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**CONCLUSIONS ET RECOMMANDATIONS DES PREMIÈRE ET DEUXIÈME PARTIES DE LA  
COMMISSION SPÉCIALE SUR LE FONCTIONNEMENT PRATIQUE DE LA CONVENTION DE  
1980 SUR L'ENLÈVEMENT D'ENFANTS ET DE LA CONVENTION DE 1996 SUR LA  
PROTECTION DES ENFANTS ET RAPPORT DE LA DEUXIÈME PARTIE DE LA RÉUNION**

*établis par le Bureau Permanent*

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**CONCLUSIONS AND RECOMMENDATIONS OF PART I AND PART II OF THE SPECIAL  
COMMISSION ON THE PRACTICAL OPERATION OF THE 1980 CHILD ABDUCTION  
CONVENTION AND THE 1996 CHILD PROTECTION CONVENTION  
AND A REPORT OF PART II OF THE MEETING**

*drawn up by the Permanent Bureau*

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*drawn up by the Permanent Bureau*

**AGENDA OF PART II OF THE SIXTH MEETING OF THE SPECIAL COMMISSION  
ON THE PRACTICAL OPERATION OF THE  
1980 HAGUE CHILD ABDUCTION CONVENTION AND THE  
1996 HAGUE CHILD PROTECTION CONVENTION  
(25-31 JANUARY 2012)**

**PART II**

Part II of the Special Commission meeting will take place in The Hague from Wednesday 25 (10.00 a.m.) to Tuesday 31 January 2012 (1.00 p.m.). (Please note that while there will be no official Saturday plenary session, there will be the possibility of informal discussion groups for anyone interested in participating on Saturday morning.)

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 to 2.30 p.m. Breaks for coffee will normally be from 11.00 a.m. to 11.15 a.m., and tea from 4.00 p.m. to 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 several times during the meeting, including Saturday afternoon and Monday evening.

***Wednesday 25 January 2012***

10.00 a.m.      Opening of Part II of the Special Commission  
                      Words of welcome by Mr Hans van Loon, Secretary General  
                      Introduction to the draft agenda and documentation by  
                      Ms Louise Ellen Teitz, First Secretary  
                      Adoption of the agenda  
                      Status of the 1980 and 1996 Hague Conventions  
                      Introduction (brief comments on Part I and Prel. Doc. No 14), short report  
                      on Prel. Doc. No 13 and responses of countries to Questionnaire II (Prel.  
                      Doc. No 2)

**1. POTENTIAL FORMS OF INSTRUMENTS (E.G., BINDING INSTRUMENT  
(CONVENTION / PROTOCOL), RECOMMENDATION, DECLARATION, MODEL  
LAW, PRINCIPLES, GUIDE TO GOOD PRACTICE, PRACTICAL HANDBOOK)**

General remarks

**2. IDENTIFICATION OF TOPICS FOR FURTHER CONSIDERATION (PREL. DOC.  
NO 13)**

Mediation

- Cross-border / international recognition and enforcement of agreements resulting from mediation (Prel. Doc. No 13)
- Potential freestanding legal instrument
  - Compatible with 1980 and 1996 Hague Conventions
  - Potential for broader use in family law (e.g., international relocation – see *infra*)

**6.00 p.m. Opening reception provided by the Government of the Russian Federation, at the Academy Building of the Peace Palace**

***Thursday 26 January 2012***

**2. IDENTIFICATION OF TOPICS FOR FURTHER CONSIDERATION (CONT'D)**

***Morning session***

Direct Judicial Communications (1980 and 1996 Hague Conventions) (Prel. Doc. No 3 D)

- Potential legal instrument providing a basis for use of direct cross-border judicial communication

***Afternoon session***

Domestic and Family Violence in the Context of Return Proceedings and under Article 13(1) *b*) of the 1980 Convention (Prel. Doc. No 13, Prel. Doc. No 14)

- Potential soft law instrument concerning the treatment of allegations of domestic violence in the context of return proceedings
- Consideration of Proposals from Part I of the Special Commission

***Friday 27 January 2012***

**2. IDENTIFICATION OF TOPICS FOR FURTHER CONSIDERATION (CONT'D)**

***Morning session***

International Family Relocation (Prel. Doc. No 11)

- Potential soft law instrument concerning handling of family relocation cases
- Potential use of instrument to enforce mediated and other consensual agreements (Prel. Doc. No 13)

***Afternoon session***

**3. FUTURE OF THE MALTA PROCESS (PREL. DOC. NO 12 AND INFO. DOC. NO 8)**

- Next steps
- Potential use of instrument to enforce mediated and other consensual agreements (Prel. Doc. No 13)

**4. REPORT ON THE SERVICES AND STRATEGIES PROVIDED BY THE HAGUE CONFERENCE IN RELATION TO THE 1980 AND 1996 CONVENTIONS (PREL. DOC. NO 12)**

**6.00 p.m. Reception hosted by the City of The Hague, in the foyer of the Peace Palace**

***Saturday 28 January 2012***

There will be no official Saturday session. However, the Hague Academy building will be open from 9.00 a.m. to 1.00 p.m. for meetings of informal discussion groups. For anyone wishing to participate, there will be sign up sheets for this purpose. A light continental breakfast will be available.

***Monday 30 January 2012***

**4. REPORT ON THE SERVICES AND STRATEGIES PROVIDED BY THE HAGUE CONFERENCE IN RELATION TO THE 1980 AND 1996 CONVENTIONS (PREL. DOC. NO 12) (CONT'D)**

***Morning session***

The role of the Permanent Bureau in providing assistance to Contracting States, maintaining case law, collecting statistics and information, responding to individual requests, monitoring compliance with Convention obligations; consent to travel form (Prel. Doc. No 15)

**5. GENERAL DISCUSSION OF DESIRABILITY AND FEASIBILITY OF INSTRUMENTS IN CONNECTION WITH TOPICS IDENTIFIED IN PART II OF THE SPECIAL COMMISSION**

***Afternoon session***

**5. GENERAL DISCUSSION OF DESIRABILITY AND FEASIBILITY OF INSTRUMENTS IN CONNECTION WITH TOPICS IDENTIFIED IN PART II OF THE SPECIAL COMMISSION (CONT'D)**

***Tuesday 31 January 2012***

**6. CONCLUSIONS AND RECOMMENDATIONS OF PART II OF THE SPECIAL COMMISSION**

The meeting will end no later than 1.00 p.m.

**REPORT OF PART II OF THE SIXTH MEETING OF THE SPECIAL COMMISSION  
ON THE PRACTICAL OPERATION OF THE 1980 HAGUE CHILD ABDUCTION  
CONVENTION AND THE 1996 HAGUE CHILD PROTECTION CONVENTION  
(25-31 JANUARY 2012)**

## **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).<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 Members of the Hague Conference and Contracting States to the 1980 Convention, a questionnaire on the desirability and feasibility of a protocol to the 1980 Convention ("Questionnaire II", 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 (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>

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<sup>1</sup> See also the Report of the 2011 Special Commission (Part I), "Conclusions and Recommendations and Report of Part I of 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*", Prel. Doc. No 14 of November 2011 for the attention of the Special Commission of January 2012, 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>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*.

<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 Special Administrative Region "SAR"), Colombia, Dominican Republic, El Salvador, the European Union, Mexico, Montenegro, New Zealand, Norway, Switzerland, Ukraine and Zimbabwe.

4. As a result of the discussions that took place during the 2011 Special Commission (Part I), the responses to Questionnaire II<sup>5</sup> and consultations with Members, it appeared that it would not be possible to achieve consensus on asking the Council on General Affairs and Policy of the Conference (the "Council") for a mandate to proceed with a protocol to the 1980 Convention. However, there were three areas where there appeared to be substantial support for further work: cross-border recognition and enforcement of mediated agreements; legal basis for cross-border direct judicial communications; and allegations of domestic violence in the context of return proceedings. The agenda for the 2012 Special Commission (Part II) therefore focused on these specific areas of further work in connection with the 1980 and 1996 Conventions, as well as on the matters originally scheduled for discussion at Part II of the meeting: that is, international family relocation (Prel. Doc. No 11), the future of the "Malta Process" and the role of the Hague Conference in monitoring and supporting the 1980 and 1996 Conventions (Prel. Doc. No 12). A Guide to Part II of the Sixth Meeting of the Special Commission (Prel. Doc. No 13)<sup>6</sup> was prepared and circulated prior to Part II.

## **Representation and chairmanship**

5. The 2012 Special Commission (Part II) took place in The Hague from 25-31 January 2012. The Special Commission included more than 240 experts and observers from 67 States and 13 organisations. Of the 67 States represented, 63 were Member States of the Hague Conference. 59 of the States were Contracting States to the 1980 Convention and 32 of the States were Contracting States to the 1996 Convention. Four 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 Iran, Pakistan, Qatar and Saudi Arabia. Representatives from one intergovernmental organisation and 12 non-governmental organisations also participated as observers. Among the participants were 56 judges from 34 States, including 29 members of the International Hague Network of Judges from 23 States. Ten States,<sup>7</sup> one intergovernmental organisation<sup>8</sup> and one non-governmental organisation<sup>9</sup> had not participated in the 2011 Special Commission (Part I).

6. The meeting was opened by the Chair, Mr Justice Chamberland, expert from Canada. He thanked Mrs Borrás, expert from Spain, for continuing her position as Vice-Chair.

7. Six Preliminary Documents drawn up by the Permanent Bureau were prepared for the 2012 Special Commission (Part II).<sup>10</sup> Two Information Documents were also made available to participants of the Special Commission.<sup>11</sup>

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<sup>5</sup> 8 additional responses were received before 1 November 2011 (Argentina, Armenia, Canada, Israel, Monaco, Panama, United States of America, Venezuela) and 2 additional responses were received after 1 November 2011 (China (Macao SAR), Malta). All responses 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>6</sup> "Guide to Part II of the Sixth Meeting of the Special Commission and consideration of the desirability and feasibility of further work in connection with the 1980 and 1996 Conventions", Prel. Doc. No 13 of November 2011 for the attention of the Special Commission of January 2012, 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> This number includes 7 States invited as Members of the Conference and / or Contracting States to the Conventions (Andorra, Bulgaria, Italy, Republic of Moldova, Slovenia, Sri Lanka, and Trinidad and Tobago) and 3 Non-Member States invited as observers (Iran, Pakistan and Qatar).

<sup>8</sup> The United Nations Children's Fund (UNICEF).

<sup>9</sup> The Inter-American Bar Association (IABA).

<sup>10</sup> The numbering of documents for Part I and Part II of the Special Commission is continuous; "Note on the desirability and feasibility of a potential legal instrument providing a basis for Direct Judicial Communications" (Prel. Doc. No 3 D of December 2011); "Preliminary note on international family relocation" (Prel. Doc. No 11 of January 2012); "Report on the services and strategies provided by the Hague Conference on Private International Law in relation to the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention, including the development of regional programmes and the Malta Process" (Prel. Doc. No 12 of December 2011); "Guide to Part II of the Sixth Meeting of the Special Commission and Consideration

## Status of the 1980 and 1996 Conventions

8. The Permanent Bureau provided an update as to the status of the 1980 and 1996 Conventions. There were two new Contracting States to the 1980 Convention since June 2011,<sup>12</sup> bringing the total to 87. Since June 2011, the 1996 Convention had entered into force in Denmark, Malta and Portugal, bringing the total to 33 Contracting States, with a further six signatory States (the remaining five European Union Member States and the United States of America).<sup>13</sup>

9. Experts from 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.

## Potential forms of instruments (e.g., binding instrument (convention / protocol), recommendation, declaration, model law, principles, guide to good practice, practical handbook)

10. The Permanent Bureau introduced the full spectrum of potential forms of instruments which could form the basis for further work without disturbing the integrity of existing Conventions. It offered a brief summary on each of the potential forms, namely binding instruments, recommendations, declarations, model laws, principles and soft law tools such as guides to good practice and handbooks.

11. The Permanent Bureau explained that the objective of the 2012 Special Commission (Part II) was to consider the need for further work in several areas and to establish recommendations concerning such further work and the form in which this work might be carried out in order to submit such recommendations to the Council on General Affairs and Policy.

12. The Permanent Bureau emphasised the importance of binding instruments and Conventions and stated that they are at the core of the Hague Conference's work. However, the experts were reminded that there is a longstanding tradition of developing Guides and Handbooks in support of the Hague Conventions.

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of the desirability and feasibility of further work in connection with the 1980 and 1996 Conventions" (Prel. Doc. No 13 of December 2011); "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" (Prel. Doc. No 14 of November 2011); "Note on the possible development of a model consent to travel form" (Prel. Doc. No 15 of January 2012). 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>11</sup> "Note on the possible expansion of INCASTAT to include the data sought for the statistical analysis of cases arising in 2008" (Info. Doc. No 7 of January 2012); "Malta Declarations" (Info. Doc. No 8 of January 2012). All Information Documents are available on the Hague Conference website *ibid*.

<sup>12</sup> Guinea and the Russian Federation.

<sup>13</sup> Greece ratified the 1996 Convention shortly after the 2012 Special Commission (Part II), on 7 February 2012; the 1996 Convention will enter into force for Greece on 1 June 2012. Montenegro also ratified the 1996 Convention shortly after the 2012 Special Commission (Part II), on 14 February 2012. The 1996 Convention will enter into force for Montenegro on 1 January 2013.



## MEDIATION

13. The Permanent Bureau recalled that the Hague Conference had a long history of working in the field of cross-border mediation in family matters. It indicated that the Council on General Affairs and Policy in April 2008 asked the Permanent Bureau, as a first step, to commence work on a Guide to Good Practice on the use of mediation in the context of the 1980 Convention.<sup>14</sup>

14. The Permanent Bureau noted that the discussions of the 2011 Special Commission (Part I) revealed significant practical challenges concerning the enforceability of mediated agreements. It highlighted that mediation is a tool which may touch upon not only the issue of the return of the child but also other issues such as custody or maintenance. It then explained that these multiple issues could, in turn, cause practical challenges, especially as to questions of jurisdiction of different courts. It stated that although the 1996 Convention, as well as the 2007 Convention, may assist parents in achieving recognition of their agreed upon solution in a cross-border dispute concerning children in all Contracting States, these Conventions may not offer a satisfactory solution where the agreement covers matters which fall outside the scope of one or both Conventions, or when the relevant Conventions are not in force in both countries.

15. The Permanent Bureau underlined that the recognition and enforcement of mediated agreements can be a lengthy, cumbersome and expensive process. It therefore suggested the need to explore the desirability and feasibility of further work in this field and, in particular, in connection with the development of private international law rules.

16. Finally, the Permanent Bureau indicated that a new free-standing private international law instrument concerning mediated agreements in family law could also assist families more generally with respect to agreements containing a combination of different family law issues in a cross-border situation. The instrument could offer an efficient way to render such agreements binding and enforceable in the different legal systems concerned.

### Potential further work on recognition and enforcement of mediated agreements

17. A large number of experts expressed their support for mediation and for further work on enforcing mediated agreements. Some experts emphasised that mediation does not run counter to the objective of expeditious procedures set out in the 1980 Convention, but on the contrary, provides for the timely resolution of conflicts.

18. A few experts expressed some reservations regarding the possibility of engaging in further work on recognition and enforcement of mediated agreements. Some experts indicated that the 1996 Convention should be given the opportunity to operate before a decision is taken to determine whether another binding instrument is necessary. States were accordingly encouraged to join the 1996 Convention.

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<sup>14</sup> See Conclusions and Recommendations adopted by the Council on General Affairs and Policy of the Conference (1-3 April 2008), p. 1, 3rd para., available at < [www.hcch.net](http://www.hcch.net) > under "Work in Progress" then "General Affairs". The *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction Part V – Mediation* (hereinafter 'Guide to Good Practice on Mediation') is currently being finalised.

19. An expert from the United States of America expressed concern that further work on mediation would divert the attention and resources of the Hague Conference away from the original purpose of the 1980 Convention, namely the expeditious return of the child. The Secretary General recalled that mediation covered several family law issues and that it needed to be envisaged in a broader context than the 1980 Convention. He also indicated that the discussions concerned cases where the parties had already achieved an agreement and thus there was no interference with the regular procedure under the 1980 Convention.

20. In spite of these few reservations, the majority of experts recommended the establishment of an exploratory expert group on mediated agreements. A few experts requested that the Expert Group undertake a preliminary assessment as to the nature and extent of problems in the recognition and enforcement of agreements, including agreements resulting from mediation. It was also suggested that the Expert Group should take into account the framework of the 1980 and the 1996 Conventions as well as the 2007 Convention in order to identify potential gaps and to refer these findings to the Council on General Affairs and Policy.

21. An expert from the European Union indicated that a global instrument on mediated agreements would have added value for the Member States of the European Union in their relations with other States. The expert stressed the importance of the implementation of existing measures such as the publication of the draft Guide to Good Practice on Mediation. It was also indicated that an EU Directive (Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters) containing rules on the enforceability of mediated agreements was adopted in 2008. It was finally noted that internal European legislation dealing with recognition and enforcement involves certain safeguards necessary in mediated agreements.

22. An expert from Uruguay further supported the idea of a possible free-standing instrument on mediated agreements.

23. Several experts agreed that the work of the Expert Group should not only address mediated agreements but should cover all types of agreements obtained through alternative dispute resolution mechanisms. An expert from Canada noted that Preliminary Document No 13 was clear on this point and that this discussion on mediation was taken to include other processes which lead to an amicable resolution of disputes.

24. A few experts suggested that the mandate of the Expert Group be expanded to include consideration of other crucial issues relating to mediation. An expert from Canada underlined that the issue for discussion is the recognition and enforcement of mediated agreements. She noted that while other issues in the process of reaching voluntary agreements command attention, they are addressed in the draft Guide to Good Practice on Mediation.

25. Some experts considered that the Expert Group should be composed of experts in private international law to reflect the fact that its work would address legal issues. A few observers emphasised that the Expert Group should also include experts in non-judicial settlements and related issues, in order for the Expert Group to benefit from the broadest expertise possible.

26. Finally, an expert from Switzerland emphasised that it was for the Special Commission to put forward a proposal which will ultimately be decided by the Council on General Affairs and Policy. The Chair commended the remark from Switzerland because it

gave perspective to the role of the Special Commission in the overall decision making process.

27. The Special Commission recognised that, in the course of international child disputes, the parties may enter into agreements settling their dispute, and therefore recommended that exploratory work be undertaken to identify legal and practical problems that may exist in the recognition and enforcement of such agreements, taking into account the implementation and use of the 1996 Convention.<sup>15</sup> To this end, the Special Commission recommended that the Council on General Affairs and Policy consider authorising the establishment of an Expert Group to carry out further exploratory research, which would include identification of the nature and extent of the legal and practical problems in this area, including, specifically, jurisdictional issues and would evaluate the benefit of a new instrument in this area, whether binding or not.<sup>16</sup>

## **DIRECT JUDICIAL COMMUNICATIONS (1980 AND 1996 HAGUE CONVENTIONS)**

28. The Permanent Bureau introduced the topic by highlighting that, over the last fifteen years, direct judicial communications under the 1980 Convention have developed "organically". The Permanent Bureau recalled that, in June 2011, at the 2011 Special Commission (Part I), the General Principles for Judicial Communications (hereinafter "General Principles")<sup>17</sup> were endorsed.<sup>18</sup> However, the General Principles do not include a legal basis for judges to engage in direct judicial communications. The Permanent Bureau highlighted that, at the 2011 Special Commission (Part I), the delegation from Switzerland submitted Working Document No 4<sup>19</sup> and that this submission was followed by a discussion as to whether there was an interest in developing a legal basis for such communications in a binding instrument.

29. At the request of experts at the 2011 Special Commission (Part I), the Permanent Bureau prepared an overview of this topic in Preliminary Document No 3 D. The document was developed following an analysis of the information in the Country Profiles and responses to questionnaires. While most States indicated that no legal basis was needed, several States indicated that they needed a legal basis to engage in direct cross-

<sup>15</sup> See Conclusion and Recommendation No 76 of the 2012 Special Commission (Part II).

<sup>16</sup> See Conclusion and Recommendation No 77 of the 2012 Special Commission (Part II).

<sup>17</sup> "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", drawn up by the Permanent Bureau, Prel. Doc. No 3 A of March 2011 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 "Work in Progress" then "Child Abduction". During the 2011 Special Commission (Part I), it was decided to change the term "rules" to the term "guidance". The Emerging Guidance and General Principles for Judicial Communications were developed in consultation with a group of experts, the majority of whom were members of the International Hague Network of Judges.

<sup>18</sup> See Conclusion and Recommendation No 68 of the 2011 Special Commission (Part I).

<sup>19</sup> Work. Doc. No 4 provided as follows:

"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, seised 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, seised 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."

border judicial communications. The Permanent Bureau recalled that a number of States reported having an interest in developing a binding instrument.

30. The Permanent Bureau outlined four options: (1) a binding international instrument to provide for judicial communications between judges in cases involving international child abduction; (2) a broader binding instrument which contains a basis for judicial communications and other matters concerning the international protection of children; (3) a binding instrument that would cover all legal issues related to communications, as well as the topics in the General Principles; and (4) a legal foundation only within domestic law. The Permanent Bureau recalled that during the 2011 Special Commission (Part I), the experts considered it premature to legislate with respect to the content of the General Principles, preferring to wait to see how these principles are implemented by States and used by judges.

### **Potential legal instrument providing a basis for the use of direct cross-border judicial communication**

31. Many experts indicated that there was no need for a binding international instrument at this time. An expert from the United States of America stressed that providing a legal basis for direct judicial communications was more properly a matter of domestic law. An expert from the European Union stated that it was premature to discuss binding international rules and that a more flexible approach should be adopted. Some experts noted the difficulty in developing, adopting and effectively implementing a binding international instrument.

32. On the other hand, an expert from Switzerland stressed the importance of an international legal basis for judicial communications. She suggested the inclusion in a future binding instrument of a provision that would oblige Contracting States to provide for direct judicial communications. Another expert from Switzerland added that a legal basis should address specifically the type of information judges could share and whether judges could discuss the merits of the case. An expert from Germany noted the benefit of a binding international instrument in ensuring international reciprocity, which could not be achieved through domestic law alone.

33. Many experts expressed support for the International Hague Network of Judges (IHNJ) and emphasised the need to strengthen and expand it. Several experts commented on the challenges posed by the lack of designations of Network Judges by certain States. An expert from the United Kingdom proposed taking more initiatives on a regional basis to encourage the growth of the Network. An expert from Uruguay, supported by experts from several other States, suggested formally recognising the role of the IHNJ as being essential to the effective operation of the 1980 Convention.

34. Many experts expressed again, as in the 2011 Special Commission (Part I), support for the General Principles, their further development and their prompt dissemination.

35. Experts from some States indicated that it was desirable to have a legal basis to facilitate the designation of a judge to the IHNJ and to authorise the use of direct judicial communications. An expert from the Republic of Korea noted that the basic characteristics of the role of the IHNJ judge would first need to be determined before any domestic legislation could be introduced.

36. Some experts advised taking a cautious approach to discussing the development of an international instrument on judicial communications. An expert from Japan indicated that any such discussion should take into account the need to protect judicial discretion. An expert from France highlighted that judicial practices differ depending on the

particular legal system of a country. She noted that in civil law countries the rules of procedure are strict, making direct judicial communications difficult.

37. Many experts supported the development of soft law tools such as a 'guide to good practice' on direct judicial communications to assist judges. An expert from Israel emphasised that the most important issues to be dealt with were the scope of direct judicial communications and the uniformity of practices, noting that the lack of formalism allowed flexibility. An expert from Brazil suggested the creation of a group of experts composed of judges, Central Authority officials and government officials to develop a guide to good practice.

38. Observers from NGOs drew attention to other issues. An observer from the United States-Mexico Bar Association (USMBA) underlined that it was important to protect the rights of the parties and that the role of the IHNJ judge should be clearly defined. An observer from the International Association of Women Judges (IAWJ) noted the need to clarify whether justiciable or only non-justiciable issues could be the subject of direct judicial communications. An observer from the Association of International Family Judges (AIFJ) introduced Working Document No 9, explaining that it was drafted in June 2011 and expressed what its members felt were important for the future development of international family law. It was circulated for the information of the other experts, but there was no further discussion.

39. The Chair concluded the discussion by highlighting that there was no consensus to proceed at this time with the development of an international binding instrument on direct cross-border judicial communications, but that there was support for consideration to be given to the inclusion of a legal basis in the development of any relevant future Hague Convention.<sup>20</sup> There was consensus to promote the use of the *Emerging Guidance and General Principles on Judicial Communications*; to continue to encourage the strengthening and expansion of the International Hague Network of Judges; and to maintain an inventory of domestic legal bases relating to direct judicial communications.<sup>21</sup>

#### **DOMESTIC AND FAMILY VIOLENCE IN THE CONTEXT OF RETURN PROCEEDINGS AND UNDER ARTICLE 13(1) B) OF THE 1980 CONVENTION**

40. The Permanent Bureau recalled that the Conclusions and Recommendations of the 2011 Special Commission (Part I) affirmed support for promoting greater consistency in dealing with domestic and family violence allegations in the application of Article 13(1) b).<sup>22</sup> These Conclusions and Recommendations also indicated that the discussion on three specific proposals concerning future work in this area was to be deferred to Part II.<sup>23</sup> The first proposal was drawn up by certain Latin American States and included, among other items, the drafting of a Guide to Good Practice on the implementation of Article 13(1) b).<sup>24</sup> The second proposal, made by Canada,<sup>25</sup> suggested establishing a working group, with experts 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. A third proposal by the Permanent Bureau suggested that a group of experts, in particular, judges, Central

<sup>20</sup> See Conclusion and Recommendation No 78 of the 2012 Special Commission (Part II).

<sup>21</sup> See Conclusion and Recommendation No 79 of the 2012 Special Commission (Part II).

<sup>22</sup> See Conclusion and Recommendation No 37 of the 2011 Special Commission (Part I).

<sup>23</sup> See Conclusion and Recommendation No 38 of the 2011 Special Commission (Part I).

<sup>24</sup> Work. Doc. No 1.

<sup>25</sup> Work. Doc. No 2.

Authorities and experts on the dynamics of domestic and family violence, develop principles or a practice guide on the treatment of domestic and family violence allegations in the context of return proceedings.<sup>26</sup>

41. The Permanent Bureau reported that the responses of States to Questionnaire I<sup>27</sup> revealed that most responding Contracting States dealt with domestic violence allegations in at least a minority of cases under Article 13(1) *b*). Moreover, in response to Questionnaire II,<sup>28</sup> nearly all States indicated that guidance and further training in the application of Article 13(1) *b*) would be useful, particularly on matters such as safe return. A number of States, however, had indicated opposition to developing binding provisions on this topic in the context of a protocol to the 1980 Convention.

42. Referring experts to the relevant documentation<sup>29</sup>, the Permanent Bureau invited the 2012 Special Commission (Part II) to consider, in connection with further work on this topic, the following issues: (1) The scope of any future work – whether it should be limited to domestic and family violence within the context of Article 13(1) *b*) or whether it would be beneficial to have a broader consideration of Article 13(1) *b*); (2) who should be involved in any Working Group and how such a Working Group would be structured; and (3) if tools should be developed, at whom should they be aimed.<sup>30</sup>

### **Potential soft law tools promoting a consistent application of Article 13(1) *b*)**

43. The experts emphasised that further work should be carried out to promote a consistent interpretation of Article 13(1) *b*). Some experts noted that a consistent application of this exception is important to ensure the safety of the child. An expert from Germany added that the differences in national case law may affect the strategies chosen by taking parents in pleading an Article 13(1) *b*) defence. Following further discussion, the experts agreed that such work should take the form of a non-binding instrument.

44. Certain aspects of the project were discussed, particularly the nature of any potential soft-law tool, its objectives, its scope, and the composition of the Working Group.

45. An expert from Canada suggested that the three proposals deferred for consideration from Part I be 'merged' into one, with the recommendation that a Working Group could be tasked to produce a guide to good practice on the interpretation and application of the Article 13(1) *b*) exception. She explained that the publication could be

<sup>26</sup> See Prel. Doc. No 9 at para. 151.

<sup>27</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".

<sup>28</sup> Prel. Doc. No 2.

<sup>29</sup> "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 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"; Prel. Doc. No 13 at paras 62 to 69; Work. Docs Nos 1 and 2 and Annexes 2 and 3 to Prel. Doc. No 14.

<sup>30</sup> See Prel. Doc. No 13, at para. 69.

a “hybrid” guide, serving multiple users, with a section directed to judges and a separate section directed to Central Authorities.

46. Many experts expressed their support for the proposal of the Canadian delegation, as amended. However, concerns were expressed by an expert from Switzerland who raised a number of questions on the proposal put forward, such as the scope of such a guide and whether further approval of the completed document by a Special Commission or the Council on General Affairs and Policy would be necessary.

47. An expert from Canada indicated that the purpose of the guide would be to circumscribe the international implementation and operation of Article 13(1) *b*) and to examine the place of Article 13(1) *b*) in the context of the 1980 Convention. She indicated that the guide would also provide guidance to Central Authorities when requests are being considered and allegations of domestic and family violence arise. She noted that it is the usual practice that guides recommended during Special Commissions are reviewed by following Special Commissions and that the Council on General Affairs and Policy is made aware of this work.

48. An expert from Spain stated that there was nothing new in providing guidance and information to judges on the application of an instrument. In this regard, he noted that, for example, a guide had already been developed within the European Union to promote the implementation of the Brussels II a Regulation. He indicated that a guide to good practice concerning the application of Article 13(1) *b*) would be very well received by judges of the 27 Member States of the European Union. He underlined that all non-binding measures are welcome.

49. Many experts expressed their support for this position and insisted on the importance of providing judges with information to help them make a decision, as they ultimately deal with the application and interpretation of Article 13(1) *b*). Several experts added that it was nevertheless imperative to safeguard the fundamental principle of the independence of judges.

50. The majority of experts considered that any future work should not be limited to allegations of domestic and family violence within the context of Article 13(1) *b*), but should include all situations of ‘grave risk of harm’, such as mental illness, criminal behaviour or drug and alcohol abuse. Several experts explained that limiting the examination of Article 13(1) *b*) to domestic violence could lead to a different standard being applied to cases where domestic violence is alleged.

51. An expert from the European Union noted that the European Union was working on the subject of domestic violence. She explained that in 2011, the European Commission brought forward a package of legislative proposals concerning the rights of victims of crime and that one part of these proposals related to the mutual recognition, between Member States, of civil measures providing protection to victims of violence, including domestic violence. However, she indicated that the European Union endorsed the view that domestic violence should not be distinguished from other issues which may arise in the context of an Article 13(1) *b*) defence.

52. Two observers disagreed with this view and asserted that Contracting States should focus on cases involving allegations of domestic and family violence for the future instrument to be effective. An observer from the International Society of Family Law (ISFL) explained that these cases involve unique challenges which are different from the other situations falling within the scope of Article 13(1) *b*) and that they therefore demand a specific focus, particularly in a time of limited resources. She noted, as an

example, certain situations of domestic violence which she indicated might also result in the application of Article 20 of the 1980 Convention.

53. An expert from Canada recalled a proposal made by Canada in April 2011 to the Council on General Affairs and Policy to undertake preliminary work to consider the possibility of an instrument on the recognition and enforcement of foreign civil protection orders. She noted that the Hague Conference was undertaking this preliminary work and that this might be of use in return cases involving domestic violence.

54. A few experts indicated that further work on the application of Article 13(1) *b*) should take into consideration existing tools addressing domestic violence such as the 1994 Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women. An expert from Mexico noted that strengthening these existing tools may avoid risk to the child when the child is ordered to be returned.

55. Several observers made suggestions as to the content of a guide. A few observers proposed including research on the outcomes for children who have been returned as a result of proceedings brought under the 1980 Convention, particularly those children where a defence has been raised under Article 13(1) *b*). Reference was made to the work undertaken by ISS in following outcomes for children cared for in kinship placements.

56. An observer from the International Law Association (ILA) drew the attention of experts to an academic study in the United States of America submitted to the National Institute of Justice<sup>31</sup> which noted cases of children being returned to abusers.

57. An observer from the International Social Service (ISS) indicated that consideration should be given to four areas in drawing up any guide to good practice: (1) the gathering of evidence and how it is to be collected in light of the time constraints which return proceedings involve; (2) how to appropriately analyse the available evidence to ensure consistency; (3) the question of whether appropriate protective measures can be taken in the country to which the return of the child is sought; and (4) the need for authorities in the country to which the child is to be returned to be informed of the future plan for the child so as to ensure the appropriate monitoring of the child upon return. Moreover, the expert stressed that Article 13(1) *b*) should be applied only when there is objective evidence.

58. An observer from the United States – Mexico Bar Association (USMBA) disagreed that proof of domestic or family violence under Article 13(1) *b*) should be limited to 'objective evidence', explaining that the real-life situations of persons implicated sometimes made it very difficult to obtain such evidence. Finally, an observer from the ISFL pointed out various issues which should be explored by the expert group: the determination of the child's State of habitual residence,<sup>32</sup> how Central Authorities can ensure the confidentiality of the information they obtain concerning a possible victim of domestic violence, the differences in practices between States concerning, in particular, the definition of domestic violence and finally, the issue of the efficacy of undertakings.

<sup>31</sup> Prel. Doc. No 9 at para. 1. This study is summarised in Annex I of Prel. Doc. No 9.

<sup>32</sup> She gave the example of one study, cited in Prel. Doc. No 9 (see the study *ibid.*), in which it is indicated that 40% of those who had fled domestic violence stated that they considered their habitual residence to be coerced.



59. An expert from Canada indicated that the Working Group might include experts from the judiciary and the legal profession, as well as experts in other fields such as on the dynamics of domestic and family violence and mental health. She emphasised that the group should have the expertise necessary to enable it to fulfil its aims. A majority of experts supported this position.

60. The Chair concluded that there was broad support for work to be undertaken to promote consistency in the application of Article 13(1) *b*). There was overwhelming support for the proposal by Canada, as amended to take into account the other proposals, to examine the application of Article 13(1) *b*) through a non-binding guide which would respect the institutional and individual independence of the judiciary and take into account existing legislation on the grave risk exception. This guide would not be limited to cases where allegations of domestic and family violence were raised, but would include the application of Article 13(1) *b*), and would take into account existing documents and work done on the topic, including that by some observers.

61. There was broad support for the recommendation to the Council on General Affairs and Policy that it authorise the establishment of a Working Group composed of judges, Central Authorities and cross-disciplinary experts to develop a Guide to Good Practice on the interpretation and application of Article 13(1) *b*), with a component to provide guidance specifically directed to judicial authorities, taking into account the Conclusions and Recommendations of past Special Commission meetings and Guides to Good Practice.<sup>33</sup>

62. The Special Commission noted that the evaluation of the evidence and the determination of the grave risk of harm exception (Art. 13(1) *b*)), including allegations of domestic violence, are an exclusive matter for the authority competent to decide on the return, having due regard to the aim of the 1980 Convention to secure the prompt and safe return of the child.<sup>34</sup>

63. The Special Commission recommended that further work be undertaken to promote consistency in the interpretation and application of Article 13(1) *b*) including, but not limited to, allegations of domestic and family violence.<sup>35</sup>

## **INTERNATIONAL FAMILY RELOCATION**

64. The Permanent Bureau began by providing a brief definition of international family relocation that is the long-term move (*i.e.*, a change of habitual residence) to another country by a parent with his or her child. The Permanent Bureau indicated that it was occurring more frequently in the international context as parents moved to follow jobs or relationships or return “home”. It noted that the growing trend in many countries towards separated parents having joint parental responsibilities and an active involvement in a child’s life even after the dissolution of a relationship, created further concerns when one parent wished to relocate to another country.

65. The Permanent Bureau then described the manner in which the subject of international family relocation had emerged in the work of the Hague Conference, that is,

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<sup>33</sup> Conclusion and Recommendation No 82 of the 2012 Special Commission (Part II)

<sup>34</sup> Conclusion and Recommendation No 80 of the 2012 Special Commission (Part II)

<sup>35</sup> Conclusion and Recommendation No 81 of the 2012 Special Commission (Part II). During the adoption of the Conclusions and Recommendations, an expert from Switzerland asked for confirmation that it was the intention of the drafters of the paragraphs related to Article 13(1) *b*) that the issues to be addressed by a new guide to good practice would have a relatively wide scope, in particular focusing on 13(1) *b*) issues, but also including safety issues arising under the Convention. The Chair of the Special Commission and the Chair of the Drafting Advisory Committee confirmed that the intention was to recommend the development of a guide to good practice with a comprehensive focus.

in relation to transfrontier contact issues. It indicated that two Conclusions and Recommendations of the 2006 Special Commission covered the subject and encouraged "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".<sup>36</sup> The Permanent Bureau continued by mentioning the Washington Declaration on International Family Relocation adopted during the International Judicial Conference on Cross-border Family Relocation ("the Washington Declaration") which took place in March 2010 and which was co-organised by the Hague Conference and the International Centre for Missing and Exploited Children (ICMEC).<sup>37</sup> The Permanent Bureau underlined that this 2012 Special Commission (Part II) meeting was one of the first significant discussions on international family relocation in a Special Commission.

66. The Permanent Bureau further explained that the preliminary research presented in Preliminary Document No 11 showed the diversity of approaches taken by national laws on the issue. The Permanent Bureau outlined that these differences related mainly to three areas: (1) the circumstances in which it may be necessary for a parent to obtain a court order for permission to relocate with a child; (2) the differences between the procedures followed and the factors taken into account by the court seised; and (3) the approach taken by the court to guarantee and secure the contact rights of the remaining parent.<sup>38</sup>

67. The Permanent Bureau finally suggested that experts might want to consider the need for further comparative study to be undertaken and whether a working group should be established to consider the possible options for future work.

### **National approaches to international family relocation**

68. Experts proceeded to offer examples of the various methods of treating international family relocation cases under their relevant domestic law. Several experts indicated that relocation was subject to specific legislation in their domestic law. An expert from the United Kingdom (England and Wales) described the jurisprudential approach adopted in his jurisdiction. An expert from Venezuela explained that the courts seised considered many factors in addition to the best interests of the child. Many other experts stated that their national law did not contain such provisions, as relocation was considered not as an independent issue but as part of the broader issue of custody. An expert from Germany explained that if the parents shared custody of the child, the judge would deal with the relocation request by granting custody to one parent, in whole or in part.

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<sup>36</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", Conclusions and Recommendations Nos 1.7.4-1.7.5.

<sup>37</sup> The full text of the declaration is available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under "News & Events" then "2010". The presentations given during the Washington Conference were published in *The Judges' Newsletter on International Child Protection*, Special Edition No 1, International Judicial Conference on Cross-Border Family Relocation, 23-25 March 2010, Washington, D.C., 2010, available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under "Publications" then "Judges' Newsletter".

<sup>38</sup> See in relation to this topic *the Transfrontier Contact Concerning Children – General Principles and Guide to Good Practice* (Jordan Publishing, 2008), Sections 8.1-8.4, available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under "Child Abduction Section" then "Guides to Good Practice".

69. The experts shared their experiences in connection with this issue, including who would bear the burden of convincing the decision-maker. A few experts explained that under the domestic law, the burden of proof was placed on the relocating parent who must show that the move is in the best interests of the child. The variety of national approaches was exemplified by the intervention of the expert of the United States of America, who explained that there was no consensus among the 50 states within the United States of America on most aspects of relocation cases, including the burden of proof. She underlined that trials were long and very difficult.

70. Despite these different approaches, the majority of experts stated that their domestic law required the relocating parent to obtain the consent of the other parent or, in the absence thereof, a judicial authorisation, before moving abroad with the child. Many experts explained that this requirement was due to the fact that parental authority was shared by both parents under their national law.

71. An expert from Israel indicated that the draft legislation which is being introduced in his jurisdiction provided for a preliminary notice of 90 days to be given by the parent wishing to relocate to the other parent. He noted that in case of disagreement, the dispute would be brought to mediation before being heard by a judge.

72. The majority of experts stated that the "best interests of the child" was the paramount consideration in relocation disputes. In this regard, many experts indicated that judges consider factors such as the desire of the parent to live abroad, the real motives for the move and the soundness of this project, the degree of involvement of each parent in the child's life, the agreements reached previously in relation to custody matters, the possibility for the child to maintain a meaningful relationship with both parents, the protection of the child from physical and emotional harm, and the views of the child. With regard to the last factor, an expert from Belgium indicated that in her jurisdiction, a child under 12 years of age was generally not questioned in order to avoid any conflict of loyalty.

73. An expert from New Zealand stressed that the broad discretion given to judges in his jurisdiction resulted in very varied outcomes and created legal uncertainty.

74. Several experts acknowledged that relocation decisions were the most difficult decisions a judge had to make, and that balancing the different interests was difficult. An expert from Belgium added that it was difficult to know how the child would adapt to the new environment and that, in such cases, there was no "good decision".

75. A few experts noted recent developments in their national case-law. An expert from the United Kingdom (England and Wales) described the jurisprudential approach adopted in his jurisdiction where the court generally grants permission to relocate unless it is contrary to the welfare of the child. He explained that there has been recently a significant softening of this traditional approach in order to reflect that in an increasing number of cases, custody of a child is shared. A few other experts described an opposite trend, explaining that since recent jurisprudential shifts, the parent who did not relocate could not easily prevent the other parent from moving.

76. Some experts noted that the polarisation of the parties made relocation cases difficult to settle through mediation. Other experts disagreed and insisted that mediation should not be excluded from the relocation issue.

77. An observer from International Parental Child Abduction Support Foundation (IPCAS) noted the abundance of social science research in the area which often reveals the serious consequences of international relocation for families. Various studies were cited, such as the research currently being undertaken by Professor Marilyn Freeman or by Dr Robert George of Oxford University, as well as the preliminary collaborative work currently being undertaken between experts in the United Kingdom and New Zealand.

### **Potential soft law instrument concerning handling of family relocation cases**

78. The majority of experts did not support the development of a binding instrument on the issue of international family relocation. Many experts underlined that relocation was a matter of substantive domestic law and that a binding instrument would be outside the scope of the work of the Hague Conference.

79. A few experts added that it would be difficult to find, within the Hague Conference, a common standard of substantive law. An expert from the United Kingdom (England and Wales) affirmed that in reality there was only one principle, that of the best interests of the child, and that all other elements were simply factors to be weighed in the balance to reach a decision as to a particular child. He explained that it was this weighing of factors that would cause difficulties in finding common ground among different States.

80. Many experts described the Washington Declaration and Preliminary Document No 11 as very valuable sources of insight and guidance into the issue and encouraged their dissemination.

81. A few experts suggested that the Washington Declaration be viewed as a basis for further development into a guide or general principles. An expert from the United Kingdom (England and Wales) emphasised that the Washington Declaration should be regarded as a “first step” rather than a completed exercise.

82. A few experts suggested that further work could be undertaken by an expert group to determine whether an instrument is necessary in this area but there was not sufficient support for an experts group. An expert from Switzerland underlined that the relocation issue should also be viewed within the context of all other topics under consideration, including recognition and enforcement of mediated agreements and direct judicial communications.

83. Many experts underlined that although relocation is a domestic law issue, it has potential private international law implications. It was explained that relocation cases often raise the problem of the recognition and enforcement of contact agreements or decisions. In this respect, several experts recalled the importance of the 1996 Convention which notably provides for the advance recognition of parenting orders (Art. 24). Thus, many experts agreed that the 1996 Convention was the principle solution and supported greater participation in the 1996 Convention. An expert from the European Union added that within the European Union, the Brussels II a Regulation (Council Regulation (EC) No 2201/2003 of 27 November 2003) provides helpful rules of jurisdiction in international relocation cases.

84. An observer from United States – Mexico Bar Association (USMBA) noted that cases involving involuntary international relocations due to immigration issues are a unique situation and should be considered in any further work on international relocation.

85. The Special Commission recognised that the Washington Declaration provides a valuable basis for further work and reflection.<sup>39</sup> Moreover, the Special Commission noted support for further comparative study being undertaken of the different approaches adopted in various legal systems to international family relocation in relation to private international law issues.<sup>40</sup> Finally, the Special Commission recognised the use of the 1996 Convention in international family relocation, and encouraged States that have not yet done so to consider ratification of, or accession to, the Convention.<sup>41</sup>

## FUTURE OF THE MALTA PROCESS

86. The Permanent Bureau introduced the topic by recalling the history of the Malta Process as outlined in various Preliminary Documents prepared by it and the declarations issued by the three previous Malta Conferences.<sup>42</sup> It also acknowledged the activities of the Working Party on Mediation in the context of the Malta Process and welcomed its '*Principles for the establishment of mediation structures in the context of the Malta Process*'.<sup>43</sup>

87. The Permanent Bureau noted some desire to explore whether the initial "building blocks" in place to develop a "rule of law" between States could be further enlarged and developed outside of the context of mediation structures. There were different views on how to approach this: to create smaller regional groups, to involve more non-Contracting States, to conduct projects relating to questions of jurisdiction and to examine other governmental structures. In this context, the Permanent Bureau sought input from States on how to move forward,<sup>44</sup> taking into account the value of the three declarations issued by the previous conferences in Malta and the possibility of supporting a Fourth Conference, to be held in late 2012 or early 2013.

88. The expert from Malta outlined the rapid progress and increasing number of States and institutions involved in the Malta Process and indicated that it would welcome holding a fourth Conference in Malta. Several experts and observers recognised the work done by the Working Party on mediation and welcomed a continued dialogue on the matter.

89. Several experts believed that the work to be undertaken should be more focused on assistance to particular States to address the problems between non-Contracting States to the Conventions and Contracting States. To this end, experts emphasised the need for concrete results and more commitment on the part of governmental entities, not just the judiciary. A number of other experts proposed the designation of Central Contact Points, including their extension to States not yet involved. Finally, a great number of experts supported the organisation of a Fourth Malta Conference.

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<sup>39</sup> Conclusion and Recommendation No 83 of the 2012 Special Commission (Part II).

<sup>40</sup> Conclusion and Recommendation No 84 of the 2012 Special Commission (Part II).

<sup>41</sup> Conclusion and Recommendation No 85 of the 2012 Special Commission (Part II).

<sup>42</sup> Such topic was briefly reviewed in Part I of the Sixth Meeting of the Special Commission. See: Prel. Doc. No 14 at paras 259-269. See also Prel. Doc. No 13 at paras 77-81; Prel. Doc. No 12 at paras 88-96; "Regional Developments", Prel. Doc. No 10 of October 2006, pp. 7-9; Info. Doc. No 8, pp. 1-14. All of these 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>43</sup> "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, available on the Hague Conference website *ibid*, pp. 1-13. See also Conclusion and Recommendation No 60 of the 2011 Special Commission (Part I).

<sup>44</sup> See Prel. Doc. No 12 of December 2011 at paras 105-108.

90. The Chair stated that there was general support to continue the Malta Process and to identify the most effective methodology to achieve concrete results. There was also support for the organisation of a Fourth Malta Conference, which Malta had kindly agreed to host. The Special Commission therefore agreed to support the continuation of the Malta Process, and encouraged greater involvement of government representatives in the Process.<sup>45</sup>

## **REPORT ON THE SERVICES AND STRATEGIES PROVIDED BY THE HAGUE CONFERENCE IN RELATION TO THE 1980 AND 1996 CONVENTIONS**

91. The Permanent Bureau introduced Preliminary Document No 12 which offered an overview of the services and strategies provided by the Hague Conference to support the practical operation of the 1980 and 1996 Conventions.<sup>46</sup> It noted that some of these services had already been discussed during the 2011 Special Commission (Part I)<sup>47</sup> and briefly recalled the Conclusions and Recommendations reached at that meeting.<sup>48</sup> It then turned to the services which were not directly addressed during the 2011 Special Commission (Part I), namely the organisation of Special Commission meetings, conferences, seminars and trainings, responding to requests for assistance, INCADAT, INCASTAT, *iChild* and a new question concerning the role of the Permanent Bureau in monitoring and ensuring compliance with the 1980 and 1996 Conventions. It invited experts to give their views particularly on the latter question, bearing in mind the financial constraints and limited resources available.

92. Many experts expressed their general appreciation for the work of the Permanent Bureau, particularly in relation to the encouragement of co-operation between States and the promotion of accessions to the 1980 and 1996 Conventions.

93. A significant number of experts supported the post-Convention services provided by the Hague Conference, which aim to promote the effective implementation and practical operation of the 1980 and 1996 Conventions. Experts emphasised the importance of the Permanent Bureau's work in organising seminars, meetings, conferences and trainings at a national, regional and global level, especially between the judiciary. Several experts also expressed appreciation for the maintenance of the Hague Conference's website and the databases of INCADAT and INCASTAT. One expert commented that the completed Country Profiles for the 1980 Convention are very useful tools.

94. Various experts thanked and encouraged the continued work of the Latin American Regional Office. Other experts welcomed the establishment of an Asia Pacific Regional Office in the Hong Kong Special Administrative Region of the People's Republic of China.

95. In relation to the idea of the Permanent Bureau taking a stronger role in monitoring compliance with the Conventions, several experts expressed their reservations regarding the idea, which they feared would have an impact on the traditional, neutral position of the Permanent Bureau.

96. Consideration was also given to the role of the Permanent Bureau in responding to requests from governments, Central Authorities, lawyers and individuals. Some experts

<sup>45</sup> Conclusion and Recommendation No 86 of the 2012 Special Commission (Part II).

<sup>46</sup> This document summarised the comments about services received from States in response to Prel. Docs Nos 1 and 2 (Questionnaires I and II). See also Prel. Doc. No 13, paras 82-87.

<sup>47</sup> See Prel. Doc. No 14 in the following areas: developing guides to good practice (paras 165-168), developing handbooks and implementation checklists (paras 169-176), maintaining country profiles for the 1980 Convention (paras 30-32), developing and updating standard forms (paras 26-29) and facilitating and supporting direct judicial communications (paras 196-215).

<sup>48</sup> Conclusions and Recommendations Nos 10, 14, 19, 21-27, 38(a) and (c), 40, 52-55, 58-59, 66, 68 and 72 of the 2011 Special Commission (Part I).

indicated that the Permanent Bureau should not deal with requests from individuals and should only respond to Central Authority requests. The Permanent Bureau reminded experts that the responses to requests from individuals represent only a portion of its work and that it generally refers individuals to the relevant Central Authorities (or other competent authority, in the case of non-Contracting States). It also mentioned that it is working on a Frequently Asked Questions (FAQ) section on its official website to attempt to reduce the number of requests for information received from individuals.

97. Various experts noted that given the limited nature of available resources, the Permanent Bureau should prioritise its services.

98. The Chair summarised the informative discussion and noted that there was unanimous support for the current work of the Permanent Bureau in supporting and promoting the effective implementation and practical operation of the 1980 and 1996 Conventions. He then noted that there was no support for extending the role of the Permanent Bureau to include a stronger role in monitoring compliance with the Conventions. He concluded that the experts wished to see the Permanent Bureau continue to focus on implementation and training. He added that many experts had also emphasised the importance of regional activities.

99. The Special Commission therefore recommended that the Permanent Bureau continue its work in supporting the effective practical operation of the 1980 and 1996 Conventions. In particular, it was recommended that the Permanent Bureau should encourage regional activities, including conferences, seminars and trainings, where requests for assistance are received from individuals, provide general information concerning the relevant competent authority(ies), and consider ways to enhance the effectiveness of Special Commission meetings to review the practical operation of the 1980 and 1996 Conventions.<sup>49</sup> It further supported the continued work of the Latin American Regional Office and the development of a Regional Office in the Asia Pacific region.<sup>50</sup>

#### **- INCADAT (The “International Child Abduction Database”)**

100. The Permanent Bureau recalled the Conclusions and Recommendations of the 2006 and 2011 (Part I) Special Commissions<sup>51</sup> where the Special Commission had welcomed the efforts of the Permanent Bureau in relation to the use and the development of information technology systems in support of existing and draft Hague Conventions in the areas of legal co-operation and family law. These Conclusions and Recommendations encouraged Member States to collaborate actively with the Permanent Bureau in the development and maintenance of these systems and to explore possible sources of funding. The Permanent Bureau thanked the many States which had supported these efforts by contributing to the Conference’s supplementary budget, as well as the other partners for their contributions.

101. The Permanent Bureau briefly summarised the history of INCADAT which was established in 1999 in order to provide accessibility for all Convention actors and users to leading decisions rendered by national courts in respect of the 1980 Convention. It noted that INCADAT currently contains summaries of more than 1000 decisions from more than 40 jurisdictions in English and French and, to a large extent, in Spanish. It further indicated that in April 2010, a new version of INCADAT was launched introducing, amongst other new features, a “Case Law Analysis” section regarding key topics of the 1980 Convention.

<sup>49</sup> See Conclusion and Recommendation No 87 of the 2012 Special Commission (Part II).

<sup>50</sup> See Conclusion and Recommendation No 88 of the 2012 Special Commission (Part II).

<sup>51</sup> See Conclusion and Recommendation No 1.1.16 of the 2006 Special Commission and Conclusion and Recommendation No 56 of the 2011 Special Commission (Part I).

102. The Permanent Bureau stated that it was working on the enlargement of INCADAT's coverage and, in this respect, would like to increase the number of leading decisions from already represented States, as well as to extend the database to include case law from not yet represented Contracting States. It also noted the importance of building and servicing a stable and reliable network of INCADAT "Correspondents" (*i.e.*, suitably qualified persons around the globe who could contribute case summaries to INCADAT) and the need to hold an INCADAT Correspondents meeting in The Hague. The Permanent Bureau highlighted that all these initiatives involve an allocation of resources which is increasingly difficult within the Permanent Bureau.

103. The Permanent Bureau noted that the overwhelming majority of responses to Questionnaire I<sup>52</sup> indicated that INCADAT was a very helpful resource and stated that it was particularly valuable for judges and lawyers in practice. It reminded experts that INCADAT could never be an exhaustive resource on case-law under the 1980 Convention. It underlined that the database was a resource offered to all, for free, and that comparisons with commercial databases were therefore unrealistic, bearing in mind the huge resources such databases have at their disposal.

104. An expert from Switzerland highlighted the importance of having accurate information placed online, so as to provide a reliable tool. An expert from Germany encouraged quicker uploading of decisions suggested by States to INCADAT's editorial team. Other experts noted that INCADAT illustrated that States still had fundamental differences in interpreting and implementing the 1980 Convention and emphasised the importance of INCADAT for achieving the uniform interpretation and application of the 1980 Convention. An expert from the United Kingdom highlighted its benefits, practical effectiveness and further commended the work of the INCADAT Legal Consultant, Professor McEleavy.

105. Many experts highlighted the usefulness of INCADAT and expressed their support for its maintenance. An expert from the United States of America supported the recommendation from the 2011 Special Commission (Part I) concerning exploring the possible extension of INCADAT to 1996 Convention cases.<sup>53</sup> However, an expert from Germany disagreed on the latter proposal, due to financial constraints and the increased difficulty of the subject matter. Various experts expressed the need for a greater allocation of resources to the database.

106. An observer from the International Law Association (ILA) emphasised the importance of the summaries on INCADAT being reviewed by academics who are native speakers of the language of the original decision.

107. The Permanent Bureau invited Professor Peter McEleavy, INCADAT Legal Consultant, to discuss the revisions and additions made to INCADAT, the new version of which was launched in April 2010. He began his report by reminding experts that the core objective of INCADAT was to make available the case law of as many jurisdictions as possible, in order to promote the uniform interpretation and application of the 1980 Convention. He stressed that INCADAT cannot guarantee a uniform interpretation of the Convention: that is a matter for the courts themselves. INCADAT simply makes the information available. He explained that decisions of particular importance were included and that these were neutrally selected. He highlighted that INCADAT was a free service which could not provide the same level of sophistication offered by commercial databases. He indicated that the summaries annexed to the decisions only presented the facts, the outcome and the reasoning of the courts in a concise, carefully examined and

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<sup>52</sup> See Prel. Doc. No 12 at para. 46.

<sup>53</sup> See Conclusion and Recommendation No 56 of the 2011 Special Commission (Part I).



neutral manner. He added that the name of the summary's author was supplied and that a link to the text of the original decision was included wherever possible.

108. He noted that so far efforts to recruit correspondents had not generated a significant contribution of summaries. He encouraged greater cooperation in this matter. He noted the future launching of an online module that would facilitate the transfer of decisions from correspondents to the editorial team. He also indicated that a new edition of the *Correspondents' Guide* would soon be available. He then referred to the new feature of the "Case Law Analysis" section of the database. Finally, he stressed that despite very limited resources, INCADAT was a tool of high quality.

109. The Special Commission took note of Professor McEleavy's report on INDACAT which stressed that future improvements to INCADAT are subject to available resources.<sup>54</sup>

#### **- INCASTAT and *iChild***

110. The Permanent Bureau introduced other information technology tools developed by the Hague Conference, namely INCASTAT and *iChild*. It recalled that INCASTAT was already discussed during the 2011 Special Commission (Part I), that it was the subject of two Conclusions and Recommendations.<sup>55</sup> With regard to the possible expansion of INCASTAT to include the data sought for the statistical analysis of cases arising in 2008, the Special Commission took note of the Information Document No 7 and acknowledged that work should continue, subject to supplementary funding.<sup>56</sup> The Permanent Bureau then referred to the possibility of an automated data migration of information from States' national statistical databases to INCASTAT.<sup>57</sup>

111. The Permanent Bureau then recalled the origins and history of *iChild*. It indicated that the system, developed in partnership with *WorldReach Canada*, was used by Mexico and that a number of Contracting States had shown an interest in it. It highlighted that the system was provided at no cost and that *WorldReach Canada* was available to States for any further necessary information.

112. An expert from Mexico shared his positive experience using *iChild* and encouraged other Central Authorities to implement the system. An expert from Paraguay also expressed interest in it.

113. The Special Commission also welcomed the continuing work on *iChild* carried out by the Hague Conference and *WorldReach Canada*.<sup>58</sup>

#### **A Model Consent to Travel Form?**

114. The Permanent Bureau introduced the topic by referring to Preliminary Document No 15. It indicated that a number of States required the use of a form giving permission to travel with a child outside its jurisdiction, especially in situations when the latter travelled with only one parent. At the Fifth Meeting of the Special Commission in 2006, the Permanent Bureau was requested to look into this matter and determine whether it might be possible to develop a model form for providing consent to travel with a child outside the jurisdiction.<sup>59</sup>

115. The Permanent Bureau noted that the form, substance and use of consent to travel forms were matters of domestic law, greatly varying from one State to another.

<sup>54</sup> See Conclusion and Recommendation No 89 of the 2012 Special Commission (Part II).

<sup>55</sup> See Conclusions and Recommendations Nos 22 and 23 of the 2011 Special Commission (Part I);

<sup>56</sup> See Conclusion and Recommendation No 90 of the 2012 Special Commission (Part II).

<sup>57</sup> See Info. Doc. No 7.

<sup>58</sup> See Conclusion and Recommendation No 91 of the 2012 Special Commission (Part II).

<sup>59</sup> See Conclusion and Recommendation No 1.2.3 of the 2006 Special Commission.

Examples of such differences were, e.g. language, requirements for consent (notarised or witnessed), and whether the form was used at points of entry or exit. In light of this, the Permanent Bureau approached the International Civil Aviation Organisation (ICAO), who was consulted in the preparation of Preliminary Document No 15.<sup>60</sup> It concluded that the mentioned differences make it very difficult to develop a model form at the international level. It therefore proposed to discontinue its development. It recommended instead that the Hague Conference bring the project to the attention of ICAO. It would then be for ICAO to consider a project within its own priorities and agenda.

116. Following discussion, the Chair noted that there was a consensus to cease work on this topic and bring the matter to the attention of ICAO. The Special Commission agreed on the discontinuation of the work concerning the model consent to travel form.<sup>61</sup>

## **CONCLUSIONS AND RECOMMENDATIONS OF THE 2012 SPECIAL COMMISSION (PART II)**

117. The Chair introduced Working Document No 10 containing the draft Conclusions and Recommendations which was accepted without change. The final Conclusions and Recommendations adopted by the Special Commission appear at Annex 1.

118. 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 Matthias Heger (Germany), the Permanent Bureau, the recording secretaries, the administrative and support staff and the interpreters. Several experts thanked the Chair and the staff of the Permanent Bureau.

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<sup>60</sup> See Prel. Doc. No 15 at paras 22-28.

<sup>61</sup> Conclusion and Recommendation No 92 of the 2012 Special Commission (Part II).

## **ANNEXES**

**Special Commission on the  
practical operation of the  
1980 and 1996 Hague Conventions  
(25-31 January 2012)**



**Conclusions and Recommendations (Part II)**

***adopted by the Special Commission***

**Recognition and enforcement of agreements**

76. Recognising that, in the course of international child disputes, the parties may enter into agreements settling their dispute, the Special Commission recommends that exploratory work be undertaken to identify legal and practical problems that may exist in the recognition and enforcement abroad of such agreements, taking into account the implementation and use of the 1996 Convention.

77. To this end, the Special Commission recommends that the Council on General Affairs and Policy consider authorising the establishment of an Expert Group to carry out further exploratory research, which would include identification of the nature and extent of the legal and practical problems in this area, including, specifically, jurisdictional issues and would evaluate the benefit of a new instrument in this area, whether binding or not.

**Direct judicial communications**

78. The Special Commission supports that consideration be given to the inclusion of a legal basis for direct judicial communications in the development of any relevant future Hague Convention.

79. In relation to future work, the Special Commission recommends that the Permanent Bureau:

- (a) promote the use of the *Emerging Guidance and General Principles on Judicial Communications*;
- (b) continue to encourage the strengthening and expansion of the International Hague Network of Judges; and
- (c) maintain an inventory of domestic legal bases relating to direct judicial communications.

**Article 13(1) b) of the 1980 Convention, including allegations of domestic and family violence**

80. The Special Commission notes that the evaluation of the evidence and the determination of the grave risk of harm exception (Art. 13(1) b)), including allegations of domestic violence, are an exclusive matter for the authority competent to decide on the return, having due regard to the aim of the 1980 Convention to secure the prompt and safe return of the child.

81. The Special Commission recommends that further work be undertaken to promote consistency in the interpretation and application of Article 13(1) b) including, but not limited to, allegations of domestic and family violence.

82. The Special Commission recommends that the Council on General Affairs and Policy authorise the establishment of a Working Group composed of judges, Central Authorities and cross-disciplinary experts to develop a Guide to Good Practice on the interpretation and application of Article 13(1) *b*), with a component to provide guidance specifically directed to judicial authorities, taking into account the Conclusions and Recommendations of past Special Commission meetings and Guides to Good Practice.

### **International family relocation**

83. The Special Commission recognises that the Washington Declaration<sup>1</sup> provides a valuable basis for further work and reflection.

84. The Special Commission notes support for further work being undertaken to study and gather information concerning the different approaches adopted in various legal systems to international family relocation, in relation to private international law issues and the application of the 1996 Convention.

85. Recognising the value of the 1996 Convention to international family relocation, States that have not yet done so are encouraged to consider ratification of or accession to the Convention.

### **The Malta Process**

86. The Special Commission supports the general continuation of the Malta Process and a Fourth Malta Conference and suggests that future emphasis be placed on the involvement of government representatives in the Process.

### **The services and strategies provided by the Hague Conference on Private International Law in relation to the 1980 and 1996 Conventions**

87. The Special Commission recommends that the Hague Conference on Private International Law, through its Permanent Bureau, continue its current work to support the effective practical operation of the 1980 and 1996 Conventions and, in this regard, the Permanent Bureau should:

- (a) focus on the promotion, implementation and effective practical operation of the 1980 and 1996 Conventions;
- (b) encourage regional activities including conferences, seminars and training;
- (c) where requests for assistance are received from individuals, provide general information concerning the relevant competent authority(ies); and
- (d) consider ways to enhance further the effectiveness of Special Commission meetings to review the practical operation of the 1980 and 1996 Conventions.

88. The Special Commission notes the strong support for the continuing work in strengthening the Latin American Regional Office and in developing a Regional Office in the Asia Pacific region.

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<sup>1</sup> Resulting from the International Judicial Conference on Cross-Border Family Relocation held in Washington, D.C., United States of America from 23 to 25 March 2010, co-organised by the Hague Conference on Private International Law and the International Centre for Missing and Exploited Children, with the support of the United States Department of State.

89. The Special Commission takes note of the report of Professor McEleavy (INCADAT Legal Consultant) which, in answering concerns expressed as to the quality of the database, stressed that continued enhancements are being made to INCADAT but that future improvements are subject to available resources.

90. The Special Commission takes note of Information Document No 7 on the expansion of INCASTAT and acknowledges that work should continue subject to supplementary funding.

91. The Special Commission welcomes the continuing work on iChild carried out by the Hague Conference and WorldReach Canada.

92. The Special Commission agrees that the Hague Conference will not continue its work on the model consent to travel form (Prel. Doc. No 15) and that the Permanent Bureau should inform ICAO of this decision.

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



**Working Document No 1 (distributed on 3 June 2011)**

**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*).

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



**Working Document No 2 (distributed on 3 June 2011)**

**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.

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**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.



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



**Conclusions and Recommendations (Part I)**

***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.

<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.

## **LISTE DES PARTICIPANTS / LIST OF PARTICIPANTS**

Sixième réunion de la Commission spéciale sur le fonctionnement pratique de la  
Convention Enlèvements d'enfants de 1980 et de la  
Convention Protection des enfants de 1996

\* \* \*

Sixth Meeting of the Special Commission to review the practical operation of the  
1980 Child Abduction Convention and the  
1996 Child Protection Convention

1-10 JUIN / JUNE 2011 (PREMIÈRE PARTIE / PART I) &  
25-31 JANVIER / JANUARY 2012 (DEUXIÈME PARTIE / PART II)

### **MEMBRES / MEMBERS**

#### **AFRIQUE DU SUD / SOUTH AFRICA**

##### ***Première Partie / Part I***

Ms Shirin EBRAHIM, Advocate, Department of Justice and Constitutional Development, Pretoria

Mr C.J. MAREE, Senior Family Advocate, Department of Justice and Constitutional Development, Pretoria

Ms Petunia Itumeleng SEABI, Chief Family Advocate, Central Authority for the Republic of South Africa, Office of Chief Family Advocate, Dept of Justice & Constitutional Development, Pretoria

##### ***Deuxième Partie / Part II***

Ms Justice Belinda VAN HEERDEN, Member of the International Hague Network of Judges; Appeal Judge, Supreme Court of Appeal, Bloemfontein

Ms Petunia Itumeleng SEABI, Chief Family Advocate, Central Authority - International Child Abduction, Office of Chief Family Advocate, Department of Justice and Constitutional Development, Pretoria

Ms J. PIENAAR, Senior State Law Advisor, Department of Justice and Constitutional Development, Pretoria

Ms Shirin EBRAHIM, principal Family Advocate, Department of Justice and Constitutional Development, Cape Town

Ms Thanisa NAIDU, Legal Counsellor, Embassy of the Republic of South Africa, The Hague

#### **ALBANIE / ALBANIA**

##### ***Première Partie / Part I***

Ms Mimoza SELENICA, Head Department of Juvenile and Family Justice, General Directorate of Codification, Ministry of Justice, Tirana

#### **ALLEMAGNE / GERMANY**

##### ***Première Partie / Part I***

Mr Matthias HEGER, Head of Division for International Civil Procedure, Bundesministerium der Justiz, Berlin

Mr Eberhard CARL, Judge at the Court of Appeal (Retired); Leiter des Referats RA7, Mediation, Schlichtung, Internationale Konflikte in Kindschaftssachen, Bundesministerium der Justiz, Berlin

Ms Andrea SCHULZ, Central Authority, (International Custody Conflicts), Bundesamt für Justiz  
Zentrale Behörde (Internationale Sorgerechtskonflikte), Bonn

Mrs Martina ERB-KLÜNEMANN, International Hague Network Judge; Judge, Amtsgericht Hamm,  
Hamm

Mr Felix NEUMANN, Legal Adviser, Embassy of the Federal Republic of Germany, The Hague

### ***Deuxième Partie / Part II***

Mr Matthias HEGER, Head of Division for International Civil Procedure, Bundesministerium der  
Justiz, Berlin

Mr Eberhard CARL, Judge at the Court of Appeal (Retired); Head of Division for Mediation, ADR,  
Settlement of Crossborder Children Conflicts, Berlin

Ms Ulrike Kjestina JANZEN, Referat I A 5 - Internationales Privatrecht, Referentin,  
Bundesministerium der Justiz, Berlin

Ms Andrea SCHULZ, Central Authority, (International Custody Conflicts), Bundesamt für Justiz  
Zentrale Behörde (Internationale Sorgerechtskonflikte), Bonn

Ms Sabine BRIEGER, Member of the International Hague Network of Judges; Richterin am  
Amtsgericht, Amtsgericht Pankow-Weißensee, Berlin

Mrs Donate ARZ VON STRAUSSBURG, Second Secretary, Embassy of the Federal Republic of  
Germany, The Hague

### **ANDORRE / ANDORRA**

### ***Deuxième Partie / Part II***

Mrs Laura CANTURRI, First Instance Judge, Palau de justícia, Andorra La Vella

Mrs Adoració GARCIA, Head of Interior Department, Central Authority - Hague Convention 1980,  
Ministry of Justice and Interior, Escaldes-Engordany

Mrs Joan Carles VILLAVARDE, Head of Social Welfare Department, Social Intervention Unit, Ministry  
of Social Affairs and Culture, Andorra La Vella

### **ARGENTINE / ARGENTINA**

### ***Première Partie / Part I***

Mrs María del C. SEOANE DE CHIODI, Director, International Legal Assistance Department, Ministry  
of Foreign Relations, International Trade and Worship, Buenos Aires

Ms Graciela TAGLE, International Hague Network Judge; Juez de la Ciudad de Córdoba, Córdoba

Mrs Victoria GRANILLO OCAMPO, Legal Counsellor, Legal Assistance Department, Ministry of  
Foreign Relations, International Trade and Worship, Buenos Aires

### ***Deuxième Partie / Part II***

Mr Luis Pablo M. BELTRAMINO, Minister – Counsellor, Chargé d'Affaires a.i., Embassy of Argentina,  
The Hague

Mr Fernando Andrés MARANI, First Secretary, Embassy of Argentina, The Hague

Mrs Victoria GRANILLO OCAMPO, Legal Counsellor, Legal Assistance Department, Legal Adviser's  
Office, Ministry of Foreign Relations and Worship, Buenos Aires

**AUSTRALIE / AUSTRALIA*****Première Partie / Part I***

Mr Paul HANSEN, Director, International Family Law Section, Family Law Branch, Commonwealth Attorney-General's Department, Barton

Ms Victoria BENNETT, International Hague Network Judge; Judge, Melbourne Registry, Family Court of Australia Commonwealth Law Courts, Melbourne

Ms Diana BRYANT, International Hague Network Judge; Chief Justice, Chief Justice's Chambers, Family Court of Australia Commonwealth Law Courts, Melbourne

***Deuxième Partie / Part II***

Mr Paul HANSEN, Director, International Family Law Section, Family Law Branch, Commonwealth Attorney-General's Department, Barton

Ms Victoria BENNETT, Member of the International Hague Network of Judges; Judge, Melbourne Registry, Family Court of Australia Commonwealth Law Courts, Melbourne

**AUTRICHE / AUSTRIA*****Première Partie / Part I***

Mr Robert FUCIK, Director, Department for International Family Law, Federal Ministry of Justice, Abteilung I 10, Vienna

***Deuxième Partie / Part II***

Mr Robert FUCIK, Director, Department for International Family Law, Federal Ministry of Justice, Vienna

Ms Christine MIKLAU, Magistrate, Directorate for Civil Law and Legislation, Federal Ministry of Justice, Vienna

Ms Andrea ERTL, Member of the International Hague Network of Judges; Judge, District Court of Linz (Bezirksgericht Linz), Linz

**BELGIQUE / BELGIUM*****Première Partie / Part I***

Mme Josiane PAUL, Conseiller, Chef de service (juriste), Dir. gén. de la Législation et des Libertés et Droits fondamentaux, Service Public Fédéral de la Justice - Service d'entraide internationale en mat. civile, Bruxelles

Mme Beatrijs DECONINCK, Conseiller à la Cour de Cassation, Ypres

Mme Karlijne van BREE, Attaché, Service Public Fédéral de la Justice, Service d'entraide internationale en mat. civile, Bruxelles ; Juriste, Dienst internationale rechtshulp in burgerlijkezaken, Brussels

Mme Olfa BENIOUCEF, Attaché (juriste), Service Public Fédéral de la Justice, Service d'entraide internationale en mat. civile, Bruxelles

***Deuxième Partie / Part II***

Mme Josiane PAUL, Conseiller, Chef de service (juriste), Dir. gén. de la Législation et des Libertés et Droits fondamentaux, Service d'entraide internationale en matière civile, Service Public Fédéral de la Justice, Bruxelles

Mme Olfa BENIOUCEF, Attaché (juriste), Service d'entraide internationale en matière civile, Service Public Fédéral de la Justice, Bruxelles

Ms Myriam de HEMPTINNE, Membre du Réseau international de juges de La Haye; Conseiller, Cour d'appel de Bruxelles, Palais de Justice, Bruxelles

## **BRÉSIL / BRAZIL**

### ***Première Partie / Part I***

Ms Patricia LAMEGO DE TEIXEIRA SOARES , Chief Co-ordinator, Secretaria de Direitos Humanos Autoridade Central Administrativa Federal - ACAF, Brasília

Ms Mônica Jacqueline SIFUENTES PACHECO DE MEDEIROS, International Hague Network Judge; Judge of the Federal Court of Appeals, Tribunal Regional Federal da 1ª Região Justiça Federal de Primeira Instância, Brasília

Mr Sergio RAMOS DE MATOS BRITO, State Attorney, International Department, Office of the Attorney General, Brasília

Mr Leandro ANTUNES MARIOSI, Secretary, Embassy of Brazil, The Hague

### ***Deuxième Partie / Part II***

Mr Leandro ANTUNES MARIOSI, Secretary, Embassy of Brazil, The Hague

Ms Mônica Jacqueline SIFUENTES PACHECO DE MEDEIROS, Member of the International Hague Network of Judges; Chief Judge of the Federal Court of Appeals, Tribunal Regional Federal da 1ª Região Justiça Federal de Primeira Instância, Brasília

Ms Patricia LAMEGO DE TEIXEIRA SOARES, Chief Co-ordinator of the Central Authority, Secretaria de Direitos Humanos Autoridade Central Administrativa Federal - ACAF, Brasília

Mr Sergio RAMOS DE MATOS BRITO, State Attorney, International Department, Office of the Attorney General, Brasília

## **BULGARIE / BULGARIA**

### ***Deuxième Partie / Part II***

Ms Bogdana Nikolova JELIAVSKA-PETROVA, Member of the International Hague Network of Judges; Vice-President of the Sofia City Court; Sofia

## **BURKINA FASO**

### ***Première Partie / Part I***

Mme Emma KIEMA, Chef du service des Adoptions; Inspectrice d'Education de Jeunes Enfants, Ministère de l'Action sociale et de la solidarité nationale, Ouagadougou

### ***Deuxième Partie / Part II***

Mme Clémence TRAORE-SOME, Présidente de l'Autorité centrale, Ministère de l'Action sociale et de la solidarité nationale, Ouagadougou

## **CANADA**

### ***Première Partie / Part I***

Mrs Marie RIENDEAU, Lawyer, Department of Justice, International Private Law Section, Public Law Sector, Ottawa

Ms Anne BOURDEAU, Deputy Director Children's Issues, Foreign Affairs and International Trade, Canada Case Support and Children's Issues Division, Ottawa

M. Jacques CHAMBERLAND, International Hague Network Judge; Juge, Cour d'appel du Québec, Montréal (Président de la Commission spéciale / President of the Special Commission)

Ms Robyn Moglove DIAMOND, International Hague Network Judge; Judge, Court of Queen's Bench (Family Division), The Law Courts, Winnipeg

Ms Lise LAFRENIERE HENRIE, Senior Counsel, Family Law Policy, Department of Justice, Ottawa

Mme France RÉMILLARD, Direction des Services Professionnels, Entraide internationale, Ministère de la Justice du Québec, Québec

Ms Janet SIGURDSON, Crown Counsel, Manitoba Justice, Family Law Branch, Winnipeg

Ms Lillian THOMSEN, Director General, Consular Policy and Advocacy Bureau, Foreign Affairs Canada; Dean, Canadian Foreign Service Institute, Ottawa

Mrs Sandra ZED FINLESS, Senior Counsel & Federal Central Authority, Justice Legal Services, Department of Foreign Affairs and International Trade, Ottawa

Mr Cyril BORLÉ, Second Secretary (Political), Embassy of Canada, The Hague

### ***Deuxième Partie / Part II***

Mrs Marie RIENDEAU, Lawyer, Department of Justice, International Private Law Section, Public Law Sector, Ottawa

Mrs Sandra ZED FINLESS, Senior Counsel & Federal Central Authority, Office of the Central Authority, Justice Legal Services, Department of Foreign Affairs and International Trade, Ottawa

Ms Lise LAFRENIERE HENRIE, Senior Counsel, Family Law Policy, Department of Justice, Ottawa

Ms Penelope LIPSACK, Barrister and Solicitor, Legal Services Branch, Central Authority for British Columbia, Victoria

Mme Fabienne BOUCHARD, Direction des orientations et politiques, Ministère de la Justice, Québec

M. Jacques CHAMBERLAND, Membre du Réseau international de juges de La Haye ; Juge, Cour d'appel du Québec, Montréal (Président de la Commission spéciale / President of the Special Commission)

Ms Robyn Moglove DIAMOND, International Hague Network Judge; Judge, Court of Queen's Bench (Family Division), The Law Courts, Winnipeg

Mr Bez BABAKHANI, Director, Case Support and Children's Issues, Consular Operation Bureau, Justice Legal Services, Department of Foreign Affairs and International Trade, Ottawa

Mr Cyril BORLÉ, Second Secretary (Political-Economic), Embassy of Canada, The Hague

### **CHILI / CHILE**

#### ***Première Partie / Part I***

Mr Juan Francisco ZARRICUETA BAEZA, Chief Lawyer, International Office, Corporación de Asistencia Judicial de la Región Metropolitana, Santiago De Chile

Mrs Nazhla ABAD, Third Secretary, Embassy of Chile, The Hague

#### ***Deuxième Partie / Part II***

Mrs Nazhla ABAD, Third Secretary, Embassy of Chile, The Hague

### **CHINE, RÉPUBLIQUE POPULAIRE DE / CHINA, PEOPLE'S REPUBLIC OF**

#### ***Première Partie / Part I***

Mr QU Wensheng, Legal Counsellor, Embassy of the People's Republic of China, The Hague

Mr ZHANG Jian, Deputy Director, Department of Treaty and Law, Ministry of Foreign Affairs, Beijing

Ms WU Haiwen, Second Secretary, Department of Treaty and Law, Ministry of Foreign Affairs, Beijing

Mr Michael J. HARTMANN, International Hague Network Judge; Judge of the High Court of the Hong Kong Special Administrative Region, Hong Kong

Ms Bebe Pui-ying CHU, Principal Family Court Judge, Family Court, Wanchai Law Courts, Hong Kong SAR

Ms Susana SIT, Senior Government Counsel, Department of Justice International Law Division, Hong Kong SAR

Ms TAM Mei-po Mable, Senior Inspector, Child Protection Policy Unit, Crime Support Group, Hong Kong Police Force, Hong Kong SAR

Ms WONG Kio Chan Doris, Legal Adviser, Government of the Macau SAR, Law Reform and International Law Bureau, Macau SAR

Ms WONG Wai Ying Winnie, Senior Technical Officer, Social Welfare Bureau, Macao SAR

### ***Deuxième Partie / Part II***

Mr LI Zhenhua, Counsellor, Department of Treaty and Law, Ministry of Foreign Affairs, Beijing

Ms WU Haiwen, Second Secretary, Department of Treaty and Law, Ministry of Foreign Affairs, Beijing

Mr Michael J. HARTMANN, Member of the International Hague Network of Judges; Judge of the High Court of the Hong Kong Special Administrative Region, Hong Kong SAR

Mr Jeremy Shiu Chor POON, Judge of the Court of First Instance of the High Court, Hong Kong SAR

Ms Susana SIT, Senior Government Counsel, Department of Justice, International Law Division, Hong Kong SAR

Ms WONG Kio Chan Doris, Legal Adviser, Government of the Macau SAR Law Reform & International Law Bureau, Macau SAR

Ms WONG Wai Ying Winnie, Senior Technical Officer, Social Welfare Bureau, Macau SAR

### **CHYPRE / CYPRUS**

#### ***Première Partie / Part I***

Mrs Louiza CHRISTODOULIDES-ZANNETOS, Senior Counsel of the Republic, Office of the Attorney General of the Republic, Nicosia

Ms Troodia DIONYSIOU, Administrative Officer, Unit for International Legal Co-operation, Ministry of Justice and Public Order, Lefkosia (Nicosia)

Mr Nikitas E. HATZIMIHAİL, Assistant Professor, Department of Law, University of Cyprus, Nicosia

Mr George A. SERGHIDES, International Hague Network Judge; Judge, President of the Family Court of Nicosia-Kyrenia, Family Court, Nicosia

#### ***Deuxième Partie / Part II***

Mr Nikitas E. HATZIMIHAİL, Assistant Professor, Department of Law, University of Cyprus, Nicosia



**COLOMBIE / COLOMBIA**

***Première Partie / Part I***

Ms Belen VILLAMIZAR BAEZ, Abogada de la Autoridad Central, Instituto Colombiano de Bienestar Familiar, Bogotá

***Deuxième Partie / Part II***

Ms Solángel ORTIZ MEJIA, Counsellor, Embassy of Colombia, The Hague

**CORÉE, RÉPUBLIQUE DE / KOREA, REPUBLIC OF**

***Première Partie / Part I***

Mr Jong Seop YOON, Judge, Seoul Family Court, Seoul

Mr Min Ho YANG, Judge, Seoul Southern District Court, Seoul

Mr Woo Jin HWANG, Public Prosecutor, International Legal Affairs Division, Ministry of Justice, Gyeonggi-Do

Ms Jin-he OH, First Secretary, Division of Consular Services, Ministry of Foreign Affairs and Trade, Seoul

Mr Jae-Woo KIM, First Secretary, Embassy of the Republic of Korea, The Hague

***Deuxième Partie / Part II***

Mr Zha Hyoung RHEE, Counsellor, Embassy of the Republic of Korea, The Hague

Mr Woo Jeong SHIN, Judge, Seoul Central District Court, Seoul

Ms Nak-Hee HYUN, Judge, Ulsan District Court, Ulsan

Ms Jin-he OH, First Secretary, Ministry of Foreign Affairs and Trade Division of Consular Services, Seoul

**COSTA RICA**

***Première Partie / Part I***

Mrs Ana Marcela CALDERON, Minister Counsellor, Embassy of the Republic of Costa Rica, The Hague

***Deuxième Partie / Part II***

H.E. Mr Jorge URBINA ORTEGA, Ambassador of Costa Rica, Embassy of the Republic of Costa Rica, The Hague

Mrs C. MARIELOS HERNANDEZ, Executive Director, Patronato Nacional de la Infancia (PANI), San Jose

Mr Jorge URBINA SOTO, Technical Manager, Patronato Nacional de la Infancia (PANI), San Jose

Ms Ingrid QUESADA, Legal Adviser, Patronato Nacional de la Infancia (PANI), San Jose

Mrs Ana Marcela CALDERON, Minister Counsellor, Embassy of the Republic of Costa Rica, The Hague

Ms Shara DUNCAN VILLALOBOS, Counsellor, Embassy of the Republic of Costa Rica, The Hague

**CROATIE / CROATIA**

***Première Partie / Part I***

Ms Lidija BUDIMOVIC, Senior Advisor, Ministry of Health and Social Welfare, Zagreb

Mrs Marija STOJEVIC, Head of the Department for International Cooperation, Child Protection, Ministry of Health and Social Welfare, Zagreb

Mr Ivica MILICIC, Counsellor, Embassy of the Republic of Croatia, The Hague

***Deuxième Partie / Part II***

Mr Sloven SUŠNIK, Third Secretary, Embassy of the Republic of Croatia, The Hague

**DANEMARK / DENMARK**

(Présidence du Conseil de l'Union européenne / Presidency of the Council of the European Union)

***Première Partie / Part I***

Ms Cecilie AMBROSIUS PEDERSEN, Head of Section, Ministry of Justice Department of Family Affairs, Copenhagen

Ms Nanna KILDSIG, Head of Section, Ministry of Justice Department of Family Affairs, Copenhagen

Mr Nikolaj KROHN-RASMUSSEN, Head of Section, Ministry of Justice Department of Family Affairs, Copenhagen

Mr Lars THOGERSEN, Legal Advisor, Ministry of Justice Department of Family Affairs, Copenhagen

***Deuxième Partie / Part II***

Mr Nikolaj KROHN-RASMUSSEN, Head of Section, The National Social Appeals Board Division of Family Affairs, Copenhagen

**ÉQUATEUR / ECUADOR**

***Première Partie / Part I***

Mrs Maria Veronica LOYOLA, Functionary of the Ministry of Foreign Affairs, Trade and Integration, Ministerio de Relaciones Exteriores, Quito

Mrs Karina SUBÍA, Unidad de Relaciones Internacionales de la Autoridad Central de la Secretaría Ejecutiva, Consejo Nacional de la Niñez y Adolescencia

***Deuxième Partie / Part II***

Mrs Karina SUBÍA, Unidad de Relaciones Internacionales del Consejo Nacional de la Niñez y Adolescencia, Autoridad Central de la Secretaría Ejecutiva, Quito

**ESPAGNE / SPAIN**

***Première Partie / Part I***

Mme Alegría BORRÁS, Catedrática de Derecho Internacional Privado, Universidad de Barcelona, Facultad de Derecho, Barcelone

Mr Francisco Javier FORCADA MIRANDA, International Hague Network Judge; Magistrado, Family Court of First Instance No 6, Zaragoza

Ms Maria CURTO IZQUIERDO, Abogado del Estado, Jefe del Departamento de Civil y Mercantil, Abogacia del Estado, Madrid

Mrs Carmen GARCÍA REVUELTA, Consejera Técnica de la Subdirección General de Cooperación Jurídica Internacional, Ministerio de Justicia, Madrid

***Deuxième Partie / Part II***

Mr Francisco Javier FORCADA MIRANDA, Member of the International Hague Network of Judges; Senior Judge, Family Court of First Instance No 6, Zaragoza

Mme Alegría BORRÁS, Catedrática de Derecho Internacional Privado, Universidad de Barcelona, Facultad de Derecho, Barcelone; (Vice-présidente de la Commission spéciale / Vice-President of the Special Commission)

**ESTONIE / ESTONIA*****Première Partie / Part I***

Ms Haldi MÄESALU, Advisor, International Judicial Co-operation Unit, Ministry of Justice of Estonia, Tallinn

***Deuxième Partie / Part II***

Ms Haldi MÄESALU, Advisor, International Judicial Co-operation Unit, Ministry of Justice, Tallinn

ÉTATS-UNIS D'AMÉRIQUE / UNITED STATES OF AMERICA

***Première Partie / Part I***Representatives

Mr James D. PETTIT, Deputy Assistant Secretary of State for Overseas Citizens Services, Bureau of Consular Affairs, U.S. Department of State, Washington, D.C.

Ms Susan JACOBS, Special Advisor for Children's Issues, Bureau of Consular Affairs, U.S. Department of State, Washington, D.C.

Alternate Representative

Mr Michael S. COFFEE, Attorney Adviser, Office of the Legal Adviser, U.S. Department of State, Washington, D.C.

Advisers

Ms Karen K. JOHNSON, Deputy Legal Counselor, Embassy of the United States of America, The Hague

Ms Corrin M. FERBER, Attorney Advisor, Office of Policy Review & Interagency Liaison, Bureau of Consular Affairs, U.S. Department of State, Washington, D.C.

Ms Shannon HINES, Attorney Advisor, Office of Policy Review & Interagency Liaison, Bureau of Consular Affairs, U.S. Department of State, Washington, D.C.

Ms Lisa VOGEL, Attorney Advisor, Office of Policy Review & Interagency Liaison, Bureau of Consular Affairs, U.S. Department of State, Washington, D.C.

Ms Kathleen S. RUCKMAN, Chief, Incoming Abduction Branch, Office of Children's Issues (CA/OCS/CI), U.S. Department of State, Washington, D.C.

Ms Laurie TROST, Abductions Division Chief for the Western Hemisphere, Office of Children's Issues, Bureau of Consular Affairs, U.S. Department of State, Washington, D.C.

Mr James L. BISCHOFF, Attorney Adviser, Office of the Assistant Legal Adviser for Consular Affairs, U.S. Department of State, Washington, D.C.

Ms Lauren NASSIKAS, Associate Director, Office on Violence Against Women, U.S. Department of Justice, Washington, D.C.

Private Sector Advisers

Mr James D. GARBOLINO, International Hague Network Judge; Assigned Judge, Superior Court of California, Roseville

Ms Judith L. KREEGER, International Hague Network Judge; Senior Judge, Circuit Court, Miami

Ms Melissa A. KUCINSKI, Senior Advisor, Family Law Committee, Section of International Law, American Bar Association; Bulman, Dunie, Burke & Feld, Chartered, Bethesda

Ms Mary W. SHEFFIELD, International Hague Network Judge; Circuit Judge, Circuit Court, 25th Judicial Circuit, Rolla

Mr Robert G. SPECTOR, Glenn R. Watson Chair & Centennial Professor of Law, University of Oklahoma, College of Law, Norman

Ms Elaine F. TUMONIS, Deputy Attorney General, State of California, Department of Justice, Office of the Attorney General, Los Angeles

***Deuxième Partie / Part II***Representatives

Mr James D. PETTIT, Deputy Assistant Secretary of State for Overseas Citizens Services, Bureau of Consular Affairs, Department of State, Washington, DC

Alternate Representative

Mr Michael S. COFFEE, Attorney Adviser, Office of the Legal Adviser, Department of State, Washington, DC

Advisers

Ms Susan B. CARBON, Director, Office on Violence Against Women, Department of Justice, Washington, DC

Ms Corrin M. FERBER, Attorney Adviser, Office of Policy Review & Interagency Liaison, Bureau of Consular Affairs, Department of State, Washington, DC

Ms Beth PAYNE, Director, Office of Children's Issues (CA/OCS/CI), Central Authority, Department of State, Bureau of Consular Affairs, Washington, DC

Ms Katherine PENBERTHY, Attorney Adviser, Office of the Assistant Legal Adviser for Consular Affairs, Department of State, Washington, DC

Ms Lisa VOGEL, Attorney Adviser, Office of Policy Review & Interagency Liaison, Bureau of Consular Affairs, Department of State, Washington, DC

Private Sector Advisers

Ms Judith L. KREEGER, Member of the International Hague Network of Judges; Senior Judge, Circuit Court, Miami

Ms Betsy MCALISTER GROVES, Director, Child Witness to Violence Project MAT 5, Division of Developmental & Behavioral Pediatrics, Boston Medical Center, Boston

**EX-RÉPUBLIQUE YUGOSLAVE DE MACÉDOINE / THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA*****Première Partie / Part I***

Ms Elena BODEVA, Third Secretary, Embassy of the Republic of Macedonia, The Hague

**FINLANDE / FINLAND*****Première Partie / Part I***

Ms Elisabeth BYGGLIN, International Hague Network Judge; Judge, Helsinki Court of Appeal, Helsinki

Mr Markku J. HELIN, Counsellor of Legislation, Ministry of Justice, Helsinki

Ms Outi KEMPPAINEN, Legal Adviser, International Affairs, Ministry of Justice, Helsinki

***Deuxième Partie / Part II***

Ms Outi KEMPPAINEN, Legislative Counsellor, Law Drafting Department, Ministry of Justice, Helsinki

Ms Elisabeth BYGGLIN, Member of the International Hague Network of Judges; Judge, Helsinki Court of Appeal, Helsinki

**FRANCE*****Première Partie / Part I***

Mme Alice COTTE, Magistrat, Ministère de la Justice, Bureau de l'Entraide civile et commerciale int'l (D3), Paris

Mme Ankeara KALY, Magistrat, chargée de l'aide à la médiation, familiale internationale pour les familles, Ministère de la Justice, Bureau de l'Entraide civile et commerciale int'l (D3), Paris

Mme Stéphanie LEURQUIN, Juriste contractuel, Ministère de la Justice, Bureau de l'Entraide civile et commerciale int'l (D3), Paris

Mme Jocelyne PALENNE, Magistrat, Ministère de la Justice, Bureau de l'Entraide civile et commerciale int'l (D3), Paris

Mme Bénédicte VASSALLO, International Hague Network Judge ; Conseiller référendaire à la première chambre, Cour de cassation, Paris

***Deuxième Partie / Part II***

Mme Alice COTTE, Magistrat, adjointe au chef du bureau de l'entraide civile et commerciale internationale, Direction des Affaires Civiles et du Sceau, Ministère de la Justice, Paris

Mme Bénédicte VASSALLO, Membre du Réseau international de juges de La Haye ; Conseiller référendaire à la première chambre, Cour de cassation, Paris

Madame Tania JEWZUK, Magistrat, rédactrice au bureau de l'entraide civile et commerciale internationale, Ministère de la Justice et des Libertés, Paris

M. Adrien FLESCHE, Magistrat, rédacteur au bureau de l'entraide civile et commerciale internationale, Ministère de la Justice et des Libertés, Paris

Mme Jocelyne PALENNE, Magistrat, adjointe au chef du bureau de l'entraide civile et commerciale internationale, Ministère de la Justice, Bureau de l'Entraide civile et commerciale int'l (D3), Paris

Mme Stéphanie LEURQUIN, Juriste contractuel, Ministère de la Justice et des Libertés, Bureau de l'Entraide civile et commerciale internationale, Paris

**GUATEMALA*****Première Partie / Part I***

Ms Sara PAYÉS SOLARES, Procuradora de la Niñez y la Adolescencia, Autoridad Central de Guatemala

**HONDURAS*****Première Partie / Part I***

Mrs Alba Cecilia MENA SEGURADO, Responsable de la Autoridad Central, Oficina Especializada para el conocimiento y seguimiento de los casos relacionados con la Convención de la Haya sobre los Aspectos Civiles de la Sustracción Internacional de Menores, Instituto Hondureño de la Niñez y la Familia (IHNFA)

**HONGRIE / HUNGARY**

(Présidence du Conseil de l'Union européenne / Presidency of the Council of the European Union)

***Première Partie / Part I***

Ms Krisztina BARABÁS, Ministry of National Resources Child and Youth Care Department, Budapest

Mr György GATOS, Chair of the Working Party on General Questions (Civil Law Committee), Ministry of Public Administration and Justice, Department of Justice, Cooperation and Private International Law, Budapest

Ms Agnes NÍNAUSZ-BARTÓK, Counsellor, Ministry of Public Administration and Justice, Department of Justice, Cooperation and Private International Law, Budapest

Ms Melinda BODNÁR, Counsellor, Ministry of Public Administration and Justice, Department of Justice, Cooperation and Private International Law, Budapest

***Deuxième Partie / Part II***

Ms Agnes NÍNAUSZ-BARTÓK, Counsellor, Ministry of Public Administration and Justice, Department of Justice, Cooperation and Private International Law, Budapest

Henriett KOZÁK, juge, Tribunal central des Arrondissements de Pest

**INDE / INDIA*****Première Partie / Part I***

Mr Vivek JOSHI, Joint Secretary to the Government of India, Ministry of Women and Child Development, New Delhi

Ms Neeru CHADHA, Director, Legal & Treaties Division, Ministry of External Affairs, New Delhi

**IRLANDE / IRELAND*****Première Partie / Part I***

Ms Mary P. MULVANERTY, Civil Law Reform, Department of Justice and Equality, Dublin

Mr George TRIMBLE, Civil Law Reform Division, Department of Justice and Law Reform, Dublin

Mr Michael HURLEY, Deputy Head of Mission, Embassy of Ireland, The Hague

***Deuxième Partie / Part II***

Ms Mary P. MULVANERTY, Civil Law Reform, Central Authority, Department of Justice and Equality, Dublin

**ISLANDE / ICELAND*****Première Partie / Part I***

Mrs Jóhanna GUNNARSDÓTTIR, Senior Legal Expert, Ministry of the Interior, Reykjavik

Mr Jónas JÓHANNSSON, International Hague Network Judge, Watermael-Boitsfort

***Deuxième Partie / Part II***

Mrs Jóhanna GUNNARSDÓTTIR, Senior Legal Expert, Ministry of the Interior, Reykjavik

ISRAËL / ISRAEL

***Première Partie / Part I***

Ms Leslie KAUFMAN, Senior Deputy to the State Attorney, Ministry of Justice Office of the State Attorney, Jerusalem

Ms Regina TAPOOHI, Senior Deputy to the State Attorney, Ministry of Justice Office of the State Attorney, Jerusalem

***Deuxième Partie / Part II***

Ms Leslie KAUFMAN, Senior Deputy to the State Attorney, Office of the State Attorney, Department of International Affairs, Ministry of Justice, Jerusalem

Ms Regina TAPOOHI, Senior Deputy to the State Attorney, Office of the State Attorney, Department of International Affairs, Ministry of Justice, Jerusalem

Mr Peretz SEGAL, Head of Legal Counsel Department, Ministry of Justice, Jerusalem

Mr Neal HENDEL, Member of the International Hague Network of Judges; Judge, Vice President, Justice Supreme Court, Southern District Court, Hall of Justice, Beersheva

**ITALIE / ITALY**

***Deuxième Partie / Part II***

Ms Francesca VILLATA, Department of International Studies, Istituto di diritto internazionale, Milan

**JAPON / JAPAN**

***Première Partie / Part I***

Mr Junya MATSUURA, Director, Human Rights & Humanitarian Affairs Division, Foreign Policy Bureau, Ministry of Foreign Affairs, Tokyo

Ms Chieko MASUDA, Officer, Human Rights & Humanitarian Affairs Division, Foreign Policy Bureau, Ministry of Foreign Affairs, Tokyo

Ms Eriko KAWAJIRI, Attorney, Ministry of Justice, Civil Affairs Bureau, Tokyo

Mr Fuminori SANO, Attorney, Ministry of Justice, Civil Affairs Bureau, Tokyo

Mr Yoshiki OGAWA, First Secretary / Legal Advisor, Embassy of Japan, The Hague

***Deuxième Partie / Part II***

Mr Kouji ABE, Director, Human Rights and Humanitarian Affairs Division, Foreign Policy Bureau, Ministry of Foreign Affairs, Tokyo

Mr Sadaharu KODAMA, Attorney, Civil Affairs Bureau, Ministry of Justice, Tokyo

Mr Yoshiki OGAWA, First Secretary / Legal Advisor, Embassy of Japan, The Hague

**LETTONIE / LATVIA**

***Première Partie / Part I***

Ms Santa BERNHARDE, Judge, Regional Court of Riga, Vidzemes District Court of Riga, Riga

Mr Agris SKUDRA, Head of Division on Co-operation of Children Affairs, Ministry of Justice, Riga

**MALTE / MALTA**

***Première Partie / Part I***

H.E. Mr Martin VALENTINO, Ambassador of Malta, Embassy of Malta, The Hague

***Deuxième Partie / Part II***

H.E. Mr Martin VALENTINO, Ambassador of Malta, Embassy of Malta, The Hague

Ms Francesca MUSCAT CAMILLERI, Assistant Director of Central Authority, Department for Social Welfare Standards, Ministry of Justice, Dialogue and the Family (MJDF), Employment & Family, St Venera

Mrs Abigail LOFARO, Judge, Family Court of Malta, Qrendi

**MAROC / MOROCCO**

***Première et Deuxième Partie / Part I and II***

M. Mohamed ZAHLOUL, Magistrat détaché auprès de l'Ambassade du Royaume du Maroc, Ambassade du Royaume du Maroc, La Haye

**MAURICE / MAURITIUS**

***Première et Deuxième Partie / Part I and II***

Mrs Feroza MAUDARBOCUS-MOOLNA, Chief State Attorney, Attorney General's Office, Port-Louis

**MEXIQUE / MEXICO**

***Première Partie / Part I***

Ms Margarita GALLEGOS LÓPEZ, Judge, Suprema Corte de Justicia de la Nacion, México

Mr Héctor Samuel CASILLAS MACEDO, Judge, Suprema Corte de Justicia de la Nacion, México

Mr Oscar CERVERA RIVERO, International Hague Network Judge; Judge, Presidente de la Segunda Sala Familiar, Tribunal Superior de Justicia del Distrito Federal, Deleg. Cuauhtémoc

Ms Arminda Araceli FRÍAS AUSTRIA, Consejera de la Judicatura del Tribunal Superior de Justicia, Hidalgo

Mr Eduardo GARCIA RAMIREZ, Juez Noveno de lo familiar, Tribunal Superior de Justicia del Distrito Federal, Deleg. Cuauhtémoc

Ms Nuria GONZÁLEZ MARTIN, Professor, Asesora de la Consultoría Jurídica SRE México, Universidad Nacional Autónoma de México (UNAM), Mexico, D.F.

Mr Ares Nahim MEJÍA ALCÁNTARA, Director General Legal and Institutional Liaison, Sistema Nacional para el Desarrollo Integral de la Familia Dirección de Asistencia Jurídica, Mexico

Mr Johannes Jácome CID, Director for Family Law, Secretaría de Relaciones Exteriores Dirección General de Protección y A.C., Centro, Mexico

Mr Alejandro David SOTO FRIAS, Derecho Internacional Privado, Hidalgo

***Deuxième Partie / Part II***

Ms Margarita GALLEGOS LÓPEZ, Judge, Tribunal Superior de Justicia del Distrito Federal, México, DF

Mr Héctor Samuel CASILLAS MACEDO, Judge, Family Issues, Consejo de la Judicatura, Suprema Corte de Justicia de la Nacion, México, DF



Mr Oscar Gregorio CERVERA RIVERO, Member of the International Hague Network of Judges; Judge, Presidente de la Segunda Sala Familiar, Tribunal Superior de Justicia del Distrito Federal, Deleg. Cuauhtémoc

Mr Johannes Jácome CID, Director for Family Law, Secretaría de Relaciones Exteriores Dirección General de Protección y A.C., Centro, Mexico, DF

Mr Guillaume MICHEL BLIN, Legal Counsel, Embassy of the United Mexican States, The Hague

Mr Jaime GUTIERREZ, Investigator

## **MOLDAVIE / MOLDOVA**

### ***Deuxième Partie / Part II***

Mr Corneliu TARUS, Head of Department Protection of Children, Ministry of Labour, Social Protection and Family, Chisinau

## **MONACO**

### ***Première Partie / Part I***

M. Jérôme FOUGERAS LAVERGNOLLE, Juge tutélaire, Palais de Justice, Monaco

M. Florestan BELLINZONA, Juge tutélaire suppléant, Monaco

Mme Christine LORENZINI, Médiateur Familial International, Service de Médiation Familiale, Département des Affaires Sociales et de la Santé, Monaco

Mme Marzia GHIGLIAZZA, Avocate internationale formée à la Médiation familiale, Genova

### ***Deuxième Partie / Part II***

M. Jérôme FOUGERAS LAVERGNOLLE, Juge tutélaire, Palais de Justice, Monaco

M. Florestan BELLINZONA, Juge tutélaire suppléant, Monaco

## **NORVÈGE / NORWAY**

### ***Première Partie / Part I***

Mr Christian BOYSEN, Adviser, Ministry of Foreign Affairs, Section for Consular Affairs and Immigration, Oslo

Ms Hanne KRISTENSEN LØSETH, Senior Adviser, Department of Civil Affairs, The Royal Norwegian Ministry of Justice and the Police, Oslo

Ms Torunn E. KVISBERG, International Hague Network Judge; Judge, Lillehammer

Ms Anne Marie SELVAAG, International Hague Network Judge; Judge, Trondheim District Court, Trondheim

Ms Trude SØRBY EINERSEN, Adviser, The Royal Norwegian Ministry of Justice and the Police, Oslo

Ms Trude Elisabeth SVEEN, Senior Adviser, The Norwegian Ministry of Children, Equality and Social Inclusion, Oslo

### ***Deuxième Partie / Part II***

Ms Hanne KRISTENSEN LØSETH, Senior Adviser, Department of Civil Affairs, Ministry of Justice and the Police, Oslo

Ms Kristin Ugstad STEINREM, Adviser, Department of Civil Affairs, Ministry of Justice and the Police, Oslo

Ms Torunn E. KVISBERG, Member of the International Hague Network of Judges; Judge, Lillehammer

Ms Anne Marie SELVAAG, Member of the International Hague Network of Judges; Judge, Trondheim District Court, Trondheim

Ms Trude Elisabeth SVEEN, Senior Adviser, The Norwegian Ministry of Children, Equality and Social Inclusion, Oslo

## **NOUVELLE-ZÉLANDE / NEW ZEALAND**

### ***Première Partie / Part I***

Ms Patricia BAILEY, Manager, Central Authority, Ministry of Justice Tahu o te Ture, Wellington

Mr Peter F. BOSHIER, International Hague Network Judge; Judge, Principal Family Court Judge of New Zealand, Principal Family Court Chief Judge's Chambers, Wellington

### ***Deuxième Partie / Part II***

Mr Jeff ORR, Chief Legal Adviser, Ministry of Justice, Wellington

Mr Peter F. BOSHIER, Member of the International Hague Network of Judges; Judge, Principal Family Court Judge of New Zealand, Principal Family Court Chief Judge's Chambers, Wellington

## **PANAMA**

### ***Première Partie / Part I***

Ms Mariela VEGA, Subdirectora General de asuntos Juridicos y Tratados, Ministerio de Relaciones Exteriores Dir. Gen. De Asuntos Juridicos y Tratados, Panama

Ms Anethe VERGARA, Abogado de Casos de Restitución de la Dirección de Asuntos Jurídicos y Tratados, Ministerio de Relaciones Exteriores Dir. Gen. De Asuntos Juridicos y Tratados, Panama

Ms Rita Sylvia HILTON THEODINE, Juez de Niñez y Adolescencia de Bocas del Toro, Mgters Violencia Intrafamiliar Derecho Procesal, Bocas del Toro

Mr Yan Carlos PÉREZ, Agregado Embajada de Panama, Embassy of Panama, Brussels

### ***Deuxième Partie / Part II***

Ms Mariela VEGA, Subdirectora General de asuntos Juridicos y Tratados, Ministerio de Relaciones Exteriores Dir. Gen. De Asuntos Juridicos y Tratados, Panama

## **PARAGUAY**

### ***Première Partie / Part I***

Ms Lili Beatriz MÉNDEZ DELGADILLO, National Secretariat for Childhood and Adolescence, Asunción

Mrs María Eugenia GIMÉNEZ DE ALLEN, Miembro Tribunal de Apelación Niñez y Adolescencia - Central, Asunción

### ***Deuxième Partie / Part II***

Mrs Irma Rumilda ALFONSO DE BOGARÍN, Member of the International Hague Network of Judges; Magistrate, Criminal Court of Appeals for Adolescents, Capital District, Asunción

Mrs María Eugenia GIMÉNEZ DE ALLEN, Member of the International Hague Network of Judges; Magistrate, Miembro Tribunal de Apelación Niñez y Adolescencia, Circunscripción Judicial de Central, Asunción

**PAYS-BAS / NETHERLANDS**

***Première Partie / Part I***

Mr Paul VLAS, President of the Netherlands Standing Government Committee on Private International Law; Professor of Private International Law, Vrije Universiteit, Amsterdam; Advocate General of the Supreme Court of the Netherlands

Ms Henriëtte LENTERS, Policy Advisor, Youth Policy Department, Ministerie van Veiligheid en Justitie, The Hague

Mrs Helen VERLEG, Senior Policy Officer, Youth Policy Department, Ministerie van Veiligheid en Justitie, The Hague

Mr Joël D. VAN ANDEL, Advisor on International Relations, Ministerie van Veiligheid en Justitie, The Hague

Ms Mirjam ZEEVAART, Policy Officer, Ministerie van Veiligheid en Justitie, The Hague

Mrs Paulien M.M. VAN DER GRINTEN, Co-ordinating Legal Advisor, Legislative Department, Private Law Section, H528, Ministerie van Justitie Stafafd. Wetgeving Privaatrecht, The Hague

Ms Francetta SCHOE, Acting Head of the Central Authority International Child Abduction, Ministerie van Veiligheid en Justitie, The Hague

Mrs Kristy L. WEHRUNG, Senior Legal Officer, Central Authority International Child Abduction, Ministerie van Veiligheid en Justitie, The Hague

Ms Sihem FTITACHE, Senior Officer Central Authority International Child Abduction, Ministerie van Veiligheid en Justitie, The Hague

Mrs Savitri N. WARNEKE, Senior Officer, Central Authority International Child Abduction, Ministerie van Veiligheid en Justitie, The Hague

Mr J. Alexander KRAB, Legal Officer, Central Authority International Child Abduction, Ministerie van Veiligheid en Justitie, The Hague

Mrs Madzy MALJAARS, Legal Officer Central Authority International Child Abduction, Ministerie van Veiligheid en Justitie, The Hague

Mrs Anneke M. SCHUTTER, Senior Officer, Ministerie van Buitenlandse Zaken, The Hague

Mrs Robine G. DE LANGE-TEGELAAR, International Hague Network Judge; President of the Criminal Division; Vice-President, District Court of The Hague, Rechtbank 's-Gravenhage, Paleis van Justitie, The Hague

Mr Jacques M.J. KELTJENS, International Hague Network Judge; President of Criminal Law Subdivision of Criminal Division; Vice-President of the District Court of The Hague, Rechtbank 's-Gravenhage, Paleis van Justitie, The Hague

Mrs Marjolijn KRAMER, President of Subdivision of the Family Division; Vice-President of the District Court of The Hague; Deputy Liaison Judge, Rechtbank 's-Gravenhage, Paleis van Justitie, The Hague

Mr Patrick LAHMAN, Legal Assistant, Subdivision of the Family Division, Rechtbank 's-Gravenhage, Paleis van Justitie, The Hague

***Deuxième Partie / Part II***

Mr Paul VLAS, President of the Netherlands Standing Government Committee on Private International Law; Professor of Private International Law, Vrije Universiteit, Amsterdam; Advocate General of the Supreme Court of the Netherlands, Voorschoten

Ms Esther J. VAN DIJK, Head of Department, Child Protection, Ministerie van Veiligheid en Justitie, The Hague

Mr Jacques M.J. KELTJENS, International Hague Network Judge; President of Criminal Law Subdivision of Criminal Division; Vice-President, District Court of The Hague, Rechtbank 's-Gravenhage, Paleis van Justitie, The Hague

Mrs Marjolijn KRAMER, President of Subdivision of the Family Division; Vice-President of the District Court of The Hague; Deputy Liaison Judge, Rechtbank 's-Gravenhage, Paleis van Justitie, The Hague

Mrs Robine G. DE LANGE-TEGELAAR, International Hague Network Judge; President of the Criminal Division; Vice-President, District Court of The Hague, Rechtbank 's-Gravenhage, Paleis van Justitie, The Hague

Ms Henriëtte LENTERS, Policy Advisor, Youth Policy Department, Ministerie van Veiligheid en Justitie, The Hague

Mrs Kristy L. WEHRUNG, Senior Legal Officer, Central Authority International Child Abduction, Ministerie van Veiligheid en Justitie, The Hague

## **PÉROU / PERU**

### ***Première et Deuxième Partie / Part I and II***

Mr Alfredo FORTES, Counsellor, Embassy of Peru, The Hague

## **PHILIPPINES**

### ***Première Partie / Part I***

Ms Maria Anna Lilia DE VERA, Second Secretary and Consul, Embassy of the Philippines, The Hague

### ***Deuxième Partie / Part II***

Ms Bernadette B. ABEJO, Executive Director, Intercountry Adoption Board (ICAB), Quezon City

Mr Carlo Florendo CASTRO, Attorney, Legal Service Director, Department of Social Welfare and Development, Quezon City

Mr Frank R. CIMA FRANCA, Minister and Consul General, Chargé d'Affaires, a.i., Embassy of the Philippines, The Hague

## **POLOGNE / POLAND**

### ***Première Partie / Part I***

Mr Leszek KUZIAK, Judge, Ministry of Justice, Department of International Co-operation and European Law, Warszawa

### ***Deuxième Partie / Part II***

Mr Leszek KUZIAK, Judge, Department of International Co-operation and European Law, Ministry of Justice, Warsaw

## **PORTUGAL**

### ***Première Partie / Part I***

Ms Mafalda GOMES, First Secretary, Embassy of Portugal, The Hague

## **RÉPUBLIQUE DOMINICAINE / DOMINICAN REPUBLIC**

### ***Première Partie / Part I***

Ms Emilia CONDE SANTANA, Second Secretary, Embassy of the Dominican Republic, The Hague

Ms Aly Q. PEÑA NUÑEZ, Encargada del Departamento Legal, Consejo Nacional Para la Niñez y la Adolescencia / Head of Legal Department, National Council for Childhood and Adolescence (CONANI), Santo Domingo

## ***Deuxième Partie / Part II***

Ms Aly Q. PEÑA NUÑEZ, Encargada del Departamento Legal, Consejo Nacional Para la Niñez y la Adolescencia / Head of Legal Department, National Council for Childhood and Adolescence (CONANI), Santo Domingo

Ms Pilar AWAD, Counselor, Embassy of the Dominican Republic, The Hague

Ms Antonia Josefina GRULLÓN BLANDINO, Magistrada Juez Presidente Sala Civil, Tribunal de Niños, Niñas y Adolescentes, Santo Domingo

## **RÉPUBLIQUE TCHÈQUE / CZECH REPUBLIC**

### ***Première Partie / Part I***

Ms Zuzana FIŠEROVÁ, International Department for Civil Matters, Director of International Department for Civil Matters, Ministry of Justice, Prague

Mr Zdenek KAPITÁN, Director, Office for International Legal Protection of Children, Brno

Ms Markéta NOVÁKOVÁ, Deputy Director, Office for International Legal Protection of Children, Brno

Ms Sona DOSTÁLOVÁ, Head of Department, Office for International Legal Protection of Children, Brno

Ms Agata BÁRTA, Lawyer, Office for International Legal Protection of Children, Brno

### ***Deuxième Partie / Part II***

Ms Marta ZAVADILOVÁ, Head of Unit for Private International Law, International Department for Civil Matters, Ministry of Justice, Prague

Ms Markéta NOVÁKOVÁ, Deputy Director, Office for International Legal Protection of Children, Brno

Ms Sona DOSTÁLOVÁ, Head of Department, Office for International Legal Protection of Children, Brno

Ms Zuzana FIŠEROVÁ, Director, International Department for Civil Matters, Ministry of Justice, Prague

## **ROUMANIE / ROMANIA**

### ***Première Partie / Part I***

Ms Viviana ONACA, Director, Department for International Law and Judicial Cooperation, Ministry of Justice, Bucarest

Mme Camelia TOBÁ, Conseillère juridique, Ministère de la Justice, Direction de Droit International et Coopération Judiciaire, Bucarest

Mr Flavius George PĂNCESCU, Legal Adviser, Ministère de la Justice, Direction de Droit International et Coopération Judiciaire, Bucarest

Ms Andreea Florina MATEESCU, International Hague Network Judge; Judge, 5th Civil Division, Tribunal de Bucarest, Bucarest

Ms Ileana POPESCU, Third Secretary, Embassy of Romania, The Hague

***Deuxième Partie / Part II***

Ms Viviana ONACA, Director, Department for International Law and Judicial Cooperation, Ministry of Justice, Bucarest

Mme Camelia TOBĂ, Conseillère juridique, Ministère de la Justice, Direction de Droit International et Coopération Judiciaire, Bucarest

**ROYAUME-UNI DE GRANDE-BRETAGNE ET D'IRLANDE DU NORD / UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND*****Première Partie / Part I***Angleterre et Pays de Galles / England and Wales

Mr John BOWMAN, Head of Branch Family Justice Policy, Ministry of Justice, Domestic and International Private Law Branch, London

Ms Gay BAILEY, Senior Policy Manager, Ministry of Justice, London

Ms Victoria DAMRELL, International Child Abduction & Contact Unit (ICACU), Official Solicitor & Public Trustee Office, London

Mr Matt WOOD, International Child Abduction & Contact Unit (ICACU), Official Solicitor & Public Trustee Office, London

Ms Samantha MARSH, International Child Abduction & Contact Unit (ICACU), Official Solicitor & Public Trustee Office, London

Mr Mathew THORPE, International Hague Network Judge; Head of International Family Justice; Lord Justice of Appeal; The Royal Courts of Justice, London

Ms Jill BLACK, Judge, Court of Appeal, England and Wales, The Royal Courts of Justice, London

Mr Andrew MOYLAN, Judge, The Royal Courts of Justice, London

Ms Victoria Margaret MILLER, Lawyer to the Head of the International Family Justice for England and Wales, The Royal Courts of Justice, London

Écosse / Scotland

Mr Bill GALBRAITH, Scottish Central Authority Team Leader, Scottish Government EU & International Law Branch, Edinburgh

Mr Martin MCPHEELY, Case Worker – Central Authority for Scotland, Scottish Executive Justice Department Private International Law Branch, Edinburgh

Mr Stephen Errol WOOLMAN, International Hague Network Judge; Judge, The Supreme Court, Edinburgh

Reunite International Child Abduction Centre

Ms Sandra FENN, Reunite International Child Abduction Centre, Leicester

Mr Teertha GUPTA, Reunite International Child Abduction Centre, Leicester

Mr Edward DEVEREUX, Reunite International Child Abduction Centre, Leicester

***Deuxième Partie / Part II***Angleterre et Pays de Galles / England and Wales

Mr Stuart MOORE, Head of Branch Family Justice, Ministry of Justice, London

Ms Emma BURGESS, Legal Adviser, Ministry of Justice, London

The Rt. Hon. Sir Mathew THORPE, Member of the International Hague Network of Judges; Head of the Association of International Family Judges; Lord Justice of Appeal; The Royal Courts of Justice, London

Mr Andrew MOYLAN, Judge, High Court Family Division, The Royal Courts of Justice, London

Ms Victoria Margaret MILLER, Lawyer to the Head of International Family Justice for England and Wales, The Royal Courts of Justice, London

#### Écosse / Scotland

Mr Bill GALBRAITH, Scottish Central Authority Team Leader, Scottish Government EU & International Law Branch, Edinburgh

Mr Stephen Errol WOOLMAN, Member of the International Hague Network of Judges; Judge, The Supreme Court, Edinburgh

#### Reunite International Child Abduction Centre

Ms Alison SHALABY, Acting Director, Reunite International Child Abduction Centre, Leicester

Ms Sandra FENN, Consultant Mediator, Reunite International Child Abduction Centre, Leicester

Mr Edward DEVEREUX, Barrister, Reunite International Child Abduction Centre, Leicester

### **RUSSIE, FÉDÉRATION DE / RUSSIAN FEDERATION**

#### ***Première Partie / Part I***

Ms E. DUNAEVA, Expert, Legal Department, Ministry of Foreign Affairs, Moscow

Ms Alla DZUGAEVA, Head of Section, Department of Upbringing and Child Protection,

Ms Elena KULIKOVA, Head of Division, Legal Department, Ministry of Foreign Affairs, Moscow

Mr Maxim MUSIKHIN, Counsellor, Embassy of the Russian Federation, The Hague

Mr Sergey V. PCHELINTSEV, Deputy Head of State & Legal Directorate of the President of Russian Federation, Office of the President of the Russian Federation, Principal State Legal Agency, Moscow

Ms S. SARENKOVA, Second Secretary, Embassy of the Russian Federation, The Hague

#### ***Deuxième Partie / Part II***

Ms Alla DZUGAEVA, Head of Section, Department of Upbringing and Child Protection, Ministry of Education and Science, Moscow

Ms Elena KULIKOVA, Head of Division, Legal Department, Ministry of Foreign Affairs, Moscow

Ms N. TRIGUBOVICH, Deputy Head of Section, Office of Children Rights Commissioner Mr Astakhov, Moscow

Ms Violetta STAROSTINA, Expert, Ministry of Justice, Department of International Law and Cooperation, Moscow

Ms Polina IVLIEVA, Expert, Ministry of Justice, Department of International Law and Cooperation, Moscow

### **SERBIE / SERBIA**

#### ***Première Partie / Part I***

Ms Vojka JANJIC, Secretary of the Council on Private International Law; Legal Adviser, Ministry of Justice of the Republic of Serbia, Belgrade

***Deuxième Partie / Part II***

Ms Vojka JANJIC, Secretary of the Council on Private International Law; Legal Adviser, Ministry of Justice of the Republic of Serbia, Belgrade

Ms Sanja MARJANOVIC, Teaching Assistant, University of Nis, Nis

**SINGAPOUR / SINGAPORE**

***Première Partie / Part I***

Ms FOO Tuat Yien, International Hague Network Judge; Senior District Judge, Subordinate Court of Singapore Family and Juvenile Justice Division, Singapore

Mr George SATHIASINGAM, Assistant Head, Singapore Central Authority, Rehabilitation, Protection & Residential Services Division, Ministry of Community Development, Youth and Sports (MCYS), Singapore

***Deuxième Partie / Part II***

Ms FOO Tuat Yien, Member of the International Hague Network of Judges; Senior District Judge, Subordinate Court of Singapore Family and Juvenile Justice Division, Singapore

Mr Edgar FOO, District Judge, Subordinate Court of Singapore Family and Juvenile Justice Division, Singapore

Mr George SATHIASINGAM, Assistant Head, Singapore Central Authority, Rehabilitation, Protection & Residential Services Division, Ministry of Community Development, Youth and Sports (MCYS), Singapore

**SLOVAQUIE / SLOVAKIA**

***Première Partie / Part I***

Mrs Alena MÁTEJOVÁ, Director, The Centre for International Legal Protection of Children and Youth, Bratislava

Mr Miloš HATAPKA, Director, Private International Law Division, Ministry of Justice, Bratislava

***Deuxième Partie / Part II***

Mr Miloš HATAPKA, Director, Private International Law Division, Ministry of Justice, Bratislava

Mrs Alena MÁTEJOVÁ, Director, The Centre for International Legal Protection of Children and Youth, Bratislava

**SLOVÉNIE / SLOVENIA**

***Deuxième Partie / Part II***

Ms Špela ISOP, Senior Advisor III, Ministry of Labour, Family and Social Affairs, Ljubljana

**SRI LANKA**

***Deuxième Partie / Part II***

H.E. Mr Buddhi K. ATHAUDA, Ambassador of the Democratic Socialist Republic of Sri Lanka, Embassy of Sri Lanka, The Hague

Mr Methsiri COORAY, Minister Counsellor, Embassy of Sri Lanka, The Hague



## **SUÈDE / SWEDEN**

### ***Première Partie / Part I***

Mr Claes BERGDAHL, Deputy Head of Central Authority, Ministry for Foreign Affairs, Department for Consular Affairs & Civil Law, Stockholm

Mr Örjan LANDELIUS, Director, Head of Section, Ministry for Foreign Affairs, Department for Consular Affairs & Civil Law, Stockholm

### ***Deuxième Partie / Part II***

Mr Claes BERGDAHL, Head of Central Authority, Ministry for Foreign Affairs, Department for Consular Affairs & Civil Law, Stockholm

Mr Örjan LANDELIUS, Director, Head of Section, Ministry for Foreign Affairs, Department for Consular Affairs & Civil Law, Stockholm

Mr Ola PIHLBLAD, Deputy Head of Central Authority, Ministry for Foreign Affairs, Department for Consular Affairs & Civil Law, Stockholm

Ms Ann-Sofie BROQVIST, Member of the International Hague Network of Judges; Judge, Stockholm District Court (Stockholms Tingsrätt), Stockholm

Ms Marianne GAUFFIN, Judge, Stockholm District Court (Stockholms Tingsrätt), Stockholm

Ms Kim LUNDSTRÖM, Associate Judge, Stockholm District Court (Stockholms Tingsrätt), Stockholm

Ms Cecilia CLAESON, Associate Judge, Stockholm District Court (Stockholms Tingsrätt), Stockholm

## **SUISSE / SWITZERLAND**

### ***Première Partie / Part I***

S.E. M. Markus BÖRLIN, Ambassadeur de Suisse, Ambassade de Suisse, La Haye

M. David URWYLER, Chef des Autorités centrales de la protection des enfants, Office fédéral de la Justice Unité Droit international privé, Berne

M. Andreas BUCHER, Professeur honoraire, Cologne

Mme Joëlle KÜNG, Office fédéral de la Justice (OFJ), Berne

Ms Sonja HAUSER, Scientific Assistant, Office fédéral de la Justice Unité Droit international privé, Berne

### ***Deuxième Partie / Part II***

Mme Monique JAMETTI GREINER, Vice-directrice, Domaine de direction Droit privé, Office fédéral de la Justice (OFJ), Berne

Mr Michael SCHÖLL, Head Private International Law Unit, Office fédéral de la Justice (OFJ), Berne

M. David URWYLER, Chef des Autorités centrales de la protection des enfants, Office fédéral de la Justice Unité Droit international privé, Berne

## **THAÏLANDE / THAILAND**

### ***Première Partie / Part I***

Mr Panumas ACHALABOON, Public Prosecutor of Department of International Affairs, Office of the Attorney General, Bangkok

Mrs Chalattip PUNNABUTR, Director of Child Adoption Center, Ministry of Social Development & Human Security, Bangkok

***Deuxième Partie / Part II***

Mrs Suwaree JAIHARN, Director, Child Adoption Center, Ministry of Social Development & Human Security, Bangkok

Mr Narong YOTHANANG, Chief of Legal Affairs Group, Child Adoption Center, Ministry of Social Development & Human Security, Bangkok

Ms Sutisa SUKCHOT, Public Prosecutor, Department of International Affairs, Office of the Attorney General, Bangkok

Ms Prim MASRINUAN, First Secretary, Royal Thai Embassy, The Hague

Ms Pittara CHOOSRI, First Secretary, Royal Thai Embassy, The Hague

**TRINITÉ-ET-TOBAGO / TRINIDAD AND TOBAGO**

***Deuxième Partie / Part II***

Ms Kandice RAMPERSAD, Legal Consultant to the Attorney General, Cabildo Chambers, Ministry of the Attorney General, Port-of-Spain

**UKRAINE**

***Première Partie / Part I***

Ms Viktoria GULENKO, Second Secretary, Legal Affairs Department, Ministry of Foreign Affairs, Kiev

Mr Andrii PASICHNYK, Third Secretary (Legal Affairs), Embassy of Ukraine, The Hague

Mrs Maria SNIZHKO, Deputy Head of Division, Department of Private International Law and International Legal Assistance, Ministry of Justice, Kiev

***Deuxième Partie / Part II***

Ms Larysa GERASKO, Deputy Director for the Legal and Treaty Department, Legal Affairs Department, Ministry of Foreign Affairs, Kiev

Mr Andrii PASICHNYK, Third Secretary (Legal Affairs), Embassy of Ukraine, The Hague

Ms Lyudmyla RUDA, Deputy Head of Division, Department of International Law and Cooperation, Ministry of Justice, Kiev

**UNION EUROPÉENNE / EUROPEAN UNION**

(Présidence du Conseil de l'Union européenne : Hongrie / Presidency of the Council of the European Union: Hungary)

***Première Partie / Part I***

M. Fabien CADET, Administrateur principal, Secrétariat général du Conseil de l'Union européenne, DG H, Unité 2 A, Coopération judiciaire en matière civile, Bureau JL20 50 MN 17, Bruxelles

Ms Patrizia DE LUCA, Team Leader, Unit A.1, Civil justice policies, Directorate General Justice, European Commission, Brussels

Ms Claire-Agnès MARNIER, Seconded National Expert, Unit A.1, Civil Justice Policy, Directorate General Justice, European Commission, Brussels

Mr Markus ZALEWSKI, Administrator, Unit A.1, Civil Justice Policies, Directorate General Justice, European Commission, Brussels

Mr Christoph SAJONZ, Principal Administrator, Unit A.1, Civil Justice Policies, Directorate General Justice, European Commission, Brussels

Ms Niovi RINGOU, Deputy Head of Unit, Unit A.1, Civil Justice Policy, Directorate General Justice, European Commission, Brussels

**UNION EUROPÉENNE / EUROPEAN UNION**

(Présidence du Conseil de l'Union européenne : Danemark / Presidency of the Council of the European Union: Denmark)

***Deuxième Partie / Part II***

Ms Salla SAASTAMOINEN, Head of Unit Civil Justice Policy, Directorate General Justice, European Commission, Brussels

Ms Patrizia DE LUCA, Team Leader, Unit A.1, Civil Justice Policy, Directorate General Justice, European Commission, Brussels

M. Fabien CADET, Administrateur principal, Secrétariat général du Conseil de l'Union européenne, DG H, Unité 2 A, Coopération judiciaire en matière civile, Bureau JL20 50 MN 17, Bruxelles

**URUGUAY*****Première Partie / Part I***

Mr Daniel TRECCA, Ministerio de Educación y Cultura Autoridad Central de, Montevideo

Mr Ricardo César PÉREZ MANRIQUE, International Hague Network Judge; Ministro Tribunal de Apelaciones de Familia, Montevideo

***Deuxième Partie / Part II***

H.E. Mr Alvaro MOERZINGER, Ambassador of the Republic of Uruguay, Embassy of Uruguay, The Hague

Mr Ricardo César PÉREZ MANRIQUE, Member of the International Hague Network of Judges; Ministro Tribunal de Apelaciones de Familia, Montevideo

Mrs Adriana FERNANDEZ, Ministerio de Educación y Cultura Autoridad Central, Montevideo

**VENEZUELA*****Première Partie / Part I***

H.E. Mrs Haifa Aissami MADAH, Ambassador of Venezuela, Embassy of the Bolivarian Republic of Venezuela, The Hague

Mrs Rosa Isabel REYES REBOLLEDO, International Hague Network Judge; Presidenta del Circuito Judicial del Tribunal de Protección de Niños, Niñas y Adolescentes de la Circunscripción Judicial del Área Metropolitana de Caracas

Mr Milton José MEZA RIVAS, Minister Counsellor, Embassy of the Bolivarian Republic of Venezuela, The Hague

***Deuxième Partie / Part II***

Mr Jose Alexis SOSA, Coordinator of Special Affairs, Central Authority, Caracas

Mrs Rosa Isabel REYES REBOLLEDO, Member of the International Hague Network of Judges; Presidenta del Circuito Judicial del Tribunal de Protección de Niños, Niñas y Adolescentes de la Circunscripción Judicial del Área Metropolitana, Caracas

## **OBSERVATEURS / OBSERVERS**

### **États non membres invités / Non-Member States invited**

#### **ANDORRE / ANDORRA**

##### ***Première Partie / Part I***

Mr Joan FORNER ROVIRA, Legal Adviser, General Affairs, Bilateral, and Consular Department, Ministry of Foreign Affairs, Andorra La Vella

#### **ARABIE SAOUDITE / SAUDI ARABIA**

##### ***Première Partie / Part I***

Mr Ziad M. ALATIYAH, First Secretary, Royal Embassy of Saudi Arabia, The Hague

Mr Bander H. ALSWELEM, Secretary General of the National Commission for Childhood, Ministry of Education, Riyadh

##### ***Deuxième Partie / Part II***

Mr Bander H. ALSWELEM, Secretary General of the National Commission for Childhood, Ministry of Education, Riyadh

#### **INDONÉSIE / INDONESIA**

##### ***Première Partie / Part I***

Mr Lasro SIMBOLON, Minister Counsellor - Political Affairs, Embassy of the Republic of Indonesia, The Hague

#### **IRAN**

##### ***Deuxième Partie / Part II***

Mr Ali Fahim DANESH, Legal Adviser, Embassy of the Islamic Republic of Iran, The Hague

Mr Mohammad GHORBANPOUR, Legal Expert, International and Legal Department, Ministry of Foreign Affairs, Tehran

#### **NAMIBIE / NAMIBIA**

##### ***Première Partie / Part I***

Ms Kathleen Joyce NAKUTA, Deputy Director, Child Care, Ministry of Gender Equality and Child Welfare, Windhoek

Mr Hendrik Raymond MAUYOMA, Senior Legal Officer, Ministry of Justice, Directorate Legal Services & International Co-operation, Windhoek

#### **OMAN**

##### ***Première Partie / Part I***

Mr Mubarak Suleiman AL-BASAMI, First Secretary, Embassy of the Sultanate of Oman, The Hague

Mr Alfred GHOBRIAL, Public Relations Officer, Embassy of the Sultanate of Oman, The Hague

#### **PAKISTAN**

##### ***Deuxième Partie / Part II***

Mr Karim TARIQ, First Secretary, Embassy of Pakistan, The Hague

## **QATAR**

### ***Deuxième Partie / Part II***

Mr Salman AL-ANEAMA, Second Secretary, Embassy of Qatar, The Hague

Mr Najeh AL-DAHDOUH, Communication Officer, Embassy of Qatar, The Hague

## **ZAMBIE / ZAMBIA**

### ***Première Partie / Part I***

Mrs Mwila Chibwe KOMBE, Chief State Advocate, Ministry of Justice, Attorney General's Chambers, Lusaka

### **Représentants d'organisations intergouvernementales / Representatives for Intergovernmental Organisations (IGOs)**

## **CONSEIL DE L'EUROPE / COUNCIL OF EUROPE**

### ***Première Partie / Part I***

Mr Edo KORLIJAN, Administrator Secretary of Committee of Experts on Family Law (CJ-FA), Public & Private Law Unit, Directorate of Standard-Setting, Council of Europe, Directorate General of Human Rights and Legal Affairs, Strasbourg

## **FONDS DES NATIONS UNIES POUR L'ENFANCE / UNITED NATIONS CHILDREN'S FUND (UNICEF)**

### ***Deuxième Partie / Part II***

Ms Kendra J. GREGSON, Senior Advisor, Child Protection Section, United Nations Children's Fund, New York

## **HAUT COMMISSAIRE DES NATIONS UNIES POUR LES RÉFUGIÉS / UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (UNHCR)**

### ***Première Partie / Part I***

Mr René BRUIN, Head of UNHCR Office, The Hague

Ms Gisela THATER, Division of International Protection, Senior Legal Officer, General Legal and Protection Policy, United Nations High Commissioner for Refugees, Geneva

## **UNION AFRICAINE / AFRICAN UNION (AU)**

### ***Première Partie / Part I***

Mrs Cisse Mariama MOHAMED, Secretary / Coordinator, African Committee of Experts on the Rights and Welfare of the Child, Department of Social Affairs, African Union Commission, African Union Headquarters, Addis Ababa

### **Représentants d'organisations non gouvernementales / Representatives of non-governmental organisations (NGOs)**

## **AMERICAN ASSOCIATION OF PRIVATE INTERNATIONAL LAW (ASADIP)**

### ***Première Partie / Part I***

Ms Nuria GONZÁLEZ MARTIN, Professor, Asesora de la Consultoría Jurídica SRE México, Universidad Nacional Autónoma de México (UNAM), Mexico, D.F.

**ASSOCIATION INTERNATIONALE DE DROIT DE LA FAMILLE / INTERNATIONAL SOCIETY OF FAMILY LAW (ISFL)**

***Première Partie / Part I***

Professor Ann Laquer ESTIN, Aliber Family Chair in Law, University of Iowa, College of Law, Iowa City

Ms Rhona SCHUZ, Sharei Mishpat Law School, Hod Hasaron

***Deuxième Partie / Part II***

Ms Rhona SCHUZ, Sharei Mishpat Law School, Hod Hasaron

Ms Merle WEINER, Philip H. Knight Professor of Law, School of Law, University of Oregon, Eugene

**ASSOCIATION DE DROIT INTERNATIONAL / INTERNATIONAL LAW ASSOCIATION (ILA)**

***Première Partie / Part I***

Mr Shinichiro HAYAKAWA, Professor of Law, University of Tokyo, Tokyo

***Deuxième Partie / Part II***

Mr Shinichiro HAYAKAWA, Professor of Law, University of Tokyo, Tokyo

Ms Carol S. BRUCH, Distinguished Professor Emerita & Research Professor of Law, University of California, Davis

**ASSOCIATION INTERNATIONALE FRANCOPHONE DES INTERVENANTS AUPRÈS DES FAMILLES SÉPARÉES (AIFI)**

***Première Partie / Part I***

Mme Lorraine FILION, Présidente de L'AIFI, Association Internationale Francophone des Intervenants auprès des Familles Séparées, Montréal, Québec

**ASSOCIATION OF INTERNATIONAL FAMILY JUDGES (AIFJ)**

***Première Partie / Part I***

Ms Ramona A. GONZALEZ, Circuit Court Judge, Circuit Court Branch 1, La Crosse County Courthouse, La Crosse

Ms Rossella ATZENI, Judge, Tribunal for Minors, Genova

***Deuxième Partie / Part II***

Mr Christopher Michael BUTLER, Judge, Supreme Court, Gibraltar

Ms Marthe J. ALT-VAN ENDT, Bureau Liaisonrechter internationale kinderbescherming, Rechter sector Familie- en jeudrecht, Rechtbank 's-Gravenhage, Paleis van Justitie, The Hague

Ms Tijne RITSEMA VAN ECK, Judge

**CHILD FOCUS – MISSING CHILDREN EUROPE**

***Première Partie / Part I***

Mrs Hilde DEMARRÉ, Project Manager, Child Focus - Missing Children Europe, Brussels

**DÉFENSE DES ENFANTS INTERNATIONAL (DEI) / DEFENCE FOR CHILDREN INTERNATIONAL (DCI)**

***Première Partie / Part I***

Mrs Beata STAPPERS, Defence for Children International / ECPAT Nederland, Leiden

Ms Alexandra BARENDSE

Ms Laura BOSCH

Ms Coby VAN DER KOOI

Ms Cristina LAZAR

Ms Martine MOLENDIJK, Legal Adviser, Stichting De Ombudsman Centrum Internationale Kinderontvoering (IKO), Hilversum

Ms Irmgard OLTHOF

Ms Maartje SCHULTE, Legal Adviser, Stichting De Ombudsman Centrum Internationale Kinderontvoering (IKO), Hilversum

**GEMME**

***Première Partie / Part I***

Mme Danièle GANANCIA, Vice Président Tribunal de Grande Instance, Paris

**FÉDÉRATION INTER-AMÉRICAIN DES AVOCATS / INTER-AMERICAN BAR ASSOCIATION (IABA)**

***Deuxième Partie / Part II***

Mr Eder Jesús SOLARTE MOLINA, President of Committee IV Civil Law, Council Member, Washington, DC

Mr Elio Enrique CASTRILLO CARRILLO, Abogado Especialista en Derecho Procesal Civil, inscrito en la Federación Interamericana de Abogados, Miembro Mayor, Washington, DC

**INTERNATIONAL ACADEMY OF MATRIMONIAL LAWYERS (IAML)**

***Première Partie / Part I***

Mr Robert D. ARENSTEIN, New York

Mr Edwin FREEDMAN, Attorney, Edwin Freedman Law Office, Tel Aviv

Mr Lawrence S. KATZ, Attorney at Law, Chairman, Committee on Hague Conventions, Miami

***Deuxième Partie / Part II***

Mr Edwin FREEDMAN, Attorney at Law, Edwin Freedman Law Office, Tel Aviv

Mr Lawrence S. KATZ, Attorney at Law, Chairman of US Chapter Committee on Hague Conventions, Miami

**INTERNATIONAL ASSOCIATION OF WOMEN JUDGES (IAWJ)**

***Première Partie / Part I***

Mrs Shireen Avis FISHER, Justice of Appeal, Special Court for Sierra Leone, Leidschendam

Ms Patricia A. WHALEN, International Judge of the Appeals Court, Court of Bosnia and Herzegovina Appeals Court War Crimes, Sarajevo

Ms Marion J. ELY, London

***Deuxième Partie / Part II***

Ms Shireen Avis FISHER, Judge, Justice of Appeal, Special Court for Sierra Leone, Leidschendam

**INTERNATIONAL BAR ASSOCIATION (IBA)**

***Première et Deuxième Partie / Part I and II***

Ms Mikiko OTANI, Toranomom Law & Economic Offices, Tokyo

**INTERNATIONAL CENTRE FOR MISSING AND EXPLOITED CHILDREN (ICMEC)**

***Première Partie / Part I***

Ms Samantha WOOLFE, European Representative, International Centre for Missing and Exploited Children (ICMEC), Paris

***Deuxième Partie / Part II***

Ms Eliza HARRELL, Program Coordinator, Alexandria

**INTERNATIONAL PARENTAL CHILD ABDUCTION SUPPORT FOUNDATION (IPCAS)**

***Première Partie / Part I***

Mrs Els PRINS, Managing Director, Stichting De Ombudsman, Centrum Internationale Kinderontvoering (IKO); Chair, International Parental Child Abduction Support Foundation, Hilversum

Mrs Denise CARTER, Head of Mediation Services, The International Family Law Group, London

Mr Mathijs STORM, Stichting De Ombudsman Centrum Internationale Kinderontvoering (IKO), Hilversum

***Deuxième Partie / Part II***

Mrs Els PRINS, Managing Director, Stichting De Ombudsman, Centrum Internationale Kinderontvoering (IKO); Chair, International Parental Child Abduction Support Foundation, Hilversum

Mrs Denise CARTER, Board Member of IPCAS, Head of Mediation Services, The International Family Law Group, London

Ms Marilyn FREEMAN, Adviser to IPCAS, Professor of Family Law, Director, Centre for Family Law and Practice, Middlesex

Ms Martine MOLENDIJK, Legal Adviser, Stichting De Ombudsman Centrum Internationale Kinderontvoering (IKO), Hilversum

Ms Maartje SCHULTE, Legal Adviser, Stichting De Ombudsman Centrum Internationale Kinderontvoering (IKO), Hilversum

Mr Mathijs STORM, Stichting De Ombudsman Centrum Internationale Kinderontvoering (IKO), Hilversum

Mrs Wendy A. VAN DER STROOM-WILLEMSSEN, Board member of IPCAS, Lawyer and Divorce Mediator, Smeets Gijbels



## **PARENTS AND ABDUCTED CHILDREN TOGETHER (PACT)**

### ***Première Partie / Part I***

Ms Catherine MEYER, President and CEO, PACT Parents and Abducted Children Together, Richmond

Mrs Sarah Cecilie FINKELSTEIN WATERS, Oslo

### ***Deuxième Partie / Part II***

Ms Sarah Cecilie FINKELSTEIN WATERS, Oslo

## **SERVICE SOCIAL INTERNATIONAL (SSI) / INTERNATIONAL SOCIAL SERVICE (ISS)**

### ***Première Partie / Part I***

M. Denis MARTIN, Juriste du Sector socio-juridique, Fondation Suisse du Service Social International, Genève

Ms Ursula ROELKE, Deputy Director, International Social Service, German Branch, Berlin

Mr Fionn SKIOTIS, Executive Director, International Social Service, Australian Branch, Melbourne

Mr Andy ELVIN, CEO, International Social Service, United Kingdom Branch, London

M. Stephan AUERBACH, Responsable du Secteur socio-juridique, Fondation Suisse du Service Social International, Genève

Ms Cilgia CARATSCH, Project Coordinator, International Family Mediation, International Social Service, General Secretariat, Geneva

Ms Gabriele SCHOLZ, Director, International Social Service, German Branch, Berlin

### ***Deuxième Partie / Part II***

M. Stephan AUERBACH, Responsable du Secteur socio-juridique, Fondation Suisse du Service Social International, Genève

Ms Cilgia CARATSCH, Project Coordinator, International Family Mediation, International Social Service, General Secretariat, Geneva

Mr Andy ELVIN, CEO, International Social Service, United Kingdom Branch, London

M. Denis MARTIN, Juriste du Sector socio-juridique, Fondation Suisse du Service Social International, Genève

Ms Felicity NORTHCOTT, Director, The Arthur C. Helton Institute at ISS-USA, United States of America Branch, Baltimore

Ms Ursula ROELKE, Deputy Director, International Social Service, German Branch, Berlin

Ms Gabriele SCHOLZ, Director, International Social Service, German Branch, Berlin

## **UNITED STATES - MEXICO BAR ASSOCIATION (USMBA)**

### ***Première Partie / Part I***

Ms Pamela M. BROWN, Attorney at Law, Weslaco

Mr Mariano Enrique NUÑEZ ARREOLA, Attorney and Foreign Legal Consultant, Weslaco

### ***Deuxième Partie / Part II***

Ms Pamela M. BROWN, Attorney at Law, Texas RioGrande Legal Aid, Inc., Weslaco

Mr Gregorio Mariano NUÑEZ GONZALEZ, Professor of Law, Bufete Nuñez Arreola y Asociados, Monterrey

Mr Gary CASWELL, Attorney at Law & Foreign Legal Consultant, Nunez & Caswell, San Antonio

## **CONSULTANTS TO THE PERMANENT BUREAU**

### ***Première Partie / Part I***

Mr Peter BEATON, The Hague

Ms Maria Cecilia BRUSA, Buenos Aires

Ms Dorothea VAN ITERSON, The Hague

The Honourable Mr Justice Tassaduq Hussain JILLANI, Judge, Supreme Court of Pakistan, Islamabad

Mr Nigel LOWE, Professor of Law; Head of Cardiff Law School, Cardiff University, Cardiff Law School, Cardiff

Mr Peter E. MCELEAVY, Professor of International Family Law, The University of Dundee School of Law, Dundee

## **EXPERTS INVITÉS À LA DEUXIÈME PARTIE DE LA COMMISSION SPÉCIALE / INVITED EXPERTS FOR PART II OF THE SPECIAL COMMISSION**

### ***Deuxième Partie / Part II***

Mr Peter BEATON, The Hague

Ms Dorothea VAN ITERSON, The Hague

Mr Nigel LOWE, Professor of Law; Head of Cardiff Law School, Cardiff University, Cardiff Law School, Cardiff

Mr Peter E. MCELEAVY, Professor of International Family Law, The University of Dundee School of Law, Dundee

## **SECRÉTARIAT / SECRETARIAT**

### ***Première Partie / Part I***

Mr Hans VAN LOON, Secretary General

Mr William DUNCAN, Deputy Secretary General

M. Christophe BERNASCONI, Premier secrétaire

M. Philippe LORTIE, Premier secrétaire

Mrs Marta PERTEGÁS, First Secretary

Ms Louise Ellen TEITZ, First Secretary – Designate

Ms Jennifer DEGELING, Secretary

Ms Frederike STIKKELBROECK, Attaché to the Secretary General | Director, International Centre for Judicial Studies and Technical Assistance

Mr Ignacio GOICOECHEA, Liaison Legal Officer for Latin America

Mrs Laura MARTINEZ-MORA, Adoption Programme Co-ordinator

Ms Mayela CELIS AGUILAR, Legal Officer

Ms Juliane HIRSCH, Legal Officer

M. Nicolas SAUVAGE, Collaborateur juridique

Ms Hannah BAKER, Legal Officer

Ms Maja GROFF, Legal Officer  
Ms Micah THORNER, Legal Programme Officer  
Mr Alexander KUNZELMANN, Legal Officer  
Ms Florencia CASTRO, Legal Assistant

***Deuxième Partie / Part II***

Mr Hans VAN LOON, Secretary General  
M. Christophe BERNASCONI, Secrétaire général adjoint  
M. Philippe LORTIE, Premier secrétaire  
Mrs Marta PERTEGÁS, First Secretary  
Ms Louise Ellen TEITZ, First Secretary  
Ms Jennifer DEGELING, Secretary  
Mr Ignacio GOICOECHEA, Principal Legal Officer & Liaison Legal Officer for Latin America  
Mrs Laura MARTINEZ-MORA, Principal Legal Officer & Adoption Programme Co-ordinator  
Ms Mayela CELIS AGUILAR, Senior Legal Officer  
Ms Hannah BAKER, Senior Legal Officer  
Ms Maja GROFF, Legal Officer  
Mr Alexander KUNZELMANN, Legal Officer  
Mme Emmanuelle HARANG, Collaboratrice juridique  
Mme Joëlle KÜNG, Collaboratrice juridique  
Ms Carine ROSALIA, Legal Officer  
Ms Micah THORNER, International Centre for Judicial Studies and Technical Assistance  
Ms Florencia CASTRO, Legal Assistant

**SECRÉTAIRES RÉDACTEURS / RECORDING SECRETARIES**

***Première Partie / Part I***

Mlle Fanny CORNETTE, Doctorante en droit, Rouen  
M. Thomas DELAYE-FORTIN, Montréal  
Mlle Chloe GRENADOU, Elève - avocat au Barreau de Paris  
Ms Joanna MITCHELL, Sydney  
Ms Ivana RADIC, LL.M. Candidate, Queen Mary University of London, Montréal  
Ms Victoria STEPHENS, Cardiff

***Deuxième Partie / Part II***

Mlle Caroline COTTA, stagiaire, Bureau Permanent  
Mlle Chloe GRENADOU, Elève - avocat au Barreau de Paris  
Ms Joanna MITCHELL, Lawyer, Sydney  
Ms Ivana RADIC, LL.M. Candidate, Queen Mary University of London, Montréal

## **INTERPRÈTES / INTERPRETERS**

### ***Première et Deuxième Partie / Part I and II***

M. Ernesto GONZALEZ  
Mr Giamil Ellis LARACUENTE  
Ms Amaya MORAN  
Ms Julia TANNER  
M. Christopher TYCZKA  
M. Derrick WORDSDALE

## **BUREAU DU SECRÉTAIRE GÉNÉRAL / OFFICE OF THE SECRETARY GENERAL**

### ***Première Partie / Part I***

Mrs Anna KOELEWIJN, Head of Administration  
Mrs Laura MOLENAAR, Administrative Officer  
Ms Karin HIMPENS, Financial Officer  
Mrs Gerda BOERMAN, Website Manager  
Mme Sophie PINEAU, Assistante administrative auprès du Secrétaire général  
Mrs Willy DE ZOETE, Administrative Assistant to the Deputy Secretary General  
Mme Mathilde WASZINK-PRÉNAS, Assistante administrative  
Mrs Lydie DE LOOF, French Translator / Revisor  
Mrs Jenny KLEIN MEULEKAMP, Junior Translator / Reviser  
Mr Stuart HAWKINS, Administrative Assistant for the Adoption Programme  
Ms Maryze BERKHOUT, Human Resources Assistant

### ***Deuxième Partie / Part II***

Mrs Anna KOELEWIJN, Head of Administration  
Mrs Laura MOLENAAR, Administrative Officer  
Ms Karin HIMPENS, Financial Officer  
Mrs Bernardine RINKEL, Financial Assistant  
Mrs Gerda BOERMAN, Website Manager  
Mme Sophie PINEAU, Assistante personnelle du Secrétaire général  
Mrs Willy DE ZOETE, Administrative Assistant  
Mme Mathilde WASZINK-PRÉNAS, Assistante administrative  
Mrs Lydie DE LOOF, Réviseur / Coordinatrice  
Mrs Jenny KLEIN MEULEKAMP, Traducteur / Réviseur  
Mr Stuart HAWKINS, Administrative Assistant  
Ms Maryze BERKHOUT, Human Resources Assistant

## **FONCTIONNAIRES EN DÉTACHEMENT / OFFICIALS ON SECONDMENT**

### ***Première Partie / Part I***

Mr Jung Hoon PARK

**STAGIAIRES / INTERNS**

***Première Partie / Part I***

Ms Milana KARAYANIDI

Ms Lauren KATZ

Ms Marion MEILHAC

Ms Clelia PESCE

Ms Kim PHAM

Mr TAN Phat Le

Ms Daryna TERNAVSKA

***Deuxième Partie / Part II***

Ms Melissa HANKS

Ms Abigail LUDWIG

Ms Mahbuba (Maka) MAMMADOVA

Mr Yuji MATSON

Mr Francisco SUÁREZ

**DOCUMENTS / REPRODUCTION**

***Première et Deuxième Partie / Part I and II***

Mr Willem VAN DER ENDT, General Services Officer

Mr Cor KONING

Mr Jos VAN BATENBURG

**CUISINE / KITCHEN**

***Première et Deuxième Partie / Part I and II***

Mrs Anne-Marie KOOIJMAN