding the implementation of a pilot project for effective secured electronic communications, in particular for members of the International Hague Network of Judges.

*Actions to be undertaken by the Permanent Bureau*

72. In relation to future work, the Permanent Bureau in the light of the observations made during the meeting will –

- (a) explore further the development of secured systems of communications, such as secured video-conferencing, in particular for members of the International Hague Network of Judges;
- (b) continue to develop contacts with other judicial networks, to promote the establishment of regional judicial networks, as well as consistency in the safeguards applied in relation to direct judicial communications;
- (c) continue to 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; and,
- (d) draw up a short information document for judges on direct judicial communications.

**The Judges' Newsletter on International Child Protection**

73. The Special Commission supports the continued publication of *The Judges' Newsletter on International Child Protection* and expresses its appreciation to LexisNexis for its support in publishing and distributing the Newsletter.

74. The Special Commission urges that every effort should be made to make the Newsletter available in Spanish and encourages States to consider providing support for this purpose.

**Conferences**

75. The Special Commission re-emphasises the importance of inter-disciplinary judicial conferences and seminars and the contribution they make to the effective functioning of the 1980 and 1996 Conventions. The Special Commission encourages States to support and provide continued funding for such meetings and other meetings in support of the consistent application of the Conventions.

**ANNEXE 2 : DOCUMENT DE TRAVAIL NO 1  
(DISPONIBLE EN ANGLAIS UNIQUEMENT)**

**\* \* \***

**ANNEX 2: WORKING DOCUMENT NO 1**

**Special Commission on the  
practical operation of the  
1980 and 1996 Hague Conventions  
(1-10 June 2011)**



**WORK. DOC. No 1 E**

**Distribution:** 3 June 2011

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**Proposal of the delegations of Argentina, Chile, Colombia, the Dominican Republic, Ecuador, Guatemala, Mexico, Panama, Paraguay, Uruguay and Venezuela on domestic violence**

1. The States Parties, specially the Judicial Authorities, shall consider domestic violence allegations carefully, in the understanding that its sole argumentation does not amount to the exception contained in Article 13 *b*).
2. In order to determine whether a child may be exposed to a situation of grave risk, if returned, the evidence put forth shall be conclusive. Said evidence shall be produced taking into consideration the principles of urgency and celerity inherent to return proceedings.
3. Once the question of domestic violence has been raised, either with regards to the child or to the taking parent, the judge shall consider whether such circumstances may place the child in danger of physical or psychological harm. Not every incident of domestic violence will reach the standard of Article 13 *b*).
4. It should be noted that the evaluation of the evidence and the determination of the appropriateness of the return is an exclusive matter of the courts.
5. The Special Commission recommends the drafting of a Guide to Good Practices about the implementation of Article 13 *b*).



**ANNEXE 3 : DOCUMENT DE TRAVAIL NO 2**

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**ANNEX 3: WORKING DOCUMENT NO 2**

**Special Commission on the  
practical operation of the  
1980 and 1996 Hague Conventions  
(1-10 June 2011)**



**WORK. DOC. No 2 E & F**

**Distribution:** 3 June 2011

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**Proposal of the delegation of Canada on the issue of Article 13 b)**

Recognising that the interpretation and application of the grave risk of harm exception is a matter for the judicial authorities, Canada proposes –

1. The establishment of a Working Group of representatives of the International Hague Network of Judges to consider the feasibility of developing an appropriate tool to assist in the consideration of the grave risk of harm exception.
2. The Working Group should be assisted by Central Authority experts and other experts on the dynamics of domestic violence and this work should be facilitated by the Permanent Bureau.

\* \* \*

**Proposition de la délégation du Canada concernant l'article 13 b)**

Reconnaissant que l'interprétation et l'application de l'exception fondée sur le risque grave de danger relèvent des autorités judiciaires, le Canada propose ce qui suit :

1. La création d'un groupe de travail composé de représentants du Réseau international de juges de La Haye qui se penchera sur la faisabilité d'élaborer un outil approprié pour aider dans l'appréciation de l'exception fondée sur le risque grave de danger.
2. Le groupe de travail devrait faire appel à des experts des Autorités centrales et à d'autres experts dans le domaine de la violence familiale. Le Bureau Permanent devrait apporter son soutien aux travaux du groupe.

**ANNEXE 4 : DOCUMENT DE TRAVAIL NO 3  
(DISPONIBLE EN ANGLAIS ET ESPAGNOL UNIQUEMENT)**

**\* \* \***

**ANNEX 4: WORKING DOCUMENT NO 3**

**Special Commission on the  
practical operation of the  
1980 and 1996 Hague Conventions  
(1-10 June 2011)**



**WORK. DOC. No 3 E & S**

**Distribution:** 3 June 2011

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**Proposal of the delegations of Argentina, Brazil, Chile, Colombia,  
the Dominican Republic, Guatemala, Mexico, Panama, Paraguay, Uruguay and  
Venezuela on custody rights**

The Special Commission would like to emphasise the need of taking into consideration the law of the State of the child's habitual residence in order to give proper meaning to the concept of custody rights pursuant to the Convention.

For that purpose, notice should be taken of the concept of custody included in Article 1 of the "Model Law on Procedure for the Application of the Conventions on International Child Abduction": "... rights of custody shall include rights relating to the care of the person of the child and the right to determine the child's place of residence - including his/her removal to a foreign country - under the law of the State of the child's habitual residence. Such right may arise by operation of law, by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of such State".

Said concept corresponds with the interpretation provided by the Supreme Court of the United States of America in the *Abbott* case, which this Commission recognises as useful.

\* \* \*

**Propuesta de las delegaciones de Argentina, Brasil, Chile, Colombia, República Dominicana, Guatemala, México, Panamá, Paraguay, Uruguay y Venezuela sobre derecho de custodia**

La Comisión Especial enfatiza la necesidad de tomar en cuenta el derecho vigente del Estado de residencia habitual del menor para dotar de contenido y sentido apropiado al concepto de custodia a que hace referencia el Convenio.

A tales efectos, se tomará en cuenta el concepto de custodia contenido en el Artículo 1 de la "Ley Modelo sobre Normas Procesales para la aplicación de los Convenios sobre Sustracción Internacional de Niños": "...se entiende por derecho de guarda o de custodia, aquel comprensivo del derecho de cuidado y a decidir sobre el lugar de residencia del niño - incluyendo su traslado al extranjero - de conformidad con la ley del Estado de su residencia habitual. Tal derecho puede resultar de una aplicación de pleno derecho, de una decisión judicial o administrativa o de un acuerdo vigente según el derecho de dicho Estado".

Tal concepto es coincidente con la interpretación brindada por la Corte Suprema de Justicia de Estados Unidos de América en el caso *Abbot*, cuya utilidad esta Comisión reconoce.

**ANNEXE 5 : CONCLUSIONS ET RECOMMANDATIONS ADOPTÉES PAR LA  
COMMISSION SPÉCIALE D'OCTOBRE – NOVEMBRE 2006**

**\* \* \***

**ANNEX 5: CONCLUSIONS AND RECOMMENDATIONS ADOPTED BY THE SPECIAL  
COMMISSION OF OCTOBER-NOVEMBER 2006**

novembre / November 2006

## **CONCLUSIONS ET RECOMMANDATIONS**

**DE LA CINQUIÈME RÉUNION DE LA COMMISSION SPÉCIALE SUR  
LE FONCTIONNEMENT DE LA CONVENTION DE LA HAYE DU 25 OCTOBRE 1980  
SUR LES ASPECTS CIVILS DE L'ENLÈVEMENT INTERNATIONAL D'ENFANTS  
ET LA MISE EN ŒUVRE DE LA CONVENTION DE LA HAYE DU 19 OCTOBRE 1996  
CONCERNANT LA COMPÉTENCE, LA LOI APPLICABLE, LA RECONNAISSANCE,  
L'EXÉCUTION ET LA COOPÉRATION EN MATIÈRE DE RESPONSABILITÉ PARENTALE  
ET DE MESURES DE PROTECTION DES ENFANTS  
(30 OCTOBRE – 9 NOVEMBRE 2006)**

*adoptées par la Commission spéciale*

\* \* \*

## **CONCLUSIONS AND RECOMMENDATIONS**

**OF THE FIFTH MEETING OF THE SPECIAL COMMISSION TO REVIEW THE OPERATION  
OF THE HAGUE CONVENTION OF 25 OCTOBER 1980  
ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION  
AND THE PRACTICAL IMPLEMENTATION OF 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  
(30 OCTOBER – 9 NOVEMBER 2006)**

*adopted by the Special Commission*

## **CONCLUSIONS ET RECOMMANDATIONS**

**DE LA CINQUIÈME RÉUNION DE LA COMMISSION SPÉCIALE SUR  
LE FONCTIONNEMENT DE LA CONVENTION DE LA HAYE DU 25 OCTOBRE 1980  
SUR LES ASPECTS CIVILS DE L'ENLÈVEMENT INTERNATIONAL D'ENFANTS  
ET LA MISE EN ŒUVRE DE LA CONVENTION DE LA HAYE DU 19 OCTOBRE 1996  
CONCERNANT LA COMPÉTENCE, LA LOI APPLICABLE, LA RECONNAISSANCE,  
L'EXÉCUTION ET LA COOPÉRATION EN MATIÈRE DE RESPONSABILITÉ PARENTALE  
ET DE MESURES DE PROTECTION DES ENFANTS  
(30 OCTOBRE – 9 NOVEMBRE 2006)**

*adoptées par la Commission spéciale*

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## **CONCLUSIONS AND RECOMMENDATIONS**

**OF THE FIFTH MEETING OF THE SPECIAL COMMISSION TO REVIEW THE OPERATION  
OF THE HAGUE CONVENTION OF 25 OCTOBER 1980  
ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION  
AND THE PRACTICAL IMPLEMENTATION OF 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  
(30 OCTOBER – 9 NOVEMBER 2006)**

*adopted by the Special Commission*

## INTRODUCTION

The Special Commission met in the context of important developments since the Fourth meeting of the Special Commission to review the operation of the 1980 Convention in March 2001:

- Firstly, the number of Contracting States to the 1980 Convention had grown from 66 to 76, including new States from three continents, indicating the expanding global scope of the Convention.
- Secondly, all of these were acceding States, and, not having taken part in the original negotiations, new to the Convention. In a growing number of cases this gave rise to issues relating to the implementation of the Convention, including the need to provide technical assistance and training.
- Thirdly, the trend already noticed by the Fourth Special Commission in 2001 that approximately 2/3 of the taking parents were primary caretakers, mostly mothers, had confirmed itself, giving rise to issues which had not been foreseen by the drafters of the Convention.
- Fourthly, since the Fourth Special Commission meeting, the 1996 Convention on the International Protection of Children had come into force at the global level (1 January 2002). Thirteen States were now parties to the 1996 Convention, and a further 18 States had signed the Convention. Of these 31 States, 29 were also Parties to the 1980 Convention.\*
- Fifthly, at the regional level, the Brussels II *bis* Regulation, which is designed to facilitate the return of children further, and many of whose provisions were inspired by the 1996 Convention, took effect on 1 March 2005. At the same time important initiatives to promote the 1996 Convention and good practice in relation to the 1980 Convention were underway in Latin America, Africa, the Asian Pacific region, and in the framework of the Malta process.
- Finally, important new initiatives had seen the light in respect of cross-border mediation and direct cross-border co-operation among judges.

## CHAPTER I – OPERATION OF THE 1980 CONVENTION

### PART I – THE ROLE AND FUNCTIONS OF CENTRAL AUTHORITIES

#### *Role of the requesting and requested Central Authorities in handling applications*

- 1.1.1 The problem of legal concepts being mistranslated or misunderstood may be eased if the requesting Central Authority provides a summary of the relevant law concerning rights of custody. This summary would be in addition to a translation or copy of the relevant law.
- 1.1.2 In exercising their functions with regard to the transmission or acceptance of applications, Central Authorities should be aware of the fact that evaluation of certain factual and legal issues (for example, relating to habitual residence or the existence of custody rights) is a matter for the court or other authority deciding upon the return application.

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\* Following the meeting of the Special Commission, Romania, also a Party to the 1980 Convention, signed the 1996 Convention on 15 November 2006.



- 1.1.3 The discretion of a Central Authority under Article 27 to reject an application that is manifestly not well-founded should be exercised with extreme caution.

*Legal aid and representation*

- 1.1.4 The importance for the applicant of having effective access to legal aid and representation in the requested country is emphasised. Effective access implies:
- a) the availability of appropriate advice and information which takes account of the special difficulties arising from unfamiliarity with language or legal systems;
  - b) the provision of appropriate assistance in instituting proceedings;
  - c) that lack of adequate means should not be a barrier to receiving appropriate legal representation.
- 1.1.5 The Central Authority should, in accordance with Article 7 g), do everything possible to assist the applicant to obtain legal aid or representation.
- 1.1.6 The Special Commission recognises that the impossibility of, or delays in, obtaining legal aid both at first instance and at appeal, and / or in finding an experienced lawyer for the parties, can have adverse effects on the interests of the child as well as on the interests of the parties. In particular the important role of the Central Authority in helping an applicant to obtain legal aid quickly or to find an experienced legal representative is recognised.

*Language and translation issues*

- 1.1.7 States are reminded of the terms of Article 24 and the possibility that a requesting State may send an application in either English or French when a translation into the official language or an official language of the requested State is not possible.
- 1.1.8 As a matter of co-operation between Central Authorities, it would be desirable, in the circumstances foreseen by Article 24, for the requesting State to communicate with the requested State regarding any difficulties it has with the translation of the application. The Special Commission invites States to consider the possibility of agreeing arrangements for a translation of the application to be made in the requested State, while the cost is borne by the requesting State.

*Information exchange, training and networking among Central Authorities*

- 1.1.9 The Special Commission recognises the advantages and benefits to the operation of the Convention from information exchange, training and networking among Central Authorities. To this end, it encourages Contracting States to ensure that adequate levels of financial, human and material resources are, and continue to be, provided to Central Authorities.
- 1.1.10 The Special Commission supports efforts directed at improving networking among Central Authorities. The value of conference calls to hold regional meetings of Central Authorities is recognised.

### *Country profiles*

- 1.1.11 The Special Commission recognises the value of having information concerning the relevant national laws and procedures readily accessible to all States, and endorses the development of country profiles for this purpose. Contracting States should exclusively be responsible for updating the information contained in the country profiles. It is recommended that a Working Group facilitated by the Permanent Bureau develop a country profile form and that States representing a range of different experience, capacities and legal systems be represented on the Working Group. Those States include: Argentina, Australia, Bahamas, Belgium, Brazil, Canada, Chile, France, Portugal, South Africa, Spain, Sweden, the United Kingdom and the United States of America. The draft country profile should be circulated to all Contracting States for their comments before its publication on the Hague Conference website.

### *Ensuring the safe return of children*

- 1.1.12 The Special Commission reaffirms the importance of Recommendation 1.13 of the Special Commission meeting of 2001:

*"To the extent permitted by the powers of their Central Authority and by the legal and social welfare systems of their country, Contracting States accept that Central Authorities have an obligation under Article 7 h) to ensure appropriate child protection bodies are alerted so they may act to protect the welfare of children upon return in certain cases where their safety is at issue until the jurisdiction of the appropriate court has been effectively invoked.*

*It is recognised that, in most cases, a consideration of the child's best interests requires that both parents have the opportunity to participate and be heard in custody proceedings. Central Authorities should therefore co-operate to the fullest extent possible to provide information in respect of legal, financial, protection and other resources in the requesting State, and facilitate timely contact with these bodies in appropriate cases.*

*The measures which may be taken in fulfilment of the obligation under Article 7 h) to take or cause to be taken an action to protect the welfare of children may include, for example:*

- a) alerting the appropriate protection agencies or judicial authorities in the requesting State of the return of a child who may be in danger;*
- b) advising the requested State, upon request, of the protective measures and services available in the requesting State to secure the safe return of a particular child;*
- c) encouraging the use of Article 21 of the Convention to secure the effective exercise of access or visitation rights.*

*It is recognised that the protection of the child may also sometimes require steps to be taken to protect an accompanying parent."*

The Special Commission affirms the important role that may be played by the requesting Central Authority in providing information to the requested Central Authority about services or facilities available to the returning child and parent in the requesting country. This should not unduly delay the proceedings.

### *Use of standardised forms*

- 1.1.13 The Special Commission reaffirms the Recommendation of the Fourteenth Session of the Conference to use the standard Request for Return form.

1.1.14 The Special Commission recommends that the Permanent Bureau, in consultation with Contracting States, up-dates the standard Request for Return form.

1.1.15 The Special Commission encourages Central Authorities to use the sample forms and checklists set out in Appendix 3 to the Guide to Good Practice under the Child Abduction Convention: Part I – Central Authority Practice.

*Case management and maintenance of statistics*

1.1.16 The Special Commission reaffirms Recommendation No 1.14 of the 2001 meeting of the Special Commission:

*"Central Authorities are encouraged to maintain accurate statistics concerning the cases dealt with by them under the Convention, and to make annual returns of statistics to the Permanent Bureau in accordance with the standard forms established by the Permanent Bureau in consultation with Central Authorities."*

1.1.17 In this respect, the Special Commission welcomes the results of the iChild case management software pilot project and invites Central Authorities to consider the implementation of iChild.

1.1.18 The Special Commission also welcomes the development of INCASTAT, the statistical database for the 1980 Convention and invites all Central Authorities to make their annual returns of statistics using the database for which user names and passwords will be distributed in the near future.

1.1.19 The Special Commission, in order to promote the collection of more accurate statistics, approves the proposed amendments<sup>1</sup> to the existing Annual Statistical Forms.

1.1.20 The Special Commission expresses its gratitude to the Member States who have, through the Supplementary Budget, supported the developments of iChild and INCASTAT, and to WorldReach Software Corporation for its generosity in supporting the iChild project.

1.1.21 The Special Commission welcomes the Statistical Analysis of Applications made in 2003 under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*.<sup>2</sup> It expresses its appreciation to the authors of the Report, and to the Nuffield Foundation which provided the funding.

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<sup>1</sup> Set out in Appendix C of Prel. Doc. No 9, "Report on the iChild pilot and the development of the international child abduction statistical database, INCASTAT – Technology Systems in support of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*", October 2006.

<sup>2</sup> N. Lowe, E. Atkinson, K. Horosova and S. Patterson, "A statistical analysis of applications made in 2003 under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*", Prel. Doc. No 3 of October 2006.

## PART II – PREVENTIVE MEASURES

### *The Guide to Good Practice on Preventive Measures*

- 1.2.1 The Special Commission welcomes the publication of Part III of the Guide to Good Practice on Preventive Measures.
- 1.2.2 The Special Commission recommends that Part III of the Guide to Good Practice on Preventive Measures be widely promulgated particularly to governments of Contracting States, judges, lawyers, mediators, border control officers, passport authorities and other relevant authorities and organisations.

### *Standardised or recommended permission form*

- 1.2.3 The Permanent Bureau is requested to continue to explore the feasibility and the development of a standardised or recommended permission form in consultation with Contracting States and in co-operation with relevant international organisations which regulate international travel. The Special Commission recognises that it is necessary to have regard in the first instance to the purpose and content of the form. It was agreed that such a form would not be designed to introduce any new substantive rules but rather to operate within existing systems. The form would be non-binding and non-obligatory.

## PART III – PROMOTING AGREEMENT

### *Securing the voluntary return of the child*

- 1.3.1 The Special Commission reaffirms Recommendations 1.10 and 1.11 of the 2001 meeting of the Special Commission:

*"1.10 Contracting States should encourage voluntary return where possible. It is proposed that Central Authorities should as a matter of practice seek to achieve voluntary return, as intended by Article 7 c) of the Convention, where possible and appropriate by instructing to this end legal agents involved, whether state attorneys or private practitioners, or by referral of parties to a specialist organisation providing an appropriate mediation service. The role played by the courts in this regard is also recognised.*

*1.11 Measures employed to assist in securing the voluntary return of the child or to bring about an amicable resolution of the issues should not result in any undue delay in return proceedings".*

### *Mediation*

- 1.3.2 The Special Commission welcomes the mediation initiatives and projects which are taking place in Contracting States in the context of the 1980 Hague Convention, many of which are described in Preliminary Document No 5.<sup>3</sup>
- 1.3.3 The Special Commission invites the Permanent Bureau to continue to keep States informed of developments in the mediation of cross-border disputes concerning contact and abduction. The Special Commission notes that the Permanent Bureau is continuing its work on a more general feasibility study on cross-border mediation in family matters including the possible development of an instrument on the subject, mandated by the Special Commission on General Affairs and Policy of April 2006.

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<sup>3</sup> S. Vigers, "Note on the development of mediation, conciliation and similar means to facilitate agreed solutions in transfrontier family disputes concerning children especially in the context of the Hague Convention of 1980", Prel. Doc. No 5 of October 2006.

## PART IV – PROCEEDINGS FOR RETURN

### *Speed of Hague procedures, including appeals*

- 1.4.1 The Special Commission reaffirms Recommendations 3.3 to 3.5 of the of the 2001 meeting of the Special Commission:

*"3.3 The Special Commission underscores the obligation (Article 11) of Contracting States to process return applications expeditiously, and that this obligation extends also to appeal procedures.*

*3.4 The Special Commission calls upon trial and appellate courts to set and adhere to timetables that ensure the speedy determination of return applications.*

*3.5 The Special Commission calls for firm management by judges, both at trial and appellate levels, of the progress of return proceedings."*

### *Article 13, paragraph 1 b)*

- 1.4.2 The Special Commission reaffirms Recommendation 4.3 of the 2001 meeting of the Special Commission:

*"The Article 13, paragraph 1 b), "grave risk" defence has generally been narrowly construed by courts in the Contracting States, and this is confirmed by the relatively small number of return applications which were refused on this basis ...".*

## PART V – ENFORCEMENT OF RETURN AND CONTACT ORDERS

- 1.5.1 The Special Commission encourages support for the principles of good practice set out in Preliminary Document No 7.<sup>4</sup>

- 1.5.2 The Special Commission recommends that the Permanent Bureau be invited to draw up a draft Guide to Good Practice on Enforcement Issues based on Preliminary Document No 7 which takes into account the discussions on the proposed principles during the Fifth Meeting of the Special Commission and any additional information received on experiences in Contracting States. The draft should be completed with the assistance of a group of experts. As a starting point, this group should include Nigel Lowe (Consultant to the Permanent Bureau), Irène Lambreth (Belgium), Sandra Zed Finess (Canada), Suzanne Lee Kong Yin (China – Hong Kong SAR), Peter Beaton (European Community – Commission), Markku Helin (Finland), Eberhard Carl (Germany), Leslie Kaufmann (Israel), Peter Boshier (New Zealand), Petunia Seabi (South Africa), Mariano Banos (United States of America) and Ricardo Pérez Manrique (Uruguay). Before publication, the draft Guide to Good Practice should be circulated to Member States of the Hague Conference as well as other Contracting States of the 1980 Hague Convention for their comments.

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<sup>4</sup> A. Schulz, "Enforcement of orders made under the 1980 Convention – Towards principles of good practice", Prel. Doc. No 7 of October 2006.

- 1.5.3 The Special Commission welcomes the comparative legal study carried out by the Permanent Bureau and the empirical study carried out by Professor Lowe on the enforcement of orders made under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*.<sup>5</sup> It expresses its appreciation to the authors of the studies, and to the International Centre for Missing and Exploited Children which provided the funding for the empirical study.

## PART VI – JUDICIAL COMMUNICATIONS

- 1.6.1 The Special Commission expresses support for the developments outlined in Preliminary Document No 8.<sup>6</sup>
- 1.6.2 The Special Commission acknowledges that effective functioning of the 1980 Hague Convention depends on the concerted efforts of all interveners in matters of international child abduction, including judges and Central Authorities on internal and international levels.

### *Direct judicial communications*

- 1.6.3 The Special Commission reaffirms Recommendations No 5.5 and 5.6 of the 2001 meeting of the Special Commission, and underlines that direct judicial communications should respect the laws and procedures of the jurisdictions involved.

*"5.5 Contracting States are encouraged to consider identifying a judge or judges or other persons or authorities able to facilitate at the international level communications between judges or between a judge and another authority.*

*5.6 Contracting States should actively encourage international judicial co-operation. This takes the form of attendance of judges at judicial conferences by exchanging ideas/communications with foreign judges or by explaining the possibilities of direct communication on specific cases.*

*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."*

### *Respective roles of judges and Central Authorities*

- 1.6.4 The Special Commission recognises that, having regard to the principle of the separation of powers, the relationship between judges and Central Authorities can take different forms.

<sup>5</sup> A. Schulz, "Enforcement of orders made under the 1980 Convention – A comparative legal study", Prel. Doc. No 6 of October 2006; N. Lowe, S. Patterson and K. Horosova, "Enforcement of orders made under the 1980 Convention – An empirical study", Info. Doc. No 1 of October 2006 (available in English only).

<sup>6</sup> P. Lortie, "Report on judicial communications in relation to international child protection", Prel. Doc. No 8 of October 2006.

- 1.6.5 The Special Commission continues to encourage meetings involving judges and Central Authorities at a national, bilateral or multilateral level as a necessary part of building a better understanding of the respective roles of both institutions.

*Judicial conferences*

- 1.6.6 The Special Commission encourages the development of the established pattern of conferences for specialist family law judges (national, bilateral and multilateral) and emphasises the importance of both the regional and global frameworks that have been developed.

*Actions to be undertaken by the Permanent Bureau*

- 1.6.7 In relation to future work, the Permanent Bureau in the light of the observations made during the meeting will:

- a) continue consultations with interested judges and other authorities based on Preliminary Document No 8;
- b) continue to develop the practical mechanisms and structures of the International Hague Network of Judges;
- c) continue to develop contacts with other judicial networks and to promote the establishment of regional judicial networks;
- d) maintain an inventory of existing practices relating to direct judicial communications in specific cases under the 1980 Hague Convention and with regard to international child protection;
- e) explore the value of drawing up principles concerning direct judicial communications, which could serve as a model for the development of good practice, with the advice of a consultative group of experts drawn primarily from the judiciary;
- f) explore the development of a secured system of communications for members of the International Hague Network of Judges.

- 1.6.8 The Special Commission notes the link between the work on direct judicial communications and the feasibility study to be prepared by the Permanent Bureau for the Council on General Affairs and Policy of the Conference with regard to the development of a new instrument for cross-border co-operation concerning the treatment of foreign law.

*The Judges' Newsletter on International Child Protection*

- 1.6.9 The Special Commission supports the continued publication of the Judges' Newsletter on International Child Protection and expressed its appreciation to LexisNexis Butterworths for publishing and distributing the Newsletter.

## **PART VII – TRANSFRONTIER ACCESS / CONTACT AND RELOCATION**

*Transfrontier access / contact*

- 1.7.1 The Special Commission reaffirms the priority it attaches to ongoing work to improve transfrontier protection of rights of access / contact. It recognises the interest in this matter among many States, including those that are not Parties to the Convention of 1980 and the important role in this regard that can be played by the Convention of 1996.

1.7.2 Recognising the limitations of the 1980 Convention, and in particular of Article 21, the Special Commission:

- a) gives broad endorsement to the general principles and good practices set out in Preliminary Document No 4,<sup>7</sup> and recommends that the Permanent Bureau, in consultation with a group of experts, amend and complete the document in the light of discussions within the Special Commission and prepare it for publication as soon as possible;
- b) recommends that the Permanent Bureau should continue to keep States informed of developments in the mediation of transfrontier disputes concerning contact. It will also continue its work on a more general feasibility study on cross-border mediation in family matters including the possible development of an instrument on the subject, mandated by the Special Commission on General Affairs and Policy of April 2006;
- c) recommends that the Permanent Bureau should continue to examine ways to improve the operation of Article 21 and, through international judicial conferences and by other means, to stimulate discussion of and good practice in respect of the problems surrounding transfrontier contact and international relocation of children, taking into account also the experience with the application of the 1996 Convention and with legal regimes inspired by this Convention.

1.7.3 The Special Commission recognises the strength of arguments in favour of a Protocol to the 1980 Convention which might in particular clarify the obligations of States Parties under Article 21 and make clearer the distinction between “rights of custody” and “access rights”. However, it is agreed that priority should at this time be given to the efforts in relation to the implementation of the 1996 Convention.

*Relocation*

1.7.4 The Special Commission concludes that parents, before they move with their children from one country to another, should be encouraged not to take unilateral action by unlawfully removing a child but to make appropriate arrangements for access and contact preferably by agreement, particularly where one parent intends to remain behind after the move.

1.7.5 The Special Commission encourages all attempts to seek to resolve differences among the legal systems so as to arrive as far as possible at a common approach and common standards as regards relocation.

## **PART VIII – SECURING THE SAFE RETURN OF THE CHILD**

*The use of protective measures*

1.8.1 Courts in many jurisdictions regard the use of orders with varying names, *e.g.*, stipulations, conditions, undertakings, as a useful tool to facilitate arrangements for return. Such orders, limited in scope and duration, addressing short-term issues and remaining in effect only until such time as a court in the country to which the child is returned has taken the measures required by the situation, are in keeping with the spirit of the 1980 Convention.

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<sup>7</sup> W. Duncan, “Transfrontier access / contact – General principles and good practice”, Prel. Doc. No 4 of October 2006.



*Enforceability of protective measures*

- 1.8.2 When considering measures to protect a child who is the subject of a return order (and where appropriate an accompanying parent), a court should have regard to the enforceability of those measures within the country to which the child is to be returned. In this context, attention is drawn to the value of safe-return orders (including “mirror” orders) made in that country before the child’s return, as well as to the provisions of the 1996 Convention.

*A possible Protocol concerning protective measures*

- 1.8.3 Positive consideration was given to the possibility of a Protocol to the 1980 Convention which would provide a clear legal framework for the taking of protective measures to secure the safe return of the child (and where necessary the accompanying parent). The potential value of a Protocol was recognised though not as an immediate priority.

*Criminal proceedings*

- 1.8.4 The Special Commission reaffirms Recommendation 5.2 of the 2001 meeting of the Special Commission:

*“The impact of a criminal prosecution for child abduction on the possibility of achieving a return of the child is a matter which should be capable of being taken into account in the exercise of any discretion which the prosecuting authorities have to initiate, suspend or withdraw charges.”*

The Special Commission underlines that Central Authorities should inform left-behind parents of the implications of instituting criminal proceedings including their possible adverse effects on achieving the return of the child.

In cases of voluntary return of the child to the country of habitual residence, Central Authorities should co-operate, in so far as national law allows, to cause all charges against the parent to be abandoned.

The Central Authorities should also inform the left-behind parent of the alternative means available to resolve the dispute amicably.

*Access to procedures*

- 1.8.5 Contracting States should take measures to remove obstacles to participation by parents in custody proceedings after a child’s return.

**PART IX – REGIONAL DEVELOPMENTS**

- 1.9.1 The Special Commission welcomes the advances made by the Permanent Bureau in further expanding the influence and understanding of the Hague Conventions through the Latin American Programme, the Africa Project and developments in the Asia Pacific Region. The value of the Hague Convention model and principles are recognised for use with non-Hague Convention States as in the context of the Malta Process.
- 1.9.2 Strong support is expressed for the effort being undertaken by the Hague Conference, through the Malta Process, to develop improved legal structures for the resolution of cross-frontier family disputes as between certain Hague Convention States and certain non-Hague Convention States.

- 1.9.3 The importance of the appointment of the Liaison Legal Officer for Latin America is welcomed and the impact already made in strengthening the operation of the Convention in the Region is recognised.

## **CHAPTER II – IMPLEMENTATION OF THE 1996 CONVENTION**

- 2.1 The Special Commission welcomes the fact that a large number of States are in the process of implementing or considering implementation of the Hague Convention of 1996 on the international protection of children. It welcomes the support for that Convention expressed by the European Community and its Member States, as well as the efforts being undertaken to ensure that authorisation is obtained in the near future for all such States to become Parties to the Convention. The Special Commission also welcomes the fact that several American States are studying the Convention with a view to its ratification or accession.
- 2.2 The Special Commission invites the Permanent Bureau, in consultation with Member States of the Hague Conference and Contracting States to the 1980 and 1996 Conventions, to begin work on the preparation of a practical guide to the 1996 Convention which would:
- a) provide advice on the factors to be considered in the process of implementing the Convention into national law, and
  - b) assist in explaining the practical application of the Convention.
- 2.3 Recognising the limitations of the 1980 Convention, and in particular of Article 21, the Special Commission recommends that the Permanent Bureau should continue to make every effort to assist States in their consideration of the 1996 Convention and to promote its widespread ratification. This applies both to States which are Parties to the 1980 Convention and those which are not.

## **ANNEXE**

**Considérations additionnelles relatives au retour sans danger de l'enfant**

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## **APPENDIX**

**Additional considerations relevant to the safe return of the child**

Considering that the interests of children are paramount in matters relating to their custody and that to protect children from the harmful effects of their wrongful removal or retention and to ensure the safe return of the child, it remains important to improve the procedures established for this purpose;

The Special Commission is of the view that the provisions of the *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* support measures to be taken, where appropriate in a particular case, to –

1. attempt by mediation or conciliation to obtain the voluntary return of the child or the amicable resolution of the issues, in a manner that does not delay the return of the child;
2. provide an opportunity for the child to be heard, unless this appears inappropriate having regard to the child's age or degree of maturity;
3. secure the exercise of rights of access and contact, as appropriate, during the proceedings related to the application for return of the child;
4. enable or require the relevant authorities to cooperate in order to ensure access to pertinent information available in the States concerned;
5. provide for the protection of the child upon his / her return and to 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;
6. inform the competent authorities of the State where the child was habitually resident immediately before its removal or retention about proceedings on the application for return and any decision taken in this respect in the State where the child is;
7. assist in the implementation of protective measures, approved by the authorities in the requesting State, to provide for the protection of the child and, if necessary, the parent who removed or retained the child upon its return;
8. upon request, inform the Central Authority of the State where the return of the child has been ordered about the decision on the merits of rights of custody, rendered in the wake of such return, in so far as is permitted by the law of the State where the decision has been taken.