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GUIDE DE LA DEUXIÈME PARTIE DE LA SIXIÈME RÉUNION DE LA COMMISSION SPÉCIALE ET EXAMEN DE L'OPPORTUNITÉ ET DE LA FAISABILITÉ DE POURSUIVRE DES TRAVAUX DANS LE CADRE DES CONVENTIONS DE LA HAYE DE 1980 ET DE 1996

établi par le Bureau Permanent

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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

drawn up by the Permanent Bureau

Document préliminaire No 13 de novembre 2011 à l'intention de la Commission spéciale de janvier 2012 sur le fonctionnement pratique de la Convention Enlèvement d'enfants de 1980 et de la Convention Protection des enfants de 1996

Preliminary Document No 13 of November 2011 for the attention of the Special Commission of January 2012 on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention

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GUIDE DE LA DEUXIÈME PARTIE DE LA SIXIÈME RÉUNION DE LA COMMISSION SPÉCIALE ET EXAMEN DE L'OPPORTUNITÉ ET DE LA FAISABILITÉ DE POURSUIVRE DES TRAVAUX DANS LE CADRE DES CONVENTIONS DE LA HAYE DE 1980 ET DE 1996

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I. INTRODUCTION

1. The purpose of this document is to provide background information for Part II of the Sixth Meeting of the Special Commission to review the practical operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (hereinafter "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* (hereinafter "the 1996 Convention"), the policy-oriented portion of the Special Commission,[1] scheduled to take place from 25 to 31 January 2012 (hereinafter, "the 2012 Special Commission (Part II)"). In particular, this document is designed to give an update on developments since the circulation of the preliminary report on consultations on the desirability and feasibility of a protocol to the 1980 Convention (hereinafter "the Preliminary Report")[2] in May 2011. This Report was based upon the responses received at that time to the "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*" (hereinafter "Questionnaire II").[3]

2. Since the writing of the Preliminary Report, as discussed in section III *infra*, there have been several events that have resulted in a change of the primary focus for the 2012 Special Commission (Part II) from the consideration of the desirability and feasibility of developing a protocol to the 1980 Convention, to the consideration of specific areas of possible future work. As a result of the overall consultation process with Contracting States and Hague Conference Members[4] through, in particular, Questionnaire II, the discussions at Part I of the Special Commission in June 2011 (hereinafter, "the 2011 Special Commission (Part I)") and further consultations with several Members, it does not appear possible to achieve consensus for seeking from the Council on General Affairs and Policy a mandate to work at this time on a protocol document. In addition, Switzerland, the original proponent of a protocol, has indicated that it does not at this time seek to have the draft protocol of 2007 considered as a working document for the 2012 Special Commission (Part II).[5]

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[1] Part I of the Special Commission focused on the practical operation of the 1980 Convention and the 1996 Convention. See "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*", drawn up by the Permanent Bureau, Prel. Doc. No 14 of November 2011 for the attention of the Special Commission of January 2012 (hereinafter "the Report of Part I of the Special Commission"), available on the Hague Conference website at < www.hcch.net > under "Work in Progress" then "Child Abduction".

[2] "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", drawn up by the Permanent Bureau, Prel. Doc. No 7 of May 2011 for the attention of the Special Commission of June 2011, available on the Hague Conference website *ibid*.

[3] Drawn up by the Permanent Bureau, Prel. Doc. No 2 of December 2010 for the attention of the Special Commission of June 2011, available on the Hague Conference website *ibid*.

[4] Please note: Questionnaire II was circulated to all National and Contact Organs of Members of the Hague Conference on Private International Law, as well as to non-Member Contracting States to the 1980 Convention. The reference to "States" in the context of Questionnaire II responses will therefore include, where relevant, Member Contracting States to the 1980 Convention, non-Member Contracting States to the 1980 Convention, Member non-Contracting States to the 1980 Convention and the European Union.

[5] See the letter from Switzerland, dated 7 November 2011, distributed with L.c. ON No 37(11) on 9 November 2011 (see also *infra* note 21).

3. The greatly diverging views of States apparent from the consultation process (which included the answers to Questionnaire II[6]), in combination with the strong and unlikely to move positions of some States opposed to a protocol to the 1980 Convention, support the impossibility at this time of achieving consensus to recommend undertaking work on a protocol to the 1980 Convention at the 2012 Special Commission (Part II). At the same time, the consultation process (including, in particular, the discussions at the 2011 Special Commission (Part I)) has demonstrated the wish of many States to discuss future work in connection with the 1980 and 1996 Conventions, not necessarily in the form of a protocol, but in relation to some specific topics identified in Questionnaire II.

4. These further developments are reflected in the proposed draft Agenda for the 2012 Special Commission (Part II). It is expected that Part II will therefore now concentrate on the limited specific topics, identified in the course of the consultation process as having a broad group of States wishing to consider further work and therefore suggesting the possibility of reaching agreement for some future undertaking. These topics identified are: (1) the enforceability of mediated agreements in international family disputes concerning children; (2) a legal basis for direct judicial communications; and (3) treatment of domestic and family violence issues within the context of return proceedings. In addition, the areas originally identified for discussion at the 2012 Special Commission (Part II) remain on the proposed draft Agenda, including international family relocation, the future direction of the "Malta Process" and the role of the Hague Conference in monitoring and supporting the 1980 and 1996 Conventions.[7]

5. This document seeks to provide guidance for discussions at the 2012 Special Commission (Part II) concerning these matters that States might wish to consider in accordance with the proposed draft Agenda. Additional relevant background information will be found in the following documents:

- 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);[8]
- 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);[9] and
- The responses to Questionnaire II.[10]

[6] See the Annex to this document which provides a summary of the answers received to Questionnaire II as of 1 November 2011.

[7] Other topics, identified for potential inclusion in a possible protocol, were discussed in Part I and Conclusions and Recommendations were adopted to address some issues. However, it was clear after consultations that consensus for further work at this time was unlikely to be achieved, as indicated in more detail in the Annex hereto. Reference was made frequently to the help included in the appropriate Guide to Good Practice. These Guides include: *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part I – Central Authority Practice* (Jordan Publishing, 2003); *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part II – Implementing Measures* (Jordan Publishing, 2003); *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part III – Preventive Measures* (Jordan Publishing, 2005); *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part IV – Enforcement* (Jordan Publishing, 2010), and *Transfrontier Contact Concerning Children – General Principles and Guide to Good Practice* (Jordan Publishing, 2008). The Guides to Good Practice are available on the Hague Conference website at < www.hcch.net > under "Child Abduction Section" then "Guides to Good Practice".

[8] The Report of Part I of the Special Commission, *op. cit.* (note 1).

[9] The Preliminary Report, *op. cit.* (note 2).

[10] Prel. Doc. No 2 of December 2010, *op. cit.* (note 3).

II. BACKGROUND AND MANDATE

6. The issue of a possible protocol to the 1980 Convention was first raised at the Hague Conference on Private International Law in the context of discussions concerning transfrontier access / contact. In May 2000, in response to a proposal by the delegations of Australia, Spain, the United Kingdom and the United States of America,[11] the Special Commission on General Affairs and Policy of the Conference[12] asked the Permanent Bureau to prepare a report on the desirability and usefulness of a protocol which might improve Article 21 of the Convention.[13] In response to this request, in July 2002, the Report on Transfrontier Access / Contact was published.[14] The Special Commission of October 2002 decided that it would be premature to begin work on a protocol, but stated that work should continue on the development of a guide to good practice on the issue of transfrontier contact / access in the context of the 1980 Convention, which was completed in 2008.[15]

7. Switzerland's proposal to begin work on a protocol had been presented first in 2005 to the Special Commission[16] on General Affairs and Policy of the Conference[17] and was reintroduced at the 2006 meeting of the Special Commission on General Affairs and Policy. At the 2006 Special Commission on the 1980 and 1996 Hague Conventions,[18] Switzerland put forward a more general proposal for a protocol, listing certain possible provisions.[19] Experts present at the Special Commission meeting were divided on the

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[11] Work. Doc. No 3, submitted to the Special Commission on General Affairs and Policy of the Conference (8-12 May 2000). Published as Annex III to "Conclusions of the Special Commission of May 2000 on General Affairs and Policy of the Conference", Prel. Doc. No 10 of June 2000 for the attention of the Nineteenth Session, Hague Conference on Private International Law, *Proceedings of the Nineteenth Session (2001/2002)*, Tome I, *Miscellaneous matters*, The Hague, Koninklijke Brill, 2008, at p. 102.

[12] In 2007 the work undertaken by the Special Commission on General Affairs and Policy of the Conference was taken over by the Council on General Affairs and Policy of the Conference (see the Statute of the Hague Conference on Private International Law).

[13] The Special Commission on General Affairs and Policy of the Hague Conference (8-12 May 2000) agreed to request the Permanent Bureau to "prepare [by the Nineteenth Diplomatic Session of the Hague Conference] a report on the desirability and potential usefulness of a protocol to the [1980] Convention that would, in a more satisfactory and detailed manner than Article 21 of that Convention, provide for the effective exercise of access / contact between children and their custodial and non-custodial parents in the context of international child abductions and parent re-locations, and as an alternative to return requests" (see "Conclusions of the Special Commission of May 2000 on General Affairs and Policy of the Conference", Prel. Doc. No 10 of June 2000 for the attention of the Nineteenth Session, *op. cit.* (note 11), at p. 99, also available on the Hague Conference website at < www.hcch.net > under "Work in Progress" then "General Affairs").

[14] W. Duncan, "Transfrontier Access / Contact and the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, Final Report", Prel. Doc. No 5 of July 2002 for the attention of the Special Commission of September / October 2002, available on the Hague Conference website at < www.hcch.net > under "Child Abduction Section" then "Special Commission meetings on the practical operation of the Convention" and "Preliminary documents".

[15] See "Report and Conclusions of the Special Commission concerning the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (27 September – 1 October 2002)", available on the Hague Conference website at < www.hcch.net > under "Child Abduction Section" then "Special Commission meetings on the practical operation of the Convention", Conclusions and Recommendations Nos 2(a) and 2(c).

[16] See note 12.

[17] See "Report of the Special Commission on General Affairs and Policy of the Conference of 31 March – 1 April 2005", Prel. Doc. No 32 A of May 2005 for the attention of the Twentieth Session, available on the Hague Conference website at < www.hcch.net > under "Work in Progress" then "General Affairs", at p. 34.

[18] 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).

[19] See paras 251 *et seq.* of the "Report 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)", available on the Hague Conference website at < www.hcch.net > under "Child Abduction Section" then "Special Commission meetings on the practical operation of the Convention". This proposal suggested that a protocol might contain provisions:

- requiring attempts at mediation or conciliation to secure the voluntary return of the child within the meaning of Art. 10 (in association with Art. 7(2) *c)*);
- providing for the child and parents to have an opportunity to be heard;
- formulating in detail the procedure and measures to secure the safe return of the child (as per Art. 7(2) *h)*) and the arrangements for securing rights of access (Art. 21);
- creating supplementary rules allowing the authorities of the requested State to obtain information on

proposal, and while the potential value of a protocol was recognised, they determined that a protocol was not an immediate priority.[20]

8. Switzerland put forward again a proposal to begin work on a protocol at the meeting of the Council on General Affairs and Policy in 2007 and a draft additional protocol was submitted by Switzerland in 2007, for consideration by Council in 2008.[21] In 2008, the Council had reserved for future consideration the feasibility of a protocol containing auxiliary rules designed to improve the operation of the Convention.[22]

9. Subsequently, at its meeting of March / April 2009, the Council on General Affairs and Policy of the Conference authorised the Permanent Bureau to begin preliminary consultations "concerning the desirability and feasibility of a protocol to the [*Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*] containing auxiliary rules to improve the operation of the Convention".[23]

10. Furthermore, the Council on General Affairs and Policy in April 2010 requested the Permanent Bureau to prepare a report on the consultations for discussion at the next meeting in 2011 of the Special Commission on the practical operation of the 1980 and 1996 Conventions. This was on the understanding that any decisions on the question of a protocol could only be taken by the Council. The Council stated that the report should also "take into account the extent to which the provisions of the 1996 Hague Convention supplement those of the 1980 Hague Convention".[24]

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custody rights, on the relationship between the child and his / her parents and on the well being of the child once returned to his / her country of habitual residence;
- reducing the period of one year set out in Article 12; and
- amending Art. 13(1) *b)* so as to clarify the relationship between the principle of returning the abducted child and the interests of the child.

[20] 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)", available on the Hague Conference website *ibid.*, Recommendations Nos 1.7.3 and 1.8.3. The Swiss proposal was reiterated in meetings of the Special Commission / Council on General Affairs and Policy of the Conference in 2006, 2007, 2008 and 2009.

[21] "Draft Additional Protocol to the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*" (submitted by the Swiss delegation), available on the Hague Conference website at < www.hcch.net > under "Work in Progress" then "General Affairs". This proposal was communicated to the National and Contact Organs of the Members, all States Parties to the 1980 Convention, and the other States and Organisations that attended the Fifth Meeting of the Special Commission to review the operation of the 1980 Convention, for their views on 1 November 2007 ((L.c. ON No 35(7)).

[22] Conclusions and Recommendations adopted by the Council on General Affairs and Policy of the Conference (1–3 April 2008), available on the Hague Conference website *ibid*., p. 2.

[23] Conclusions and Recommendations adopted by the Council on General Affairs and Policy of the Conference (31 March – 2 April 2009), available on the Hague Conference website *ibid*., p. 2.

[24] Conclusions and Recommendations adopted by the Council on General Affairs and Policy of the Conference (7–9 April 2010), available on the Hague Conference website *ibid*., p. 2.

11. To assist in the preparation of the report, in April 2010 the Council on General Affairs and Policy authorised the Permanent Bureau to circulate a questionnaire "to States Parties and Members later this year seeking general views as well as views in relation to the specific elements which might form part of a protocol"[25] to the 1980 Convention.

12. Switzerland also presented to the 2010 Council on General Affairs and Policy a list of matters to be considered in view of a supplementary instrument to the 1980 Convention.[26]

13. In December 2010, the Permanent Bureau circulated to States Parties and Members Questionnaire II seeking views both in general as to the desirability of a protocol and views in relation to specific elements which might form part of a protocol. Questionnaire II was not designed to gather opinions on the precise rules or language that should appear in a protocol, but rather to seek comment on the broad elements which might be covered by a protocol, as well as the feasibility of achieving consensus on these matters. Views were sought in particular in regard to the following topics: mediation, conciliation and other similar means to promote the amicable resolution of cases under the Convention; direct judicial communications; expeditious procedures; the safe return of the child; allegations of domestic violence; the views of the child; enforcement of return orders; access / contact; definitions or refined definitions; international relocation of a child; and reviewing the operation of the 1980 Convention.

14. In May 2011, the Preliminary Report on the Questionnaire II responses was circulated to provide as much background information as possible for the 2011 Special Commission (Part I). The report was based on responses from 16[27] Contracting States or Members and nine responses received from academics and researchers received as of 1 May 2011.

15. The 2011 Special Commission (Part I) was held from 1 to 10 June 2011. The detailed review of the practical operation of the 1980 and 1996 Conventions included discussions on most of the topics which Questionnaire II referred to as specific elements that might form part of a possible protocol to the 1980 Convention. In particular, the Special Commission considered in great detail several topics, including access and contact, safe return, the interpretation of key concepts of both Conventions, the child's voice, direct judicial communications as well as the use of mediation and similar means under the 1980 Convention.[28]

16. As of 1 November 2011, the Hague Conference had received eight[29] further State responses to Questionnaire II, which raises the total number of responses

[25] *Ibid*.
[26] Work. Doc. No 2 of 7 April 2010.
[27] Australia, Bahamas, Burkina Faso, Chile, China (Mainland, Hong Kong SAR), Colombia, Dominican Republic, El Salvador, European Union, Mexico, Montenegro, New Zealand, Norway, Switzerland, Ukraine and Zimbabwe. Twenty-five academics and researchers were contacted from Argentina, Brazil, Canada, France, Germany, Japan, New Zealand, Spain, Switzerland, the United Kingdom and the United States of America.
[28] See the Report on Part I of the Special Commission.
[29] Argentina, Armenia, Canada, Israel, Monaco, Panama, the United States of America and Venezuela.

sent by States or Members to 24,[30] including a response from the European Union, all of whose 27 Member States are States Parties to the 1980 Convention.[31]

III. DEVELOPMENTS SINCE THE CIRCULATION OF THE PRELIMINARY REPORT ON THE DESIRABILITY AND FEASIBILITY OF A PROTOCOL TO THE 1980 CONVENTION (MAY 2011)

17. Based on responses to Questionnaire II, discussions that took place during the 2011 Special Commission (Part I), and further consultations with States representative of the various positions along the spectrum concerning the desirability of a protocol to the 1980 Convention, it appears that a consensus would not be achievable currently. Rather, there is a clear division between States as to the need for a protocol, with those who are opposed having strong positions which appear highly unlikely to change.[32] Similarly, many of those States in favour of a protocol have given this activity a high priority,[33] again suggesting the difficulty in potentially reaching consensus. Discussion during the 2011 Special Commission (Part I) also highlighted the schism between views on several areas which might be subjects for auxiliary rules in a protocol. The answers of States to Questionnaire II only serve to reinforce these divisions, as summarised in the Annex to this document.

18. A limited number of specific areas have emerged based largely on answers to Questionnaire II, discussions at the 2011 Special Commission (Part I) and additional answers to Questionnaire I,[34] where it might be possible to obtain sufficient consensus to recommend to the Council that there be consideration given to authorising some further work. These areas, discussed in more detail in section IV of this document, form the core of the draft Agenda suggested for the 2012 Special Commission (Part II).

19. Consultations also served to underscore the lack of agreement on the need for a protocol. It was in this spirit that Switzerland, as the State that had primarily encouraged consideration of a protocol for several years, indicated that it would ask that the Working Document from 2007 for a protocol[35] not be considered at this time.

20. The draft Agenda for the 2012 Special Commission (Part II) has evolved through the process of consultation and now highlights three proposed general areas for which consensus might be achievable based on the responses to Questionnaire II as well as the discussions at the 2011 Special Commission (Part I). These areas are: (1) enforceability of mediated agreements in the family law area; (2) a legal basis for direct judicial communication; and (3) the treatment of domestic violence issues within a return proceeding. In addition, the draft Agenda also includes discussion of three areas that were originally assigned to Part II: international relocation, the future of the Malta Process, and the role of the Hague Conference in providing services in connection with the 1980 and 1996 Conventions. The suggested draft Agenda attempts to accord with the views expressed by States. In addition, it seeks to provide the most efficient use of States' time, recognising the great diversity of views, expressed in Part I, that suggest a consensus for a protocol is not possible at this time.

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[30] Argentina, Armenia, Australia, Bahamas, Burkina Faso, Canada, Chile, China (Mainland, Hong Kong SAR), Colombia, Dominican Republic, El Salvador, European Union, Israel, Mexico, Montenegro, New Zealand, Norway, Panama, Switzerland, Ukraine, the United States of America, Venezuela and Zimbabwe.

[31] It should be noted that, at this point, the European Union has not commented on the specific elements that might form part of a protocol or on the priority that should be attributed to them.

[32] Canada, New Zealand, Norway and the United States of America.

[33] Argentina, Australia, Colombia, Dominican Republic, Mexico, Montenegro, Switzerland, Venezuela, Zimbabwe.

[34] "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*" (hereinafter "Questionnaire I"), drawn up by the Permanent Bureau, 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 > under "Work in Progress" then "Child Abduction".

[35] *Op. cit.* note 21.

21. The Preliminary Report, as mentioned earlier, discussed in detail the 16 responses to Questionnaire II that had been received at that time from Contracting States or Members as well as nine responses received from academics and researchers. Some States, and in particular the European Union, reserved their positions, making it difficult to gauge the prospects of consensus not only as to the general question of whether negotiations on a protocol should begin, but also in respect to the specific elements that might be included in a protocol. The Preliminary Report also considered, as requested by the Council in the 2009 mandate, the extent to which the 1996 Convention might address or alleviate the need for a protocol providing auxiliary rules to the 1980 Convention.

22. Even the Preliminary Report evaluating the first 16 State or Member responses to Questionnaire II observed that although there was a "fair amount of agreement among States Parties about the areas of practice surrounding the Convention which might be strengthened and improved […] the question of the appropriate means to bring about the improvements [was answered very differently] […] with some States convinced that binding rules are needed in the form of a protocol, while others place greater reliance, at least for the moment, on improvements generated by the development of good practices ('soft law'), by training and other supports for improved cross-border co-operation".[36]

23. Among those opposed to the protocol, concern was expressed that any future negotiations on a protocol to the 1980 Convention might substantially alter the interpretation of existing key Convention articles, risking undermining the carefully balanced consensus among the Contracting States in the area of parental child abduction that also forms the basis of some regional instruments. Some specific topics – mediation procedures, expeditious procedures and enforcement of return orders – were seen by some States as matters of domestic law, with support expressed for encouraging States to review their domestic law and implementing measures to meet the objects of the Convention. However, there was support for the current work of the Hague Conference in providing further guidance on mediation and judicial communications.

24. Some States raised the concern that possible work on certain areas referred to in Questionnaire II would consist in harmonising substantive law, which departs from the Hague Conference's general approach of working for harmonisation of private international law.

25. In light of answers from additional States since May 2011 (which are all available on the website), an Annex to this document has been prepared to summarise the responses of all 24 States, as well as any Conclusion and Recommendation made at the 2011 Special Commission (Part I) that was directed at the specific area.

[36] *Op. cit.* (note 2), at pp. 40-41.

26. In summary, it is clear from all 24 answers, both the 16 included in the Preliminary Report and the responses from eight additional States received after 1 May 2011, that achieving consensus among the States to support a protocol to the 1980 Convention is unlikely.

IV. STRUCTURE OF THE 2012 SPECIAL COMMISSION (PART II) AND DRAFT AGENDA

27. This document does not repeat the contents of the May 2011 Preliminary Report, but rather seeks to focus on the matters relevant to the 2012 Special Commission (Part II) and to help provide additional background for States in their preparation for Part II.

28. As discussed above, based on responses to Questionnaire II, deliberations at the 2011 Special Commission (Part I), and consultations, there appears to be significant agreement on the need for further work in three areas: enforceability of mediated agreements in the family law area; a legal basis for direct judicial communication; and treatment of domestic violence issues within a return proceeding.

A. Cross-border / international recognition and enforcement of agreements resulting from mediation[37]

1. Introduction

29. In Questionnaire II, States were asked for their views as to whether provisions on "mediation, conciliation and other similar means to promote the amicable resolution of cases under the [1980] Convention"[38] could serve a useful purpose in a protocol to the 1980 Convention. In particular, States were asked whether provisions were required, first, "expressly authorising the use of […] means to promote the amicable resolution of cases under the [1980] Convention"[39] and secondly, "addressing issues of substance and procedure surrounding the use of such means".[40] The responses from States acknowledged the importance of mediation and other means of amicable dispute resolution.[41] However, responses revealed no consensus on the need for binding rules to expressly authorise the use of such amicable processes in the context of the 1980 Convention.[42] A number of States noted that the existing provisions of the 1980 Convention provided a sufficient legal basis in this regard (in particular, Arts 7(2) c*)* and 10),[43] while others considered that expressly authorizing the use of mediation, conciliation or other means in Convention cases could serve a useful purpose[44].

30. In relation to question 1.2, a number of States identified among other matters the area of recognition and enforcement of agreements resulting from mediation or other similar amicable processes as one where provisions may be of considerable practical use[45] given that in cross-border disputes concerning children, the agreements will often need to be rendered legally binding in multiple jurisdictions: for example, in the State of the habitual residence of the child, as well as in the State where contact with the child is to be exercised, if this is to take place in another jurisdiction. Further, in discussion

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[37] See *infra* para. 33 regarding the fact that the discussion of mediation and mediated agreements should be taken to include consideration of agreements resulting from similar amicable dispute resolution processes.
[38] *Op. cit.* (note 3), at question 1.
[39] *Ibid.*, at question 1.1.
[40] *Ibid.*, at question 1.2.
[41] *E.g.,* Armenia, Bahamas, Colombia, Dominican Republic, El Salvador, Israel, Monaco, Montenegro, New Zealand, Panama, Switzerland, Ukraine, Zimbabwe.
[42] Questionnaire II, *ibid.*, at question 1.1.
[43] *E.g.,* Argentina, Bahamas, Canada, the United States of America.
[44] Armenia, Australia, Bahamas, Burkina Faso, Chile, China (Hong Kong SAR), Colombia, Dominican Republic, El Salvador, Israel, Montenegro, Panama, Switzerland, Ukraine, Venezuela, Zimbabwe.
[45] *E.g.*, Armenia, Australia, Israel, Panama, Switzerland and Ukraine.

during the 2011 Special Commission (Part I) a number of experts commented that they had experienced considerable difficulties in this regard.[46]

31. While the Special Commission welcomed the draft Guide to Good Practice on Mediation[47] as providing helpful general assistance in relation to the use of mediation in the context of the 1980 Convention, the discussions pointed to the specific issue of the recognition and enforcement of agreed solutions, both in the context of applications under the 1980 Convention and also in the context of cross-border disputes concerning children more generally, as an issue that warrants further exploration. This issue was also emphasised by Switzerland in its letter concerning the 2012 Special Commission (Part II), where it stated: "if amicable solutions are truly to be encouraged, parties must have the assurance that a mediated agreement can be endorsed by the courts and hence recognised and enforced abroad."[48]

32. This section of the Preliminary Document therefore provides an initial basis for States to discuss further this issue at the 2012 Special Commission (Part II). It will consider the following matters: the background to the Hague Conference's work in the field of cross-border mediation in family matters (see section 2 below); the current practical challenges as regard to rendering agreements binding reached as a result of mediation (or other similar processes) in cross-border disputes concerning children in all relevant legal systems (see section 3 below); and some possible next steps for consideration (see section 6 below).

33. One preliminary remark should be made: the remainder of this section will refer primarily to "agreements reached as a result of mediation" or "mediated agreements". Mediation is indeed one of the most widely promoted methods of alternative dispute resolution in family law.[49] However, there are a number of other processes which aim to bring about the agreed resolution of disputes concerning children (*e.g.*, conciliation, early neutral evaluation, collaborative law, etc.). These other processes are discussed in the draft Guide to Good Practice on Mediation.[50] When considering the practical challenges which may arise in rendering agreed solutions in cross-border disputes concerning children binding, it is apparent that the challenges described will not be unique to agreements reached as a result of mediation. The discussion of "mediated agreements" below should, therefore, be taken to include agreements reached as a result of other similar processes.

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[46] See Minutes No 14 and the comments of experts, including from Australia, Germany and Switzerland. This issue was also raised in the context of discussions on the "Revised draft Practical Handbook on the operation of the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*", drawn up by the Permanent Bureau, Prel. Doc. No 4 of May 2011 for the attention of the Special Commission of June 2011, available on the Hague Conference website at < www.hcch.net > under "Work in Progress" then "Child Abduction".

[47] "Draft Guide to Good Practice under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, Part V – Mediation", Prel. Doc. No 5 of May 2011 for the attention of the Special Commission of June 2011, available on the Hague Conference website *ibid*.

[48] See *supra* note 5.

[49] Draft Guide to Good Practice on Mediation, *op. cit.* (note 47), at p. 11.

[50] *Ibid.*, at Chapter 15.

2. Background: the Hague Conference's work in the field of cross-border mediation in family matters

34. The Hague Conference has a long history of working in the field of cross-border mediation in family matters.[51] This work has been undertaken both in the context of discussions on the operation of the 1980 Convention,[52] but also, more generally, at the request of the Council on General Affairs and Policy, on the broader topic of "cross-border mediation in family matters".[53]

35. In preparation for the 2006 Special Commission, the Permanent Bureau produced a "Note on the development of mediation, conciliation and similar means to facilitate agreed solutions in transfrontier family disputes concerning children especially in the context of the Hague Convention of 1980".[54] This study was prepared in light of the increasing use of mediation in domestic family law disputes and the growing number of mediation initiatives being undertaken in the context of applications under the 1980 Convention.[55] The 2006 Special Commission welcomed "the mediation initiatives […] taking place in Contracting States in the context of the 1980 Hague Convention"[56] and invited "the Permanent Bureau to continue to keep States informed of developments in the mediation of cross-border disputes concerning contact and abduction".[57] The subsequent 2006 Special Commission on General Affairs and Policy[58] also welcomed this research. It additionally invited the Permanent Bureau to "prepare a feasibility study on cross-border mediation in family matters, including the possible development of an instrument on the subject".[59]

36. This broader "Feasibility study on cross-border mediation in family matters" was presented to the Council of April 2007 on General Affairs and Policy.[60] The study provided an overview of the developments in family mediation on a national and international level and explored possible directions for the Hague Conference's future work in the field, including:

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[51] Indeed, the provisions in the modern Hague Children's Conventions promote amicable dispute resolution: see, for example, Arts 7(2) *c)* and 10 of the 1980 Convention, Art. 31 *b)* of the 1996 Convention and Arts 6(2) *d)* and 34(2) *i)* of the *Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance* (the "2007 Convention").
[52] See *infra*, para. 35.
[53] See *infra*, paras 36 *et seq.*
[54] Drawn up by S. Vigers (former Legal Officer of the Permanent Bureau), Prel. Doc. No 5 of October 2006 for the attention of the 2006 Special Commission, available on the Hague Conference website at < www.hcch.net > under "Child Abduction Section" then "Special Commission meetings on the practical operation of the Convention" and "Preliminary Documents".
[55] *Ibid.*, p. 6.
[56] Conclusions and Recommendations of the 2006 Special Commission, *op. cit.* (note 20), Recommendation No 1.3.2.
[57] *Ibid.*, at para. 1.3.3.
[58] See note 12.
[59] "Conclusions of the Special Commission of 3-5 April 2006 on General Affairs and Policy of the Conference", Prel. Doc. No 11 of June 2006 for the attention of the Council of April 2007 on General Affairs and Policy of the Conference, available on the Hague Conference website at < www.hcch.net > under "Work in Progress" then "General Affairs", Conclusion No 3.
[60] Drawn up by the Permanent Bureau, Prel. Doc. No 20 of March 2007 for the attention of the Council of April 2007 on General Affairs and Policy of the Conference, available on the Hague Conference website *ibid*.

(a) For the Permanent Bureau "to maintain a more general watching brief on, and to report periodically upon, the development of cross-border mediation in family matters";[61]

(b) Alternatively, for "[f]urther work, including consultations […] on the question whether the lack of a fully comprehensive regime of private international rules concerning agreements in the family law area gives rise to any practical disadvantages or impediments for the mediation process such as would justify the development of a private international law instrument";[62] or

(c) "Consultations […] with Member States to explore the desirability of developing an instrument designed to improve the flow of information and to provide for closer co-operation between States in facilitating the use of mediation and in giving effect to mediated agreements."[63]

37. The 2007 Council on General Affairs and Policy invited Members to: "provide comments, before the end of 2007 […] with a view to further discussion of the topic at the spring 2008 meeting of the Council".[64] In April 2008, the Council on General Affairs and Policy, having received a number of comments from Members,[65] "invited the Permanent Bureau to continue to follow, and keep Members informed of, developments in respect of cross-border mediation in family matters".[66] Additionally, as a "first step", it asked the Permanent Bureau to commence work on: "a Guide to Good Practice on the use of mediation in the context of the [1980 Convention], to be submitted for consideration at the next meeting of the Special Commission […] in 2011".[67] As indicated above, this Guide, and thus this "first step", is about to be completed. However, as the discussions at the 2011 Special Commission (Part I) revealed, significant practical challenges concerning the enforceability of mediated agreements remain, which are outlined *infra* in section 3.

38. The importance of ensuring the enforceability (in all relevant jurisdictions) of mediated agreements[68] in cross-border family disputes has also previously been raised in the context of the Hague Conference's work in this field. For example, a proposal by Israel for an international instrument on cross-border mediation of family disputes, presented to the Council on General Affairs and Policy of the Conference in 2009, emphasised the need to render meditated agreements enforceable in the different legal

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[61] *Ibid.*, at para. 5.11 (1).
[62] *Ibid.*, at para. 5.11 (2).
[63] *Ibid.*, at para. 5.11 (3).
[64] Conclusions and Recommendations adopted by the Council on General Affairs and Policy of the Conference (2-4 April 2007), at para. 3.
[65] "Feasibility study on cross-border mediation in family matters – Responses to the Questionnaire", Prel. Doc. No 10 of March 2008 for the attention of the Council of April 2008 on General Affairs and Policy of the Conference.
[66] Conclusions and Recommendations adopted by the Council on General Affairs and Policy of the Conference (1-3 April 2008), at p. 1.
[67] *Ibid.* In response to this request, the draft Guide to Good Practice on Mediation (*op. cit.* note 47) was submitted to Part I of the Special Commission meeting in June 2011.
[68] It should also be noted that a number of European initiatives highlight the crucial importance of ensuring that a mediated agreement is rendered binding in all relevant legal systems, see: *Council of Europe Recommendation No R (98) 1 of the Committee of Ministers to Member States on family mediation*, adopted by the Committee of Ministers on 21 January 1998, available at < https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=1153972&SecMode=1&DocId=450792&Usage=2 > (last consulted 15 Nov. 2011), see IV, "The status of mediated agreements"; *Council of Europe Recommendation (2002)10 of the Committee of Ministers to Member States on mediation in civil matters*, adopted by the Committee of Ministers on 18 September 2002, available at < http://www.coe.az/pfddoc/committee_of_ministers/Rec%20R(2002)10%20%20Mediation%20in%20civil%20matters_EN.pdf?PHPSESSID=67eec3ca752961761ec775207e18cbb6 > (last consulted 15 Nov. 2011), see in particular paras 17 and 46; *European Code of Conduct for Mediators*, established by the European Commission and a group of stakeholders in 2004, text available at < http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.htm > (last consulted 15 Nov. 2011); see point 3.3.; and *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*, text available at < http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32008L0052:EN:NOT > (last consulted 15 Nov. 2011), see Recital 19 and Art. 6 of the Directive calling for appropriate procedures to be made available to give legal effect to mediated agreements, be it by court approval, court registration or otherwise.

systems concerned.[69] Further, the Working Party on mediation in the context of the Malta Process[70] identified the enforceability of mediated agreements as a crucial centre-piece in this regard.

3. The practical challenges

39. There are two separate issues which regularly must be considered when discussing the issue of rendering agreed solutions legally binding and enforceable in cross-border disputes, and hence in multiple legal systems:

(1) Issue (1): the need to render the agreement legally binding and enforceable in the legal system in which the mediated agreement has been concluded[71] (hereinafter, "State A"); and

(2) Issue (2): the need to ensure that the agreement, legally binding and enforceable in State A, is also legally binding and enforceable in any other relevant legal system (hereinafter, "State B", and possibly further States C, D, etc.).

40. In many legal systems, in disputes concerning children, issue (1) is a matter of seeking the court's approval of the agreement, such that the agreement will be rendered binding and enforceable by being made a court order.[72] One question which may confront parents attempting to render an agreement enforceable in this manner will be whether the court in the State where they have undertaken the mediation or other process has jurisdiction to make a court order in the terms of their agreement. In cross-border family disputes, both international[73] and internal[74] jurisdiction will play a role when it comes to deciding whether a certain court will be able to assume jurisdiction to make a court order in the terms of the agreement. Particular problems may arise when the mediated agreement covers multiple issues for which different jurisdictional rules apply. In addition, even if it is possible in a legal system to obtain such a court order, the practical reality of this process in some States may be long, involved and expensive.

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[69] Work. Doc. No 1 of 31 March 2009, see proposed Art. 7 (Enforceability of the settlement agreement):
"1. A settlement agreement made in a Contracting State shall be entitled to enforcement in every Contracting State provided that it is enforceable in the State of the mediation and when in that State a settlement agreement is enforceable by a court order shall be entitled to recognition and enforcement.
2. Recognition and enforcement of a settlement agreement may be refused if enforcement is manifestly incompatible with the public policy of the Contracting State addressed."

[70] See, for further details, "The 'Principles for the establishment of mediation structures in the context of the Malta Process' and the Explanatory Memorandum", drawn up by the Permanent Bureau, Prel. Doc. No 6 of May 2011 for the attention of the Special Commission of June 2011, available on the Hague Conference website at < www.hcch.net > under "Work in Progress" then "Child Abduction".

[71] Mediation may occur in one place or cross-border by way of long distance mediation; the agreement may be concluded in a different place.

[72] *E.g.,* Argentina, Australia, Brazil, China (Hong Kong SAR), Costa Rica, Czech Republic, Denmark, Estonia, Finland (an agreement has to be approved by the Social Welfare Board), France, Greece, Israel, Latvia, Lithuania, Mauritius, Mexico, Paraguay, Poland, Romania, Spain, Sweden, Switzerland, the United States of America (information obtained from responses to Country Profile – question 19.5 – as at May 2011). However, there are also some States where, in addition, it appears to be possible to render an agreement "enforceable" by either registering the agreement with the court (without needing to seek the court's approval of the terms) or other methods: *e.g.*, Australia, Estonia (notarisation or registration), Norway (where both parents request it, the County Governor may determine that a written agreement on parental responsibility, domicile and time spent with the child may be enforced) and Sweden (formal approval by the Social Welfare Committee).

[73] *I.e.*, which State has jurisdiction to make a court order in respect of the particular child(ren) concerned, and regarding the particular subject-matter of the agreement.

[74] *I.e.*, which court within a State has jurisdiction to make a court order in respect of the particular subject-matter of the agreement (this could be different courts within that State, for example, if the agreement includes custody / contact issues, as well as an agreement on child support).

41. Issue (2) could be achieved by two methods: (i) taking the agreement to State B (or C, D, etc.) and requesting that a court in that State make a court order incorporating the terms of the agreement. Whether the court in State B (or C, D, etc.) can make such an order will again depend upon questions of international and internal jurisdiction (discussed *supra*); or (ii) once the agreement has been rendered binding and enforceable in State A, by seeking recognition and enforcement of State A's court order in State B.[75] Where no relevant international, regional or bilateral agreement is in force between States A and B, the internal law of State B may enable recognition and enforcement.

42. Among the modern Hague Children's Conventions, the 1996 Convention, as well as the 2007 Convention, may assist parents in achieving recognition of their agreed solution in a cross-border dispute concerning children in all Contracting States concerned.[76] However, these Conventions may not offer a satisfactory solution where the agreement covers matters which fall outside the scope of one or both Conventions. In addition, certain aspects of the case can result in additional difficulties, as described *infra*.

The 1980 and 1996 Conventions and rendering agreed solutions legally binding in all relevant States

(a) Situations involving the wrongful removal or retention of a child[77]

43. As described *supra*, the responses to Questionnaire II and the discussions at the 2011 Special Commission (Part I) highlighted jurisdictional difficulties which may arise when parties wish to render an agreed solution to a 1980 Convention application legally binding and enforceable in the requested State by seeking a court order in that State (hereinafter "State A", often the State where the mediation has taken place[78]). This is because the agreed solution in such cases will often deal not only with the specific question of the return or non-return of the child, but also long-term custody and contact issues.[79] Further, usually the different parts of the agreement will be interdependent, *i.e.*, the agreement to the return or non-return will be conditional upon the agreement on the long-term custody and contact issues being put into effect. This means that a partial approval of the agreement (*i.e.*, a court order rendering only the return or non-return binding and enforceable) will not be a satisfactory solution for the parties, who bargained over several issues as a "package", and it may jeopardise the ultimate amicable resolution of the dispute.

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[75] An additional option may exist, where an agreement dealing with family law issues is legally binding and enforceable in State A without the need to be turned into a court order and where there is a legal framework in place between State A and State B providing for the recognition of such an agreement under the same conditions as judgments; see, for example, Art. 46 of the Brussels IIa Regulation (Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000). See, also, Article 30 of the 2007 Convention for maintenance agreements.

[76] While using the 1996 Convention for this purpose requires that the agreement be embodied in a court order (or other measure taken by a State authority) in compliance with Convention terms, the 2007 Convention can result in an agreement being enforceable in another State without the need to be turned into a court order: see Article 30 of the 2007 Convention. The 2007 Convention currently only has one Contracting State (Norway) and therefore has not yet entered into force.

[77] See Art. 3 of the 1980 Convention and Art. 7 of the 1996 Convention.

[78] See also section 4.4 of the draft Guide to Good Practice on Mediation (*op. cit.* note 47).

[79] Such combined agreements are reportedly very common since the parties may agree on non-return or return on the condition that the exercise of custody and contact following the return or non-return is agreed upon in a specific fashion: *e.g.*, a left-behind father may agree to the relocation of the child to State B, on the basis that he has certain agreed periods of access in State A. In the alternative, a taking mother may agree to return with the child to State A, on the basis that the father agrees that the child will live with her in State A and have defined access with him.

44. The 1980 Convention is premised on the idea that the most appropriate forum to determine the long-term merits of custody and contact issues concerning a child is usually the State of the habitual residence of that child. The child's unilateral removal to or retention in another State by one parent in breach of the other parent's custody rights should not lead to a change of jurisdiction.[80] It is on this basis that Article 16 of the 1980 Convention states:

> "After receiving notice of a wrongful removal or retention of a child […] the Contracting State to which the child has been removed or in which it has been retained *shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention* […]."[81]

45. Therefore, in an abduction case, where the parents have reached an agreed solution on the question of the child's return or non-return as well as the long-term custody and contact issues concerning the child, as part of the "package", the effect of Article 16 of the 1980 Convention may[82] be as follows:

(a) Agreement including *return* of the child to State B: the court of State A, seised with the return proceedings, may consider that, while it can make a court order concerning the agreement to return the child (in effect, to conclude the return proceedings by consent), Article 16 (which prohibits a decision on the merits of rights of custody "until it has been determined that the child is *not* to be returned"[83]), continues to prohibit the court from approving the terms of the agreement insofar as they deal with the merits of the custody and contact issues.

(b) Agreement including *non*-return of the child (*i.e.*, child remains in State A): the court in State A, seised with the return proceedings, may consider that it can approve, in a court order, the part of the agreement concerning the non-return of the child (in effect, to conclude the return proceedings by consent). It may also consider that it can then immediately proceed to approve, in a court order, the agreement relating to the long-term custody and contact issues (Art. 16 – which now no longer "blocks" the jurisdiction of State A on issues relating to custody since it has been determined that the child is "*not* to be returned"[84]). However, whether this is possible will depend upon the internal and international jurisdiction of the court to determine such matters. The internal procedural law may also not allow a court dealing with the return proceedings, following a formal termination of those proceedings, to proceed immediately to determine the custody issues.[85]

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[80] See para. 16 of the Pérez-Vera Explanatory Report on the 1980 Convention: "The insurmountable difficulties encountered in establishing […] directly applicable jurisdictional rules indeed resulted in this route being followed which, although an indirect one, will tend in most cases to allow a final decision on custody to be taken by the authorities of the child's habitual residence prior to its removal." Hague Conference on Private International Law, *Actes et documents de la Quatorzième session (1980)*, Tome III, *Child abduction*, The Hague, Imprimerie Nationale, 1982, pp. 425-473, at p. 429. *Cf. interim* custody and contact issues (*e.g.*, ensuring safe return of the child and the general safety of the child pending the merits of custody and contact issues being dealt with in the State of the child's habitual residence). These *interim*, short-term issues may be dealt with by State A in the scheme provided for by the 1996 Convention if they fall within the scope of Art. 11 of the 1996 Convention (see Art. 7(3)).

[81] Emphasis added. See also para. 121 of the Pérez-Vera Explanatory Report, *ibid*., at p. 463.

[82] Of course, the interpretation and application of Art. 16 in Contracting States will be a matter for each Contracting State. These examples are provided from reports given by some Contracting States concerning the challenges which have occurred.

[83] Emphasis added.

[84] *Id.*

[85] Ending the return proceedings with a non-return decision and thus rendering the agreement as regards the non-return binding without immediately rendering the remainder of the agreement on long-term custody and contact issues binding, may, as pointed out *supra*, put the amicable solution of the dispute at risk due to the interdependence of the different parts of the agreement.

46. As far as *international* jurisdiction is concerned, where the 1996 Convention is in force between the two States concerned, Article 7 of the 1996 Convention will also have to be taken into account. Article 7 is a special jurisdictional rule which applies in cases of child abduction.[86] The effect of Article 7 in abduction cases is that the State of the child's habitual residence immediately before the abduction will retain jurisdiction to take measures for the protection of the person (and property) of the child (*i.e.*, including measures on the merits of custody and contact) until: (a) the child has acquired a habitual residence in another State (usually State A); and (b) the conditions in either Article 7(1) *a)* or *b)* are met. The corollary of this is that, unless the cumulative conditions set out in Article 7 can be satisfied, jurisdiction concerning the merits of the long-term custody and contact issues will remain with State B. State A in these circumstances would not have jurisdiction to approve these matters in a court order, even if the parents would want the court to have jurisdiction to enter their agreement which covers more than simply return and resolves amicable issues of the child's future habitual residence and access.

47. Other provisions of the 1996 Convention, however, seem to offer a solution (or at least, a partial one) in these circumstances: first, the parties may seek a court order in State B rendering the agreement legally binding in State B (which retains jurisdiction over the long-term merits of custody and contact issues in accordance with Article 7 of the 1996 Convention); or secondly, a transfer of jurisdiction from State B to State A in accordance with Article 8 or, more usually, Article 9 of the 1996 Convention could be sought to render the agreement binding in State A by court order.[87] In both options, the parties will benefit from the 1996 Convention's provisions on recognition and enforcement, making their agreement-based court order legally binding and enforceable in all Contracting States to that Convention.[88]

48. Both of these options, however, may result in considerable further practical difficulties and expense for the parties. For example, whichever option above is used, the court dealing with the custody issues in State B (either rendering the agreement binding, or deciding on the transfer of jurisdiction) is not under a Convention obligation to deal with the case expeditiously (in contrast to the court seised with the return proceedings in State A). Even though courts in many States tend to deal with custody matters in a speedy way, the processes in State B may be too lengthy to keep the return proceedings under the 1980 Convention in State A pending.

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[86] Art. 7 of the 1996 Convention is designed to support, as Art. 16 of the 1980 Convention, the notion that an abducting parent should not be able to bring about a change of jurisdiction in relation to the merits of a custody dispute by abducting a child.

[87] As stated above, according to the wording of Art. 16 of the 1980 Convention the courts in State B can only decide on custody issues once the pending return proceedings end with a determination "that the child is not to be returned". A transfer of jurisdiction under the 1996 Convention may arguably therefore only assist in cases where the parents' agreements include a consensus on the "non-return" of the child.

[88] As a "measure directed to the protection of the person of the child" (*cf.* Art. 1), the agreement-based court order made in accordance with the jurisdictional rules of the 1996 Convention will by operation of law be recognised (Art. 23) and can be declared enforceable (Arts 26 *et seq*.) in any other Contracting State to the 1996 Convention (provided no ground in Art. 23(2) is established).

49. As described above*,* due to the interdependence of the terms of the agreement, it is not a satisfactory solution to terminate the return proceedings in accordance with the agreement without rendering the remainder of the agreement on the long-term custody issues legally binding and enforceable.[89] Additionally, a practical impediment to pursuing the suggested option of going back to State B may be that the court in State B, seised to turn the parental agreement on custody and contact issues into a court order, may request the presence of both parties in court and may wish to interview the child. Acceding to this request would, however, mean that the abducting parent would have to travel back to State B together with the child, which amounts to a factual return, without the (full) agreement having been rendered legally binding and enforceable. Also immigration issues and possible criminal proceedings against the abducting parent in State B may complicate the matter.

(b) Cross-border disputes concerning children that do not involve the wrongful removal or retention of a child

50. In "non-abduction" situations there may also be certain difficulties when attempting to render a mediated solution to what is, or what might become, a cross-border dispute concerning a child legally binding and enforceable in the relevant legal systems. As mentioned before, in addition, there might be difficulty in some situations and some legal systems to convert the mediated agreement into a judgment.

51. In an international relocation case, for example, the non-relocating parent may wish to have an agreement containing clauses on post-relocation access rendered legally binding in the State to which the other parent is to relocate but *before* the relocation takes place (to ensure the access agreement can be enforced in that State, should the need arise). It has to be emphasised that the 1996 Convention may provide a solution in such cases.[90] If the parents turn their agreement into a court order in the State of the child's current habitual residence, this court order would be recognised by operation of law in all Contracting States to the 1996 Convention (subject to Art. 23(2)). To resolve any doubt, the parents could request "advance recognition" of the order in accordance with Article 24 of the 1996 Convention. However, if the 1996 Convention or a comparable legal framework is not in force as between the two States concerned, the courts in the State to which the parent and child are to relocate might not consider that they have jurisdiction to deal with the matter before the relocation has occurred (due to the current lack of connection with that State).

52. Furthermore, problems can also arise where an agreement contains clauses on matters that fall outside the scope of the 1996 Convention.

53. Overall, the process of rendering a mediated agreement in a cross-border family dispute involving an array of issues legally binding in all States concerned may be a lengthy, cumbersome and expensive process.

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[89] As described *supra* (see note 85).

[90] See Chapter 10 (in particular 10 c) of the Revised draft Practical Handbook on the operation of the 1996 Convention (Prel. Doc. No 4 of May 2011, *op. cit.* note 46).

4. Possible next steps for consideration

54. The existing practical challenges concerning rendering mediated agreements binding, especially in relation to international child abduction cases, pointed out in the discussions at the 2011 Special Commission (Part I), as well as in the responses to Questionnaire II, suggest the need to explore the desirability and feasibility of further work for the Hague Conference in this field and, in particular, in connection with the development of private international rules in this area. Of course, any such exploration of future work would have to include a careful assessment of how any steps could be designed in a way to be compatible with both the 1980 Convention and the 1996 Convention, since it is of utmost importance that the objectives of these Conventions are not undermined. In addition, consideration might be given to an instrument that does not require a court order for enforcement and relies instead on the enforceability of the mediated agreement in the State in which the agreement was made, provided there was certain protection of the parties and of the rights of the child.

55. A new, free-standing private international law instrument concerning mediated agreements in family law[91] could be of use not only in abduction situations, but could also assist families more generally by offering an efficient way to render agreements containing a combination of different family law issues in a cross-border situation legally binding and enforceable in the different legal systems concerned. In this regard, compatibility with other international instruments, such as the 2007 Convention, would also need to be explored. Further research would also have to be carried out to determine whether States that currently have some hesitation in joining the 1996 Convention, such as certain Shariah law based States, might, as a first step, be willing to consider joining an international family law instrument dealing with the recognition and enforcement of agreement-based solutions to cross-border family disputes.

56. The Permanent Bureau considers that some possible next steps which the Special Commission might wish to consider are:

(a) further comparative research on the matter, allowing for assessment of the feasibility and desirability of developing private international law rules for enforcement of mediated agreements in cross-border family law; and

(b) the establishment of an exploratory experts group to consider initially the feasibility and desirability of further work on the recognition and enforcement of mediated agreements.

[91] While this document focuses on agreements in cross-border family disputes concerning children, the 2007 Feasibility study on family mediation (Prel. Doc. No 20 of March 2007, *op. cit.* note 60) which explored the possible directions of future work for the Hague Conference referred to agreements in the area of family law more generally.

B. Providing a legal basis for direct judicial communication

57. A full analysis for the purpose of this item of the Agenda is available in Preliminary Document No 3 D.[92] The analysis takes into account: (1) the legal basis offered by existing international instruments; (2) the responses to Question 2 of Questionnaire II; (3) the responses to Question 21 of the Country Profile for the 1980 Convention with regard to direct judicial communications;[93] (4) the Conclusions and Recommendations of judicial conferences; and (5) the discussions held during the 2011 Special Commission (Part I).

58. It is clear from the analysis in Preliminary Document No 3 D that existing international legal instruments do not offer an appropriate legal basis for the purpose of direct judicial communications. Furthermore, the analysis reveals that an important number of States need a legal basis for direct judicial communications whether they have designated a judge to the International Hague Network of Judges (IHNJ) or not.[94] On the other hand, a number of jurisdictions do not need such a legal basis.[95] In devising a way forward it would be desirable to hear from the Contracting States that have not completed the Country Profile nor yet expressed their views on this subject.

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

60. Since June 2011, a framework for direct judicial communications has been endorsed in the form of a non-binding international legal instrument (*i.e.*, the General Principles for Judicial Communications[96]). While this framework does not provide for mandatory reciprocity,[97] it works on the basis of mutual trust and confidence between the judges involved in direct judicial communications. It is hoped that this framework will invite the designation of judges to the International Hague Network of Judges by States

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[92] "Note on the desirability and feasibility of a potential legal instrument providing a basis for direct judicial communications", drawn up by the Permanent Bureau, Prel. Doc. No 3 D of December 2011 for the attention of the Special Commission of January 2012, available on the Hague Conference website at < www.hcch.net > under "Work in Progress" then "Child Abduction".

[93] Country Profiles completed by Contracting States to the 1980 Convention are available on the Hague Conference website at < www.hcch.net > under "Conventions" then "Convention No 28" and "Country Profiles". Forty-eight States have so far completed their Country Profile.

[94] In their responses to Questionnaire II, a number of States indicated that they were favourable to providing a legal basis in a protocol (*i.e.*, Argentina, Armenia, Australia, Bahamas, Chile, China (Hong Kong SAR), Colombia, El Salvador, Israel, Montenegro, Panama, Switzerland and Ukraine). It is important to note that the question was in relation to an international legal basis to be found in a protocol to the 1980 Convention and not a stand-alone instrument dealing solely with direct judicial communications. Furthermore, the analysis of the Country Profiles for the 1980 Convention shows that 10 States cannot undertake judicial communications without a legal basis (*i.e.*, Brazil, Burkina Faso, El Salvador, Greece, Honduras, Israel, Mauritius, Panama, Ukraine and Uruguay). Finally, during the 23-25 February 2011 Inter-American Meeting of International Hague Network Judges and Central Authorities, judges from 21 States of the region expressed a clear need for a legal basis in domestic law.

[95] An analysis of the Country Profiles for the 1980 Convention reveals that 22 States that have designated a judge to the International Hague Network of Judges can undertake direct judicial communications in the absence of a legal basis: Argentina, Australia, Belgium, Canada, Chile, China (Hong Kong SAR), Cyprus, Denmark, Dominican Republic, Finland, France, Ireland, Malta, Mexico, Norway, Paraguay, Peru, Romania, Sweden, United Kingdom, United States of America and Venezuela. Furthermore, the analysis of the Country Profile reveals that seven States that have not designated a judge to the IHNJ can undertake direct judicial communications in the absence of a legal basis. Estonia, Latvia, Lithuania, Poland, Portugal, Switzerland and Turkey.

[96] "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 > 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 "emerging". The Emerging Rules and General Principles for Judicial Communications were developed in consultation with a group of experts, the majority of which were members of the International Hague Network of Judges.

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

that have not yet made such a designation. Furthermore, the General Principles, which may continue to evolve and be refined over time, will provide flexibility in the development of appropriate norms as States gain more experience in this area.

61. The analysis of the need for a binding international instrument carried out in Preliminary Document No 3 D shows that a number of States report that they have an interest in developing such an instrument.[98] However, it may be that the interest of these States to develop a binding international instrument which would deal solely with a legal basis for direct judicial communications may not be strong enough to warrant its development at this time.[99] On the other hand, interest in such a project may grow if the provision of a legal basis is included in a broader instrument dealing with international child protection matters. Such an instrument could have the advantage of: creating reciprocal obligations; and, designating judges in accordance with an international legal standard. A number of States, however, are of the view that the development of international binding rules regarding direct judicial communications is premature and that States need time to gain more experience in this area in order to identify common standards.

C. Potential soft-law tool(s) concerning allegations of domestic violence in the context of return proceedings

62. The 2011 Special Commission (Part I) considered Preliminary Document No 9 of May 2011 on "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".[100] The consideration of the Special Commission on this topic was divided into three parts: (1) existing research and case law, the evidentiary aspects and the definition of domestic violence within the context of Article 13(1) *b)*; (2) issues of protection, including protective measures for the safe return of the child and accompanying parent; and (3) potential further actions and means to promote consistency.[101]

63. In relation to the discussions regarding further steps which might be taken regarding this issue, three proposals were presented during the 2011 Special Commission (Part I) and discussed by States:

64. Preliminary Document No 9, paragraph 151, proposed the establishment of a group of experts, including in particular judges, Central Authority experts and experts in the dynamics of domestic violence, to develop principles or a practice guide on the treatment of domestic violence allegations in Hague return proceedings.[102]

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[98] See, *supra*, para. 58.
[99] See, *supra*, para. 58. States that don't need a legal basis may not be interested in negotiating an instrument whose sole purpose would be to provide a legal basis for direct judicial communications.
[100] Drawn up by the Permanent Bureau, Prel. Doc. No 9 of May 2011 for the attention of the Special Commission of June 2011, available on the Hague Conference website *ibid*.
[101] For a summary of the discussion on these topics, see the Report of Part I of the Special Commission at paras 92-130.
[102] "The Permanent Bureau suggests, as one possible way of taking these matters forward, that work be commenced on the development of principles or some kind of practice guide on the management of domestic violence allegations in Hague return proceedings. Consideration might be given to the establishment of a group of experts, including in particular members of the judiciary as well as Central Authority experts, and other cross-disciplinary experts in the dynamics of domestic violence, to assist the Permanent Bureau in developing such principles or guide."

65. Working Document No 1 contained proposals by a number of Latin American delegations. This document invited the Special Commission to recommend the adoption of four criteria to treat domestic violence allegations (items 1-4 of the proposal) and the drafting of a Guide to Good Practice on the implementation and operation of Article 13(1) *b)* (item 5 of the proposal).[103] In response to this proposal,[104] many experts expressed their views as to the great potential utility of such a guide. However, concerns were expressed by a number of experts, in particular in relation to the fact that the judicial function in exercising discretion where a defence is raised under Article 13(1) *b)*, given the facts of a specific case, should not be minimised. An expert from Uruguay clarified that the proposal supported the development of a Guide to Good Practice regarding Article 13(1) *b)* exceptions and did not seek to exclude judges from the process.

66. An expert from Canada proposed Working Document No 2, suggesting that work on this issue may be best carried out in the context of the judiciary, in particular, as a Working Group composed primarily of members of the International Hague Network of Judges, assisted by Central Authority experts and other experts on the dynamics of domestic violence. It was suggested that the development of an appropriate tool or tools, which may include, for example, principles, a Guide to Good Practice and training modules, to assist in the consideration of Article 13(1) *b)* may be more influential if developed by those who are called upon to apply the Convention. It was also stated by the Canadian expert that it should be considered whether situations other than domestic violence which are raised as a defence under Article 13(1) *b)*, such as alcohol and drug abuse, should form a part of this investigation and further research on this issue might be necessary. In response to this proposal,[105] one expert indicated that, while he was supportive of the proposal of the delegation of Canada and sympathetic towards that of the Latin American delegations, judges are not bound by guides to good practice, and thus the option of developing binding rules in this area should also be retained. He noted also that his State had not designated a judge to the International Hague Network of Judges and that the Working Group to be established under the Canadian proposal should not be limited to Network judges. A number of experts agreed with the suggestion that any Working Group which might be convened could or should include experts in the area of domestic and family violence or abuse, and also practitioners.

67. The discussion at the 2011 Special Commission (Part I) on this issue was consistent with the approach taken by many States in their responses to Questionnaire II. In Questionnaire II, States were asked for their views on whether provisions "providing guidance on the manner in which […] [domestic violence] allegations should be handled in the context of proceedings for the return of a child" could be usefully included in any protocol to the 1980 Convention. While many States were concerned about the prospect of a binding protocol including provisions on this issue,[106] a number of States recognised the importance of the matter and the need for further guidance, in particular for judges.[107] Indeed, two States specifically proposed the development of a new Guide to Good Practice on domestic violence.[108]

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[103] With regard to the second para. in Work. Doc. No 1, an expert from Argentina clarified that the term "conclusive" should be replaced by "relevant enough".
[104] See, in particular, paras 122, 123 and 127 of the Report of Part I of the Special Commission for a summary of the discussions concerning this proposal.
[105] See, in particular, paras 125-128 of the Report of Part I of the Special Commission for a summary of the discussions concerning this proposal.
[106] See, *e.g.*, the responses of Argentina, Canada, Montenegro, and the United States of America.
[107] See, *e.g.*, the responses of Argentina, Canada, El Salvador, Ukraine and the United States of America noting the importance and seriousness of the issue and the responses of the Bahamas, Canada and the United States of America (and to a lesser degree, New Zealand) which proposed further guidance be developed on this issue.
[108] Canada and the United States of America.

68. From the discussions at the 2011 Special Commission (Part I) and the responses to Questionnaire II, it is apparent that there is broad support for further action to be taken to promote consistency in the application of Article 13(1) *b)* where issues of domestic and family violence are raised.[109]

69. In order to facilitate discussion at the 2012 Special Commission (Part II) on the specific form which future action in this area may take, it is suggested that experts may wish to consider the following issues:

(a) The scope of any future work: *i.e.*, should any future work (whether consisting of the development of principles, a Guide to Good Practice, a bench book or any other appropriate tools) be limited in scope to issues of domestic and family violence within the context of the Article 13(1) *b)* defence, or would it be beneficial for there to be broader consideration of Article 13(1) *b)* in the soft-law tool(s)?

(b) Is there broad agreement as to what sort of tools, such as the development of principles, a Guide to Good Practice, a bench book or other appropriate tools, should be developed in this area, or, should an expert group first be convened in order to recommend which appropriate tools should be developed?

(c) Who should be involved in the future work process? If there is to be an expert group, there appears to be agreement (from discussions at the 2011 Special Commission (Part I)) that its composition should include judges, cross-disciplinary experts in the dynamics of domestic and family violence, as well as Central Authority personnel and possibly practitioners. How should the composition of such a group be structured to include input from the above experts?

(d) If there is agreement that appropriate tools be developed, who should such soft-law tools be aimed at? The judiciary, Central Authority personnel or all those involved with the Convention's application, including practitioners?

D. International family relocation and potential further work

70. The Hague Conference's work in the last decade reflects the increasing importance of the topic of international family relocation and the ongoing effort to achieve greater international consistency in the approach to cross-border relocation disputes. "International family relocation" involves the permanent move to another country of a child with one parent, usually the primary caregiver. Approaches to relocation under national law differ, *inter alia*, in relation to:

– the circumstances in which it may be necessary for a parent to obtain a court order for permission to relocate with a child;

– the factors to be taken into account by a court in determining whether relocation should be permitted; and

[109] See the Chair's conclusion at para. 129 of the Report of Part I of the Special Commission.

– the approach taken by the court to guaranteeing and securing the contact rights of the "left-behind" parent.

71. The topic was first and most frequently addressed in the context of conflicts concerning transfrontier contact and preventive measures to protect children from abduction. Both the Guide to Good Practice on Preventive Measures (2005) and the Guide to Good Practice on Transfrontier Contact Concerning Children (2008) underscore the importance of ensuring the recognition and enforcement in the country of relocation of contact orders made within the context of international family relocation. The Guide on Transfrontier Contact devotes Chapter 8 to the issue of relocation and access. The Guide notes that the degree to which contact rights may be preserved should always be a relevant factor for a court in deciding whether or not to permit relocation. The Guide also emphasises the importance of ensuring that the terms and conditions of a contact order are given maximum respect in the country in which the relocation occurs. To that effect, the Guide details several mechanisms such as advanced recognition, mirror orders and direct judicial communications. The 1996 Convention is particularly relevant in this regard.

72. The Conclusions and Recommendations of the 2006 Special Commission 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".[110]

73. In March 2010, the Hague Conference on Private International Law and the International Centre for Missing and Exploited Children (ICMEC) co-organised the International Judicial Conference on Cross-Border Family Relocation.[111] At the end of the conference the delegates issued and adopted a document, the "Washington Declaration on International Family Relocation".[112] This Declaration gives 13 recommendations, including a list of 13 factors which are to guide a judge confronted with a relocation dispute. The Declaration states that the best interests of the child should always be the paramount consideration, without any presumptions for or against relocation. Reasonable notice should be given of the relocating parent's intention to the parent left behind in the move. The Declaration also emphasises the goal of achieving the voluntary settlement of relocation disputes through mediation and similar facilities as well as the importance of having mechanisms in place ensuring the enforcement of the orders for relocation and access regulations in the State of destination.

74. The presentations given during the Washington Conference on Cross-Border Family Relocation,[113] as well as the answers of States to Questionnaire I concerning the practical operation of the 1980 and 1996 Conventions,[114] demonstrate the significantly divergent approaches adopted by the courts dealing with international relocation cases. These differences among States are further explored in Preliminary Document No 11 ("Preliminary Note on international family relocation").

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[110] *Op. cit.* (note 20), Recommendation No 1.7.5

[111] The conference took place in Washington DC, United States of America, and brought together more than 50 judges and other experts from 14 countries to discuss cross-border family relocation.

[112] The full text of the declaration can be found in Annex A to the "Preliminary Note on international family relocation", drawn up by the Permanent Bureau, Prel. Doc. No 11 of October 2011 for the attention of the Special Commission of January 2012, and is also available on the Hague Conference website at < www.hcch.net > under "News & Events" then "2010".

[113] 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 > under "Publications" then "Judges' Newsletter".

[114] Questions 19.1 to 19.4 in particular focused on the topic of international family relocation, seeking information from Contracting States on their domestic law and case law concerning international family relocation as well as seeking their views on the Washington Declaration.

75. Questionnaire II, circulated in preparation for the 2012 Special Commission (Part II), included several questions on the issue of international family relocation in connection with the desirability of a protocol.[115] The responses were very divided, some States expressing the value of a possible protocol addressing the circumstances in which one parent may lawfully relocate with a child. In addition, some States saw the possibility of promoting consensual agreements between parents with respect to relocation, noting especially the role of mediation. Other States viewed protocol provisions on either matter as inappropriate or unnecessary, most of them emphasising the role of domestic law in determining the legality of the relocation of the child.

76. In light of the divergent views of States on relocation, the Permanent Bureau suggests that States explore the possible ways of pursuing further work, including recommending to the Council the establishment of a group of experts to consider the possible options for future work, such as principles or the development of a Guide to Good Practice or a Handbook on international relocation. The suggested work on mediated agreements (see *supra* section A) and direct judicial communications (see *supra* section B) are also of relevance to international family relocation, strengthening the co-operation among States in order to ensure that all aspects of relocation orders or agreements are respected in the country to which the parent and child are relocating.

E. The future direction of the Malta Process

77. The "Malta Process" is a dialogue between senior judges and high ranking government officials from Contracting States to the 1980 and 1996 Conventions and non-Contracting States with Shariah-based law. The Process is aimed at improving State co-operation in order to assist with resolving difficult cross-border family law disputes in situations where the relevant international legal framework is not applicable. In particular, the Process seeks to improve child protection between the relevant States by: (1) ensuring that the child's right to have continuing contact with both parents is supported (even though they live in different States); and (2) by combating international child abduction.

78. At the centre of the Malta Process has been the search for common legal principles to begin to identify the basic building blocks for better co-operation and for the development of a "rule of law" between the States concerned.[116] This has involved: "(1) a full appreciation of how the legal systems concerned currently address cross-frontier family law problems; (2) a process in which principles develop on the basis of consensus – principles in which all the countries concerned feel a sense of 'ownership'; (3) respect for the diversity of the different legal systems and their basic values; and (4) a willingness to compromise in the pursuit of shared objectives which, in the case of international child protection, include those embodied in the *United Nations Convention of 1989 on the Rights of the Child*."[117]

[115] The questions were the following: "Could provisions (*i.e.*, possible components of a protocol) on the matter of international relocation of a child serve a useful purpose and how high a priority would you attach to the development of provisions on this matter?
- 10.1 Addressing the circumstances in which one parent may lawfully remove a child to live in a new country
- 10.2 Promoting agreement between parents in respect of relocation
- 10.3 Others."

[116] See Vol. VIII of *The Judges' Newsletter* and the contribution of Deputy Secretary General, William Duncan.

[117] See, *ibid.*, at p. 7.

79. The Malta Process is discussed in detail in Preliminary Document No 12 (at paras 88-108) in the context of the services provided by the Hague Conference, through its Permanent Bureau.[118] This document sets out the background of the Malta Process and considers the responses provided by States to questions concerning the Malta Process in Questionnaire I. As stated in Preliminary Document No 12, the State responses to these questions were somewhat limited in number.[119] However, many of the States that did provide substantive comments emphasised the importance of the Malta Process.[120] In relation to the future of the project as a whole, several States expressed interest in moving the Malta Process forward.[121] The specific suggestions received from States concerning the future of the Malta Process are set out at paragraphs 105 to 108 of Preliminary Document No 12.

80. As Preliminary Document No 12 makes clear, there appears to be general support for moving forward with the Malta Process in order to build upon past work and to achieve further tangible results. In this context, there is a desire among a number of States to explore whether the "building blocks" which are already in place to develop a "rule of law" between these States can be further enlarged.

81. States may wish to discuss at the 2012 Special Commission (Part II) what can be done to reinforce further the Malta Process. Whatever the outcome of discussions, it is hoped that States will support a Fourth Malta Conference, possibly in late 2012 or early 2013, to continue this important dialogue.

F. Services provided by the Hague Conference on Private International Law in relation to the 1980 and 1996 Conventions

82. The Hague Conference on Private International Law, through its Permanent Bureau, provides a wide range of services in connection with the 1980 and 1996 Conventions, from help in implementing Conventions, to training judges, to maintaining a database of case law on the 1980 Convention (INCADAT), to creating Guides to Good Practice. All this is done primarily by a staff of 1.5 Principal Lawyers and 4 Legal Officers. Given the range of services and the limited resources, States may wish to consider providing their views on the prioritisation of services. They may also wish to discuss the role which the Permanent Bureau should play in a number of specific areas (see below).

83. The services provided by the Hague Conference in relation to the 1980 and 1996 Conventions are detailed in Preliminary Document No 12, along with the comments provided by States in relation to these services in their responses to Questionnaire I. Various suggestions have been made in Preliminary Document No 12 regarding particular aspects of these services which States may wish to discuss during the 2012 Special Commission (Part II).

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[118] "*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*", drawn up by the Permanent Bureau, Prel. Doc. No 12 of November 2011 for the attention of the Special Commission of January 2012.

[119] Thirteen substantive responses to question 20.6 (b) and 17 substantive responses to question 20.6 (c).

[120] *E.g.*, Canada, Estonia, France, Germany, Israel, Spain, Switzerland, Ukraine, the United States of America.

[121] *E.g.*, Austria, Belgium, Canada (though stressing the need for this to be discussed at the Council on General Affairs and Policy in light of the Hague Conference's mandate and priorities), France, Germany, Israel, Mauritius, Portugal, Slovakia, Spain, the United States of America.

84. First, States may wish to consider the role the Permanent Bureau should play in responding to requests for information and assistance. As stated in Preliminary Document No 12 (at para. 71), in the past year, the Permanent Bureau has responded to over 100 requests for assistance and information in relation to the 1980 and 1996 Conventions. The Permanent Bureau has noted a constant increase in the number of requests received over the past years. Some of the requests received by the Permanent Bureau are from Central Authorities and other State authorities. However, the majority of the requests for assistance received by the Permanent Bureau are from parents and other family members and occasionally their lawyers. While responding to these requests does use Permanent Bureau resources, the requests often ensure that operational issues which have arisen in relation to the Conventions are brought to the attention of the Permanent Bureau. Responding to the requests may therefore benefit not only those making the requests but also the Hague Conference.

85. In Questionnaire I, States were asked for their views about the role of the Permanent Bureau in handling requests received from individuals. The vast majority of the replies[122] from States supported the work of the Permanent Bureau in responding to individuals, including referral(s) and offering information of a general nature on the Conventions. Many States indicated that they found such a service useful[123] and several States commented that the service contributed to the effective operation of the Conventions.[124] Although the Permanent Bureau's work in responding to individual requests appears highly valued by the overwhelming majority of States, it does entail a significant allocation of resources. Further, it should be noted that some Contracting States[125] have suggested an even more active role for the Permanent Bureau in the future in relation to individual cases where there are difficulties between Contracting States and allegations of non-compliance with the 1980 Convention. In this regard, reference is made to Section IV of Preliminary Document No 12. As stated in Preliminary Document No 12 (at para. 114), one issue which therefore appeared in several forms in the responses to Questionnaire I was the role the Permanent Bureau should play in monitoring compliance with the Convention and addressing issues of non-compliance. This issue arose (1) in a general form, and (2) in the context of individual cases. The role of the Permanent Bureau in assisting Contracting States with such issues not only has significant resource implications but also concerns questions of mutual trust among Contracting States and may warrant further discussion at the 2012 Special Commission (Part II).

86. An additional issue is that of the possible development of "a model consent to travel form". Reference in this regard is made to paragraphs 68 to 70 of Preliminary Document No 12.

87. Ultimately, the overarching issue for discussion by States at Part II concerning the services provided by the Hague Conference, through its Permanent Bureau, is the need for priorities to be identified, in light of the limited resources available.

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[122] Of 21 substantive responses to question 22.1 (g), 20 States responded positively to this service.

[123] *E.g.*, Argentina, Canada, China (Hong Kong SAR and Macao SAR), Colombia, Croatia, Cyprus, Czech Republic, Estonia, Finland, Israel, Luxembourg, Norway, Panama, Portugal, Romania, Slovakia, United Kingdom (England and Wales).

[124] *E.g.*, Argentina, China (Hong Kong SAR and Macao SAR), Israel, Panama, United Kingdom (England and Wales).

[125] *E.g.*, see Norway's response to Questionnaire I at question 23; see also Prel. Doc. No 12 of November 2011, *op. cit.* (note 118).

V. CONCLUSION – THE WAY FORWARD

88. In the discussions at the 2011 Special Commission (Part I) and in the responses to Questionnaire II, States referred to a variety of possibilities to remedy certain of the problems in the practical operation of the 1980 Convention which had originally been suggested for inclusion in a protocol. It became apparent that other options short of a protocol might be possible, especially in light of the likely inability of achieving consensus on the need for a protocol or on its contents. It also became clearer that the division among States and the degree of entrenchment at opposite ends of the spectrum made it difficult to conceive of a productive discussion at the 2012 Special Commission (Part II) that might result in agreement on further work on a protocol at this time.

89. In connection with the Council's mandate to consider the feasibility of a protocol, it has become clearer during further consultations, including additional responses to Questionnaire II and discussions at the 2011 Special Commission (Part I), that there is the possibility of an evolving consensus on certain specific topics even if not on a protocol – providing for the cross-border recognition of mediated agreements in international family disputes concerning children; establishing a legal basis for direct judicial communication; and providing further support in the form of soft law for the treatment of domestic and family violence issues within the context of return proceedings. These topics, and others to be discussed at the 2012 Special Commission (Part II) and included within the suggested draft Agenda, have been identified as areas where it appears it might be possible to achieve consensus on the need for further work and to seek a mandate from the Council for next steps.

A N N E X E / A N N E X

INTRODUCTION

This Annex provides a summary of the 24[1] responses to Questionnaire II[2] received from States[3] as of 1 November 2011. It updates the Preliminary Report which was prepared by the Permanent Bureau in May 2011[4] and which was based on the 16[5] responses received as of 1 May 2011. This document follows the general structure of part V of the Preliminary Report.

Questionnaire II inquired as to the views of States[6] regarding: (1) the areas that might form the possible components of a protocol (the responses to this part of the Questionnaire are summarised in section A below); and (2) the general desirability and feasibility of a protocol to the 1980 Convention (the responses to this part of the Questionnaire are summarised in section B below).

The summary of responses at section A below is followed, where relevant, by a brief mention of the discussions which took place at Part I of the Special Commission meeting in June 2011 (the "2011 Special Commission (Part I)") concerning the particular topic. Reference is also made to the relevant Conclusions and Recommendations from this meeting.[7]

It is hoped that this Annex will assist the work of Part II of the Special Commission ("the 2012 Special Commission (Part II)").

THE VIEWS OF SOME STATES

A. Topics referred to in Questionnaire II as possible components of a protocol[8]

1. Mediation, conciliation and other similar means to promote the amicable resolution of cases under the 1980 Convention

(i) The responses to Questionnaire II

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[1] Argentina, Armenia, Australia, Bahamas, Burkina Faso, Canada, Chile, China (Mainland, Hong Kong SAR), Colombia, Dominican Republic, El Salvador, European Union, Israel, Mexico, Monaco, Montenegro, New Zealand, Norway, Panama, Switzerland, Ukraine, Unites States of America, Venezuela and Zimbabwe.

[2] "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",* drawn up by the Permanent Bureau, Prel. Doc. No 2 of December 2010 for the attention of the Special Commission of June 2011, available on the Hague Conference website at < www.hcch.net > under "Work in Progress" then "Child Abduction".

[3] Questionnaire II was circulated to all National and Contact Organs of Members of the Hague Conference on Private International Law, as well as to non-Member Contracting States to the 1980 Convention. The reference to "States" in the context of Questionnaire II responses will therefore include, where relevant, Member Contracting States to the 1980 Convention, non-Member Contracting States to the 1980 Convention, Member non-Contracting States to the 1980 Convention and the European Union.

[4] "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", drawn up by the Permanent Bureau, Prel. Doc. No 7 of May 2011 for the attention of the Special Commission of June 2011, available on the Hague Conference website *ibid*.

[5] Australia, Bahamas, Burkina Faso, Chile, China (Mainland, Hong Kong SAR), Colombia, Dominican Republic, El Salvador, European Union, Mexico, Montenegro, New Zealand, Norway, Switzerland, Ukraine and Zimbabwe.

[6] *Op. cit.* note 3.

[7] See the Conclusions and Recommendations adopted by the Sixth Meeting of the Special Commission to review the operation of the 1980 and 1996 Conventions (1-10 June 2011), available on the Hague Conference website at < www.hcch.net > under "Child Abduction section", then "Special Commission meetings on the practical operation of the Convention" (hereinafter, the "2011 Conclusions and Recommendations").

[8] It should be noted that, in the absence of comments by the European Union on possible specific components of a protocol, this section summarises the views of the 23 Contracting States to the 1980 Convention or Members of the Hague Conference which had provided responses to Questionnaire II as of 1 November 2011.

Several responses indicated that expressly authorising the use of mediation, conciliation or other means to promote the amicable resolution of cases under the 1980 Convention could serve a useful purpose.[9] Many responses referred in this context to the encouragement of amicable solutions in a broad sense, including other forms of alternative dispute resolution, in addition to mediation.[10] However, several responses expressed the need for careful consideration to ensure that mediation or other processes to bring about amicable solutions do not result in an undue delay in the return procedure.[11]

A number of responses[12] expressed the view that such a provision would not be necessary, arguing that Article 7 of the 1980 Convention appeared to be sufficient. Some of these responses[13] noted that, considering the broad substantive issues involved in mediation, introducing a protocol on the subject may create jurisdictional issues[14] and would exceed the scope of the 1980 Convention[15]. Canada also considered possible protocol rules on mediation as premature, arguing that States should first be given the time to consider and apply the good practices set forth in the draft Guide to Good Practice on Mediation under the 1980 Convention[16] which is about to be finalised.[17] Finally, New Zealand expressed concerns about the promotion of mediation to such a point that it became automatic in return proceedings, as this could reduce the incentive of the taking parent to act lawfully prior to the return.

Several responses[18] indicated that in their view it would be appropriate to address issues of substance and procedure surrounding the use of such means (*e.g.*, concerning matters such as confidentiality, the interrelationship between the mediation process and return proceedings, or the recognition and enforcement of agreements resulting from mediation). Australia suggested that possible provisions could be imported from the principles being developed by the Working Party on Mediation in the context of the Malta Process.[19]

Responses suggested several issues concerning mediation which could be addressed in any possible provisions, including: the relationship between the mediation procedure and the return procedure;[20] the timeframe of the mediation process;[21] the practical issues arising from a mediation process when one parent is abroad;[22] the admissibility of mediation;[23] the procedures concerning the appointment of a mediator;[24] cross-border mediation rules of conduct and ethics;[25] mediator training, accreditation and continuing professional development;[26] the confidentiality of the mediation process;[27] the person

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[9] Armenia, Australia, Bahamas, Burkina Faso, Chile, China (Hong Kong SAR), Colombia, Dominican Republic, El Salvador, Israel, Montenegro, Panama, Switzerland, Ukraine, Venezuela, Zimbabwe.
[10] Australia, Bahamas, Chile, El Salvador, Monaco, Panama, Switzerland, Venezuela.
[11] Bahamas, Dominican Republic, Switzerland.
[12] Argentina, Canada, New Zealand, United States of America.
[13] Canada, New Zealand.
[14] New Zealand.
[15] Canada.
[16] "Draft Guide to Good Practice under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, Part V – Mediation", drawn up by the Permanent Bureau, Prel. Doc. No 5 of May 2011 for the attention of the Special Commission of June 2011, available on the Hague Conference website at < www.hcch.net > under "Work in Progress" then "Child Abduction".
[17] Similarly Argentina.
[18] Armenia, Australia, Burkina Faso, Chile, China (Hong Kong SAR), El Salvador, Israel, Monaco, Panama, Switzerland, Ukraine.
[19] See "The 'Principles for the establishment of mediation structures in the context of the Malta Process' and the Explanatory Memorandum", drawn up by the Permanent Bureau, Prel. Doc. No 6 of May 2011 for the attention of the Special Commission of June 2011, available on the Hague Conference website at < www.hcch.net > under "Work in Progress" then "Child Abduction".
[20] Chile, Switzerland, Venezuela.
[21] Bahamas, Chile.
[22] Chile.
[23] Australia.
[24] Bahamas (response to Question 1.1).
[25] Israel.
[26] Israel.
[27] Australia, Chile, Ukraine.

and / or entities that should bear the cost of such process;[28] the evaluation of cross-border mediation and quality control, including procedures to lodge a complaint.[29] A slightly bigger group of responses supported possible provisions on the recognition and enforcement of agreements reached as a result of mediation conducted in another State,[30] with one State suggesting a standard application form for recognition and enforcement of such an agreement abroad.[31]

Concerns expressed about the feasibility of an instrument addressing the above issues related especially to the costs of mediation services,[32] the diversity of legislation and methods among the States Parties,[33] and the potential practical difficulties arising from the co-ordination of the authorities involved internally in the mediation process (Central Authorities, mediation agencies, mediators, judicial authorities).[34]

Several responses did not think it appropriate to address issues of substance and procedure surrounding the use of means of amicable resolution.[35] New Zealand noted that the substantive issues fell outside the scope of the 1980 Convention and were matters for the domestic law of the competent authorities having jurisdiction, while the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* ("the 1996 Convention") dealt clearly with rules on jurisdiction, recognition and enforcement.

The United States of America, who expressed strong views against the development of a protocol, supported the promotion of non-binding principles such as the principles being developed by the Working Party on Mediation in the context of the Malta Process.

(ii) The 2011 Special Commission (Part I)

The 2011 Special Commission (Part I) dealt with the issue of mediation, conciliation and similar means in the context of the 1980 Convention in detail when considering the draft Guide to Good Practice on Mediation under the Convention.[36] The topic was also discussed in relation to the obligation of Central Authorities under Article 7 of the Convention regarding securing "the voluntary return of the child or to bring about an amicable resolution of the issues"[37] as well as in the context of the discussions on the draft Practical Handbook on the 1996 Convention.[38]

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[28] Zimbabwe.
[29] Israel.
[30] Armenia, Australia, Bahamas (response to Question 1.1), Chile, Switzerland, Ukraine.
[31] Ukraine.
[32] Zimbabwe.
[33] Bahamas.
[34] Ukraine, Zimbabwe.
[35] Bahamas, Dominican Republic, Mexico, Montenegro, New Zealand.
[36] *Op. cit.* note 16. See the "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", drawn up by the Permanent Bureau, Prel. Doc. No 14 of November 2011 for the attention of the Special Commission of January 2012 (hereinafter, the "Report of Part I of the Special Commission"), at paras 225 *et seq*.
[37] *Ibid.* at paras 43 *et seq*.
[38] "Revised draft Practical Handbook on the operation of the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*", drawn up by the Permanent Bureau, Prel. Doc. No 4 of May 2011 for the attention of the Special Commission of June 2011, available on the Hague Conference website at < www.hcch.net > under "Work in Progress" then "Child Abduction"; see Minutes Nos 8 and 9 of the 2011 Special Commission (Part I).

The Special Commission welcomed "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 recognise[d] that the use of measures to this end should not result in delay."[39]

The draft Guide to Good Practice on Mediation[40] was welcomed by the Special Commission and the Permanent Bureau was "requested to make revisions to the Guide in light of the discussions of the Special Commission, taking account also of the advice of experts".[41]

One issue that was identified in the course of the discussions as causing particular practical challenges was how parental agreements made in international child abduction cases could best be rendered legally binding and enforceable in all States concerned, when such agreements contain issues relating to custody, *i.e.*, matters on which the State where return proceedings are pending does not have jurisdiction. This topic will be discussed at the 2012 Special Commission (Part II): see, for further details, Preliminary Document No 13 (Chapter IV, section A).[42]

2. Direct judicial communications

(i) The responses to Questionnaire II

A great number of responses indicated that if the development of a protocol were to be embarked on, they would favour providing a legal basis for the use of direct cross-border judicial communications in respect of cases brought under the 1980 Convention.[43] Several responses highlighted the importance of direct judicial communications to ensure the proper operation of the Convention,[44] especially in the context of safe return of the child[45] and enforcement of return orders.[46] Providing such legal bases for the use of direct judicial communications was seen as a means to encourage the use of direct judicial communications in States that have been sceptical so far,[47] in particular due to their legal tradition and practice, and as an opportunity to clarify the role of the Central Authority compared to the role of judicial authorities in their co-operation and communications, including the circumstances and procedures required of Central Authorities to seek assistance through the judicial network in respect of particular cases.[48]

In contrast, some responses[49] expressed the view that, despite the usefulness of direct judicial communications, it would not be necessary or appropriate to deal with this issue in a protocol. The reasons given were that direct judicial communications were currently already possible in Hague cases,[50] that the matter was governed by the law of the State of the judicial authorities seised[51] and that binding rules could possibly affect the

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[39] See the 2011 Conclusions and Recommendations (*op. cit.* note 7), at para. 15.
[40] *Op. cit.* note 16.
[41] See the 2011 Conclusions and Recommendations (*op. cit.* note 7), at para. 58.
[42] "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", drawn up by the Permanent Bureau, Prel. Doc. No 13 of December 2011 for the attention of the Special Commission of January 2012, available on the Hague Conference website at < www.hcch.net > under "Work in Progress" then "Child Abduction".
[43] Argentina, Armenia, Australia, Bahamas, Chile, China (Hong Kong SAR), Colombia, El Salvador, Israel, Montenegro, Panama, Switzerland, Ukraine.
[44] Chile, Monaco, Montenegro, Switzerland.
[45] Chile, Switzerland.
[46] Chile.
[47] Chile, Panama, Israel, Ukraine.
[48] Australia, Switzerland, Zimbabwe.
[49] Canada, New Zealand, United States of America.
[50] Canada, United States of America.
[51] New Zealand.

independence of the judiciary or fundamental principles such as due process.[52] In contrast, soft law, such as the current draft General Principles on Direct Judicial Communications[53] should be promoted.[54]

Several responses found it necessary to define the scope of such direct communications and / or to set out procedural safeguards for the use of direct judicial communications.[55] In particular, it was viewed as necessary to provide clear rules on the role of the authorities involved, including Central Authorities, in the context of such communications.[56] In contrast, Ukraine did not see binding provisions defining the scope of direct judicial communications and safeguards as appropriate and wished to pursue instead the establishment of non-binding rules or guidance.

Providing an explicit legal basis for the International Hague Network of Judges was considered as useful by about half of the responses.[57]

(ii) The 2011 Special Commission (Part I)

Direct judicial communications were dealt with in great detail at the 2011 Special Commission (Part I).[58]

Regarding a legal basis for direct judicial communications, the Special Commission concluded as follows:

> "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."[59]

This topic will be discussed at the 2012 Special Commission (Part II): see, for further details, Preliminary Document No 13 (Chapter IV, section B)[60] and Preliminary Document No 3 D.[61]

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[52] Canada.
[53] "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 > under "Work in Progress" then "Child Abduction".
[54] Canada, New Zealand and United States of America.
[55] Armenia, Australia, Bahamas, Chile, China (Hong Kong SAR), Dominican Republic, El Salvador, Israel, Monaco, Montenegro, Panama, Switzerland, Venezuela.
[56] El Salvador, Switzerland.
[57] Australia, Bahamas, Chile, China (Hong Kong SAR), Colombia, El Salvador, Montenegro, Switzerland, Ukraine, Venezuela, Zimbabwe.
[58] See the Report of Part I of the Special Commission (*op. cit.* note 36), at paras 184 *et seq*.
[59] See the 2011 Conclusions and Recommendations (*op. cit.* note 7), at paras 69 to 70.
[60] *Op. cit.* note 42.
[61] "Note on the desirability and feasibility of binding rules including a legal basis for direct judicial communications", drawn up by the Permanent Bureau, Prel. Doc. No 3 D of December 2011 for the attention of the Special Commission of January 2012, available on the Hague Conference website at < www.hcch.net > under "Work in Progress" then "Child Abduction".

3. Expeditious procedures

(i) The responses to Questionnaire II

About half of the responses thought that more explicit or stricter provisions to ensure that return applications are processed rapidly at first instance, on appeal and at the enforcement stage could serve a useful purpose[62] despite concerns expressed concerning the possibility of achieving consensus on this issue.[63] Some noted that Article 11 of the 1980 Convention does not appear to be sufficient, with significant delays encountered in child abduction cases,[64] including by Central Authorities which may hold up the filing of return applications before judicial authorities or delay the notification of decisions.[65] Other responses suggested the inclusion of more explicit or stricter provisions in conjunction with greater clarity as to the limited range of matters that should be considered by the courts in determining an application under the Convention, especially in view of the growing trend to consider a wide range of issues related to the "best interests of the child" rather than limiting matters for consideration.[66]

Several responses expressed the view that stricter provisions would not be helpful.[67] Articles 2 and 11 were seen as clear enough; rather, it was felt that priority should be given to emphasising the practical implementation of such obligations and regular review of State practices.[68] Stricter provisions would not ensure quicker procedures in practice, since delays were caused by a lack of compliance by Contracting States with the current provisions of the 1980 Convention, not by the terms of the Convention itself.[69] One response highlighted that shortening the existing timeframe could jeopardise the quality of the proceedings and thus endanger the child's best interests.[70] Finally, one response highlighted that the matter of how to secure expeditious procedures was dealt with in detail in the Guides to Good Practice under the 1980 Convention and that besides promoting the implementation of these good practices, the use of direct judicial communication promised a speeding up of return procedures.[71]

(ii) The 2011 Special Commission (Part I)

As at previous Special Commission meetings on the practical operation of the 1980 Convention,[72] an important theme of discussions at the 2011 Special Commission (Part I) was the need for expeditious procedures in international child abduction cases. This issue was addressed on several occasions in the course of the meeting and the importance of expeditiousness at all stages of such cases was highlighted.[73]

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[62] Armenia, Australia, Burkina Faso, Chile, China (Hong Kong SAR), Colombia, Dominican Republic, El Salvador, Israel, Mexico, Monaco, Norway, Panama, Switzerland, Venezuela.
[63] Norway.
[64] Chile, Switzerland.
[65] Chile, Mexico.
[66] Australia, Mexico.
[67] Bahamas, Montenegro, New Zealand, Ukraine, United States of America.
[68] Argentina, Canada, New Zealand.
[69] Canada, Ukraine.
[70] Montenegro.
[71] United States of America.
[72] See, *e.g.*, the Conclusions and Recommendations adopted by the Fifth Meeting of the Special Commission to review the operation of the 1980 and 1996 Conventions (30 October – 9 November 2006), at para. 1.4.1 (reaffirming Recommendations 3.3 to 3.5 of the Fourth Meeting of the Special Commission (22-28 March 2001)), available on the Hague Conference website at < www.hcch.net > under "Child Abduction Section" then "Special Commission meetings on the practical operation of the Convention".
[73] See, *e.g.*, the Report of Part I of the Special Commission (*op. cit.* note 36) – in relation to Central Authorities, at paras 21 *et seq.*, in relation to mediation, at para. 22, in relation to direct judicial communications, at para. 50, in relation to immigration, at para. 62, in relation to access / contact, at para. 83, in relation to legal aid, at para. 132, in relation to domestic and family violence, at paras 93 and 104. See also the 2011 Conclusions and Recommendations (*op. cit.* note 7), at paras 15, 33 and 36.

The Special Commission re-emphasised in particular "the need for close co-operation between Central Authorities in the processing of applications and the exchange of information under the 1980 Convention, and [drew] […] 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."[74] Furthermore the Special Commission encouraged "the use of information technology with a view to increasing the speed of communication and improving networking between Central Authorities".[75]

4. The safe return of the child

(i) The responses to Questionnaire II

Specifying measures (*e.g.*, interim protective orders) which may be taken by either of the States involved to help ensure the safe return of the child and, where appropriate, an accompanying parent was seen as useful by more than half of the responses.[76] However, the views expressed varied in relation to the measures to be specified. It was suggested that the responsibilities of authorities involved be further specified to ensure the safe return,[77] and that provisions regulating the involvement of Embassies[78] as representatives of the requesting State's Central Authority would be helpful in relation to travel documents and the logistics of the return. Another response emphasised the role of the parents in removing obstacles to return and otherwise securing the safe return and opposed the idea of regulating specific requirements for the Central Authority itself to seek orders in these matters.[79] Two responses highlighted that the list of specified measures should be non-exhaustive.[80]

A number of States considered that such provisions did not appear to be appropriate or needed.[81] Some highlighted the flexibility of the 1980 Convention in this regard[82] and feared that inclusion of certain measures in a protocol could lead to a restrictive interpretation of the existing rules.[83] Some States emphasised that the regulation of specific measures was a matter of domestic law[84] and that a non-exhaustive enumeration of measures in a Guide to Good Practice under the 1980 Convention was the more appropriate remedy.[85] It was also emphasised that the main issue in the area of safe return related to the recognition and enforcement of the interim protective measures taken, which was already dealt with by the 1996 Convention and its ratification should therefore be encouraged.[86]

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[74] *Ibid.*, at para. 7.
[75] *Ibid.*, at para. 11.
[76] Armenia, Australia, Burkina Faso, Chile, China (Hong Kong SAR), Colombia, Dominican Republic, El Salvador, Mexico, Montenegro, Norway, Panama, Switzerland, Ukraine, Venezuela, Zimbabwe.
[77] Switzerland.
[78] Mexico, Switzerland.
[79] Australia.
[80] Chile, Ukraine.
[81] Argentina, Bahamas, Canada, Israel, Monaco, United States of America.
[82] Bahamas, United States of America.
[83] Bahamas.
[84] Argentina, Canada, Israel.
[85] Argentina, Canada, Monaco. The United States of America suggested in regard to the issue of domestic violence to draw up a specific Guide to Good Practice, see also under section 5 below.
[86] New Zealand indicated that auxiliary rules would only be helpful for States Parties to the 1980 Convention which are not Parties to the 1996 Convention, so long as the rules are similar to those contained in the 1996 Convention.

The great majority of the responses considered that it would be useful to provide for co-operation between courts or between Central Authorities in securing the safe return of the child and removing obstacles to return.[87] Such provisions were considered by States as needed in relation to co-operation between courts in particular,[88] as well as between immigration authorities[89] with a view to expediting proceedings.[90] One State suggested that such provisions should also apply to the safe return of the accompanying parent.[91]

A number of States were of the view that such provisions were not needed,[92] since Article 7 of the 1980 Convention already provided for co-operation between Central Authorities and competent authorities to secure the safe return of the child.[93] One response highlighted that the matter was better dealt with in a Guide to Good Practice.[94]

The idea of providing for an exchange of information following the return of the child was supported by about half of the responses.[95] One of these responses, however, expressed concerns regarding the resource implications of such a provision.[96] The information exchange was, in particular, seen as helpful in ensuring that the child arrived safely, in considering psychological follow-up for the child,[97] as well as in verifying compliance with the measures ordered, or the extrajudicial agreements reached, for the safe return of the child.[98] According to two States, such feedback could permit the court ordering the return of the child to develop more efficient practices for the safe return of the child and better co-operation with the authorities of the State of the child's habitual residence.[99] In this regard, it has been suggested that there is a crucial need for a prompt decision on the merits by the courts of the State of the child's habitual residence following a return.[100]

Switzerland expressed the view that addressing more generally the issue of the follow-up of the child after the return is seen as a way to strengthen trust between States. In its response to Questionnaire I,[101] Switzerland also mentioned that ensuring co-operation between Central Authorities is important after the return and that, for this purpose, recommendations are not enough and binding rules are necessary.[102]

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[87] Armenia, Australia, Burkina Faso, Chile, China (Hong Kong SAR), Colombia, Dominican Republic, El Salvador, Mexico, Montenegro, Norway, Panama, Switzerland, Ukraine, Venezuela, Zimbabwe.
[88] Chile, Zimbabwe.
[89] Mexico.
[90] Mexico, Zimbabwe.
[91] Chile.
[92] Argentina, Bahamas, Canada, Israel, New Zealand, United States of America.
[93] Argentina, Canada, New Zealand, United States of America.
[94] Argentina.
[95] Australia, Burkina Faso, Chile, China (Hong Kong SAR), Dominican Republic, El Salvador, Montenegro, Panama, Switzerland, Ukraine, Venezuela.
[96] Australia.
[97] Burkina Faso.
[98] Australia, Chile, Panama.
[99] Australia, Switzerland.
[100] Switzerland.
[101] "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*", drawn up by the Permanent Bureau, 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 > under "Work in Progress" then "Child Abduction.
[102] See the response of Switzerland to Question 6.8 of Questionnaire I.

A number of responses considered that providing for an exchange of information following the return of the child was not appropriate,[103] while one was undecided on this suggestion.[104] As a matter of respect for the legal system of the State of habitual residence, it should be accepted that that State has the ability to protect the child on return.[105] In addition, some responses noted that such provisions could impose an unnecessary burden on the individual States.[106] One State indicated openness towards a voluntary exchange of information, subject to domestic law restrictions regarding privacy.[107]

(ii) The 2011 Special Commission (Part I)

In relation to facilitating the safe return of the child and the accompanying parent, the 2011 Special Commission (Part I)[108] reached the following Conclusions and Recommendations:

> "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."[109]

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[103] Argentina, Bahamas, Canada, Mexico, New Zealand, United States of America.
[104] Israel.
[105] Argentina, New Zealand.
[106] Australia, New Zealand.
[107] Canada.
[108] See the Report of Part I of the Special Commission (*op. cit.* note 36), at paras 52 *et seq.*
[109] See the 2011 Conclusions and Recommendations (*op. cit.* note 7), at paras 39-43.

5. Allegations of domestic violence

(i) The responses to Questionnaire II

Nearly all of the responses considered that providing guidance on the manner in which allegations of domestic violence should be handled in the context of proceedings for the return of a child would be useful.[110] However, some responses[111] were opposed to the idea of including this guidance in a protocol or were undecided[112] in this regard. Some rather favoured the drawing up of a Guide to Good Practice[113] on the matter or giving guidance in form of Special Commission recommendations.[114] Two States reserved their position on the matter for the time being.[115]

Two States were of the view that work on such possible provisions should involve specialists in the field of domestic violence.[116] Some responses considered as potentially beneficial that, where it is anticipated that the respondent may raise an allegation of domestic violence, the requesting State should provide information about any alleged domestic violence and about the laws and services available to protect and support the child and respondent were a return order to be made.[117] In particular, return should be ordered where the requesting State provides assurance that those issues will be addressed upon the child's return.[118] Several responses mentioned that it would be useful to promote a consistent and uniform approach on the issue,[119] especially regarding the construction of the exception to the return under Article 13(1) *b)* of the 1980 Convention (grave risk).[120] Consideration should also be given to the living conditions of the child after the return, which relate closely to the Article 13(1) *b)* exception.[121] It was noted that the 1996 Convention could be of use to a certain extent,[122] although it was also observed that there is no provision for jurisdiction to take protective measures in this context unless the measures are urgent.[123] As a result, two States suggested that such provisions should also deal with the issue of the jurisdiction and powers of the authorities seised of a return application to take protective measures.[124] One response referred to the recent decision of the Council on General Affairs and Policy[125] to add to the Hague Conference's Agenda the topic of recognition of foreign civil protection orders.[126]

One State warned that careful consideration should be given to ensuring that such guidelines would not restrict the discretion of the judicial authorities.[127]

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[110] Argentina, Australia, Bahamas, Burkina Faso, Canada, Chile, China (Hong Kong SAR), Dominican Republic, El Salvador, Mexico, Monaco, Montenegro, New Zealand, Panama, Ukraine, United States of America.
[111] Argentina, Canada, United States of America.
[112] Argentina.
[113] Canada, United States of America.
[114] Canada.
[115] Israel, Norway.
[116] El Salvador, Panama.
[117] Australia, Mexico, Venezuela. New Zealand suggests to limit the inquiry on protective measures available.
[118] Mexico (response to Question 9.3).
[119] Bahamas, Chile, Dominican Republic, Mexico, New Zealand.
[120] Chile, Dominican Republic, Mexico, New Zealand.
[121] Switzerland.
[122] Canada, New Zealand.
[123] Switzerland.
[124] Switzerland, Ukraine.
[125] See the Conclusions and Recommendations adopted by the Council on General Affairs and Policy of the Conference (5-7 April 2011), available on the Hague Conference website at < www.hcch.net > under "Work in Progress" then "General Affairs", at para. 23.
[126] United States of America.
[127] Bahamas.

(ii) The 2011 Special Commission (Part I)

The 2011 Special Commission (Part I) dealt with the topic of domestic and family violence in the context of the 1980 Convention in great detail.[128]

In the 2011 Conclusions and Recommendations, the Special Commission stated as follows:

> "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."[129]

This topic will be discussed at the 2012 Special Commission (Part II): for further details, see Preliminary Document No 13 (Chapter IV, section C).[130]

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[128] See the Report of Part I of the Special Commission (*op. cit.* note 36), at paras 92 *et seq*.
[129] See the 2011 Conclusions and Recommendations (*op. cit.* note 7), at paras 35 to 38.
[130] *Op. cit.* note 42.

6. The views of the child

(i) The responses to Questionnaire II

The views expressed on the need for further provisions concerning the right of the child to be heard and to have his or her views taken into account in the course of return proceedings were finely balanced.

A number of States[131] considered that such provisions may be of use to ensure that the child is heard in return proceedings, since this is not provided for in the 1980 Convention. In particular, it was suggested that the conditions for such hearing be addressed.[132] In contrast, the majority of responses considered such provisions as unnecessary or redundant,[133] taking into account the relevant provisions of the *United Nations Convention on the Rights of the Child* (UNCRC)[134] ratified by most State Parties to the 1980 Convention and referring to the existing practice to hear the child in return proceedings.[135] Some responses highlighted that procedures applied with regard to hearing the child were a matter for each State to determine according to its own laws.[136] Other responses considered that a better implementation of the UNCRC should be promoted first,[137] as well as greater standardisation of practices.[138] One State further indicated that any recommendation concerning the right of the child to be heard should be introduced as additions to a Guide of Good Practice, in the form of a non-exhaustive enumeration of measures.[139]

One State took the view that instead of dealing with the question of the hearing of the child, a possible protocol should address the issue of the representation of the child in return and access proceedings, especially by the use of a guardian *ad litem* or similar institution.[140]

(ii) The 2011 Special Commission (Part I)

In relation to the views of the child, the 2011 Special Commission (Part I)[141] reached the following Conclusions and Recommendations:

> "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 recognizes the need for the child to be informed of the ongoing

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[131] China (Hong Kong SAR), Dominican Republic, El Salvador, Mexico, Switzerland, Ukraine.
[132] Burkina Faso, Monaco, Ukraine.
[133] Argentina, Australia, Canada, Chile, Colombia, Israel, Montenegro, New Zealand, Panama, United States of America, Zimbabwe.
[134] Art. 12:
"1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."
[135] Argentina, Chile, Israel, Montenegro, New Zealand.
[136] Canada, New Zealand, United States of America.
[137] Ukraine.
[138] Australia.
[139] Canada.
[140] Chile.
[141] See the Report of Part I of the Special Commission (*op. cit.* note 36), at paras 157 *et seq.*

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."[142]

7. Enforcement of return orders

(i) The responses to Questionnaire II

About half of the responses indicated that explicit provisions concerning enforcement procedures (*e.g.*, limiting legal challenges, promoting voluntary compliance, use of expeditious proceedings) could be of use.[143] Legal challenges were one important obstacle to the enforcement of return orders, creating delays that could even in some cases lead to a change of decision concerning the return of the child, considering the time that had elapsed and the adaptation of the child to a new environment.[144] One State considered that voluntary compliance may increase the risk of abductions and further litigation and therefore should not be promoted.[145]

Several States considered that explicit provisions were not necessary,[146] highlighting that the exact nature of procedural rules was a matter of domestic law.[147] However, recommendations or Guides to Good Practice,[148] especially the newly published Guide to Good Practice on Enforcement, were seen as particularly appropriate.[149]

(ii) The 2011 Special Commission (Part I)

The Guide to Good Practice on Enforcement was published in 2010[150] and a copy of this Guide was sent to all National and Contact Organs of Members of the Hague Conference and all Central Authorities designated under the 1980 Convention, as well as to all members of the International Hague Network of Judges.[151] The 2011 Special Commission (Part I) was reminded of the extensive research and drafting process which led to the publication of this Guide and the broad range of enforcement issues covered in the Guide.

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[142] See the 2011 Conclusions and Recommendations (*op. cit.* note 7), at paras 50 and 51.
[143] Armenia, Bahamas, Burkina Faso, Chile, China (Hong Kong SAR), Colombia, El Salvador, Israel, Mexico, Monaco, Montenegro, Norway, Panama, Switzerland.
[144] Chile, Colombia, Israel, Panama.
[145] Mexico.
[146] Argentina, Australia, Canada, Dominican Republic, New Zealand, Ukraine, United States of America, Venezuela.
[147] Canada, New Zealand, Ukraine.
[148] *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part I – Central Authority Practice* (Jordan Publishing, 2003); *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part II – Implementing Measures* (Jordan Publishing, 2003); *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part III – Preventive Measures* (Jordan Publishing, 2003); *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part IV – Enforcement* (Jordan Publishing, 2010, hereinafter, "Guide to Good Practice on Enforcement"). The Guides to Good Practice are available on the Hague Conference website at < www.hcch.net > under "Child Abduction Section" then "Guides to Good Practice".
[149] Argentina, New Zealand, United States of America.
[150] In English and French and, in 2011, in Spanish.
[151] See the Report of Part I of the Special Commission (*op. cit.* note 48), at paras 165 *et seq.*

The Conclusions and Recommendations of the meeting recognised the value of all parts of the Guide to Good Practice under the 1980 Convention.[152]

8. Access / contact

(i) The responses to Questionnaire II

More than half of the responses[153] expressed the need to clarify the obligations under Article 21 of the 1980 Convention (*e.g.*, the responsibilities of Central Authorities) which, as some of the responses[154] observed, had been interpreted very differently in Contracting States. One response highlighted a number of factors making access applications particularly difficult to handle, such as the fact that many access cases are affected by frequent, recurring breaches of orders, and the often significant legal costs incurred.[155] One suggestion for clarification was that a list of obligations under Article 21 be drafted.[156] The 1996 Convention was referred to by a number of States as a possible remedy for the existing problems regarding access applications,[157] although it was expressed that the fact that not all States Parties to the 1980 Convention are Parties to the 1996 Convention may make protocol rules on access necessary.[158]

A small number of responses[159] considered a clarification of Article 21 as not necessary, seeing problems in access cases rather in connection with the implementation of the relevant Convention provisions in the Contracting States. In this regard, it was observed that the Guide to Good Practice on Transfrontier Contact[160] and the Country Profiles were very helpful tools.

The majority of the responses were in favour of further provisions to facilitate contact between the child and the left-behind parent during the return procedure.[161] States pointed to a number of benefits in facilitating contact between the child and the left-behind parent during the return procedure. Contact would avoid further prejudice to the child, such as parental alienation,[162] and facilitate amicable resolution where possible.[163] The lack of contact during the return proceedings increased tension to a point where an amicable solution was difficult to find. As a result, the promotion of contact during the procedure was seen as a key aspect in facilitating an amicable solution and responding to the concerns of the left-behind parent.[164]

In particular, some States expressed the need for an effective mechanism to enforce rights of access, and to clarify jurisdiction rules, regarding which the 1980 Convention was silent.[165] One State argued that priority should be given to the prompt return of the child and better implementation of Article 11, but that further provisions might be necessary to facilitate contact when there was a delay in the return proceedings.[166]

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[152] See the 2011 Conclusions and Recommendations (*op. cit.* note 7), at para. 52.
[153] Australia, Bahamas, Burkina Faso, Chile, China (Hong Kong SAR), Colombia, Dominican Republic, El Salvador, Mexico, Monaco, Montenegro, Norway, Panama, Switzerland, Ukraine, Zimbabwe.
[154] Australia, Canada, Chile, Montenegro, Switzerland.
[155] Australia.
[156] Ukraine.
[157] Argentina, Israel, United States of America.
[158] Argentina, Israel.
[159] Canada, New Zealand, United States of America.
[160] *Transfrontier Contact Concerning Children – General Principles and Guide to Good Practice* (Jordan Publishing, 2008).
[161] Argentina, Armenia, Australia, Bahamas, Chile, China (Hong Kong SAR), Dominican Republic, El Salvador, Mexico, Monaco, Montenegro, New Zealand, Panama, Switzerland, Ukraine, Zimbabwe.
[162] Chile.
[163] Chile, Ukraine.
[164] Switzerland.
[165] Switzerland (in relation to jurisdiction), Ukraine (an effective mechanism).
[166] New Zealand, similarly Israel.

One State highlighted the importance of mediation in this area and was supportive of any proposals encouraging mediation.[167]

Another State suggested that the protocol should contain provisions requiring Central Authorities, in co-operation with judicial authorities, to keep all judgments on record, so as to facilitate the enforcement of orders in case of non-compliance by the parties.[168]

(ii) The 2011 Special Commission (Part I)

The topic of contact / access was discussed in detail at the 2011 Special Commission (Part I), both in the context of return proceedings under the 1980 Convention and more generally.[169]

The meeting concluded:

> "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."[170]

9. Definitions or refined definitions

(i) The responses to Questionnaire II

Rights of custody

About half of the responses considered that it would be useful to provide for a refined definition of rights of custody.[171] However, opposing views were expressed concerning the way such rights should be further defined. Some supported the extension of the concept of custody to the broadest extent,[172] including *patria potestas*,[173] *kafala*[174] and situations where a non-custodial parent's consent was required to change the child's

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[167] Australia.
[168] Zimbabwe.
[169] See the Report of Part I of the Special Commission (*op. cit.* note 36), at paras 80 to 91.
[170] See the 2011 Conclusions and Recommendations (*op. cit.* note 7), at paras 17 to 20.
[171] Argentina, Armenia, Burkina Faso, Chile, Colombia, El Salvador, Mexico, Monaco, Montenegro, Panama, Switzerland, Ukraine.
[172] Ukraine.
[173] Mexico, Panama.
[174] Mexico.

place of residence.[175] The latter issue was further highlighted by two States addressing the question of *ne exeat* orders as custody rights under the 1980 Convention.[176] This topic was considered particularly important since two thirds of taking parents were primary care-givers, many of whom did not see any future in the country of their habitual residence.[177] In view of the differing approaches, doubts have been expressed on the likelihood of reaching a fruitful consensus on such a definition.[178]

The remaining responses did not consider that a further definition of rights of custody would be appropriate.[179] These responses highlighted that a definition is already provided for in the 1980 Convention, as strengthened by case law,[180] and that the open wording is a significant advantage to enable flexibility and its operation in a great variety of legal systems.[181] By providing that these rights are to be defined under the law of the State of habitual residence, the Convention explicitly leaves this issue to domestic law.[182] Communication between competent authorities on their respective law and case law regarding this concept was therefore encouraged.[183]

It has also been highlighted that any work on the definition of rights of custody would impact on the definition of rights of access which therefore would then also need to be addressed.[184]

Habitual residence

Slightly less than half of the responses saw it as necessary to define habitual residence,[185] including in relation to newborns.[186] One State mentioned in particular that it would be worth clarifying the distinction between habitual residence and the one year requirement provided by Article 12.[187]

A number of States expressed the view that provisions defining habitual residence would not be appropriate or necessary,[188] highlighting that it would be difficult to define a fact-dependent concept[189] and that sufficient case law defining the concept already exists.[190] It was also noted that, in practice, though this issue may often be raised, it has not been the deciding feature in the majority of cases.[191]

One response[192] indicated that the topic warranted further discussion to decide whether it could best be addressed in a protocol or Guide to Good Practice, etc. Another State[193] refrained from any comment at this stage.

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[175] Colombia.
[176] Argentina, Switzerland.
[177] Switzerland.
[178] El Salvador, New Zealand.
[179] Australia, Bahamas, Canada, China (Hong Kong SAR), Dominican Republic, Israel, New Zealand, United States of America.
[180] China (Hong Kong SAR), New Zealand.
[181] Australia, Chile.
[182] Australia, Bahamas, Israel, United States of America. See the 2011 Conclusions and Recommendations (*op. cit.* note 7), at para. 44 stating 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."
[183] New Zealand.
[184] Australia.
[185] Burkina Faso, Chile, China (Hong Kong SAR), Colombia, Dominican Republic, Mexico, Monaco, Montenegro, Panama, Ukraine.
[186] Dominican Republic.
[187] Colombia.
[188] Argentina, Australia, Bahamas, Canada, New Zealand, United States of America.
[189] Australia.
[190] Australia, Bahamas, Canada, New Zealand.
[191] New Zealand.
[192] Israel.
[193] Norway.

Others

One State suggested the need to define the terms "authentication", "certification", "legalisation" and "originals".[194] The suggestion was also made to define the concepts of "grave risk" and "intolerable situation".[195]

(ii) The 2011 Special Commission (Part I)

The 2011 Special Commission (Part I) discussed the concept of "rights of custody" at length, in particular in the context of the case of *Abbott v. Abbott*,[196] a decision of 2010 by the Supreme Court of the United States of America.[197] The meeting concluded:

> "44. 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."[198]

10. International relocation of a child

(i) The responses to Questionnaire II

Several responses expressed the value of addressing in a possible protocol the circumstances in which one parent may lawfully remove a child to live in a new country,[199] especially in order to prevent international child abduction.[200] In particular, it was suggested that any document granting relocation should include the destination and the length of the relocation.[201]

However, more than half of the responses[202] considered protocol provisions on international relocation inappropriate or unnecessary, most of them emphasising the role of domestic law in determining the lawfulness of the relocation of the child.[203] One State

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[194] Mexico.
[195] Mexico.
[196] 130 S.Ct. 1983 (2010). See also the INCADAT entry for *Abbott v. Abbott*: ref. HC/E/US 1029.
[197] See the Report of Part I of the Special Commission (*op. cit.* note 36), at paras 142-156.
[198] See the 2011 Conclusions and Recommendations (*op. cit.* note 7), at paras 44-46.
[199] Burkina Faso, China (Hong Kong SAR), Colombia, El Salvador, Montenegro, Zimbabwe.
[200] Chile.
[201] El Salvador.
[202] Argentina, Australia, Canada, Dominican Republic, Israel, Mexico, New Zealand, Norway, Panama, Switzerland, United States of America, Ukraine.
[203] Argentina, Australia, Canada, Israel, Norway, Panama, Ukraine. Similarly also Bahamas, although undecided on the question of protocol rules with regard to relocation.

added that a cautious approach should be taken to the issue to avoid abuse of the provision to justify abduction.[204]

One State was undecided,[205] while approximately a third of the responses saw this matter as inappropriate for a protocol to the 1980 Convention.[206] According to at least one State, this issue fell outside the scope of the 1980 Convention and should be dealt with under the 1996 Convention.[207] Another State considered that such provisions would not be necessary if the concept of "rights of custody" was clear.[208] In its response to Questionnaire I, Switzerland also suggested that the principles adopted in the Washington Declaration on International Family Relocation[209] be dealt with by a protocol.[210]

About half of the responses considered it appropriate for a possible protocol to promote agreement between parents in respect to relocation.[211] Agreement between parents was indeed supported by the 2006 Special Commission[212] and would be faster, easier and more child-friendly than judicial proceedings or other mechanisms.[213] In this context, mediation has a significant preventive role to play.[214]

More than one third of the responses saw the promotion of agreement between parents in respect of relocation in a protocol as inappropriate.[215] Despite the desire to promote amicable solutions, it was considered that such a provision would go beyond the scope of the Convention[216] and that this was rather a matter of domestic law[217]. One State considered that the matter would be better dealt with under the 1996 Convention.[218] Another State indicated that the encouragement of amicable agreements in relocation cases should rather be dealt with in the Guide to Good Practice on Mediation under the 1980 Convention.[219] One State was undecided, and emphasised the role of domestic law.[220]

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[204] Chile.
[205] Bahamas.
[206] Australia, Dominican Republic, Mexico, New Zealand, Norway, Ukraine.
[207] New Zealand.
[208] Switzerland.
[209] Declaration adopted by the judges and experts participating in the International Judicial Conference on Cross-border Family Relocation that took place in Washington, DC from 23 to 25 March 2010, Annex A to the "Preliminary Note on international family relocation", drawn up by the Permanent Bureau, Prel. Doc. No 11 of January 2012 for the attention of the Special Commission of January 2012, available on the Hague Conference website at < www.hcch.net > under "Work in Progress" then "Child Abduction"; also available under "News and Events" then "2010".
[210] See response from Switzerland to Question 19.4 of Questionnaire I.
[211] Armenia, Australia, Burkina Faso, Chile, China (Hong Kong SAR), El Salvador, Montenegro, Panama, Switzerland.
[212] Australia. See Conclusions and Recommendations of the 2006 Special Commission (*op. cit.* note 72), Recommendation No 1.7.4.
[213] Chile.
[214] Australia.
[215] Argentina, Canada, Dominican Republic, Israel, Mexico, New Zealand, Ukraine, United States of America.
[216] Israel, New Zealand.
[217] Argentina, Ukraine.
[218] New Zealand.
[219] Canada.
[220] Bahamas.

(ii) The 2011 Special Commission (Part I)

The issue of international family relocation was not discussed as a specific agenda item at the 2011 Special Commission (Part I) since it is on the proposed draft Agenda for the 2012 Special Commission (Part II): for further details see Preliminary Document No 13 (Chapter IV, section D)[221] and Preliminary Document No 11.[222]

11. Review of the operation of the 1980 Convention

(i) The responses to Questionnaire II

About half of the responses were in favour of providing in a possible protocol an explicit legal basis for convening the Special Commission to review the practical operation of the 1980 Convention in order to encourage the development of good practices under the Convention and to promote the better implementation of the Convention.[223] One State supported the strengthening of the mandate and the powers of the Special Commission.[224]

While one State was undecided on the issue,[225] and one did not feel in a position to answer at this stage,[226] such provision was not seen as necessary by several other States.[227] While Special Commission meetings were viewed as very useful for promoting co-operation and consistent approaches,[228] the existing legal basis for convening Special Commissions under Article 8 of the Statute of the Hague Conference was seen as sufficient,[229] particularly in combination with the long-standing practice.[230] It was also pointed out that providing a different legal basis for Special Commission meetings on the 1980 Convention could call into question the standing of the recommendations from other Special Commissions.[231]

About one third of the responses considered that it would be useful to require through a protocol the co-operation of Contracting States in gathering statistics and case law under the 1980 Convention and in completing Country Profiles.[232] Among those responses, however, it was noted that this collection should be requested in a reasonable way and not create a burdensome task for Central Authorities[233] and that clarifications would be needed on how and for what purpose the statistics are to be used and collected.[234]

However, several responses did not see a need for such provision[235] while one State was undecided[236] and two indicated that they did not want to comment at this stage.[237]

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[221] *Op. cit.* note 42.
[222] "Preliminary Note on international family relocation", Prel. Doc. No 11 of January 2012 (*op. cit.* note 209).
[223] Armenia, Australia, Burkina Faso, Chile, China (Hong Kong SAR), Colombia, Dominican Republic, Mexico, Monaco, Switzerland, Ukraine, Venezuela.
[224] Ukraine, similarly also Monaco.
[225] Bahamas.
[226] Norway.
[227] Argentina, Canada, China, Israel, New Zealand, United States of America.
[228] Canada, Israel, New Zealand, United States of America. Panama stated that it would be helpful for the Special Commission work to continue, without mentioning whether it thought an explicit legal basis necessary.
[229] China, New Zealand.
[230] United States of America.
[231] New Zealand.
[232] Armenia, Australia, Burkina Faso, Chile, China (Hong Kong SAR), Mexico, Monaco, Ukraine, Venezuela.
[233] Australia.
[234] Australia, Switzerland.
[235] Argentina, Canada, Dominican Republic, New Zealand, Ukraine, United States of America.
[236] Bahamas.
[237] Israel, Norway.

In particular, the co-ordination between international and national tools for implementation of the 1980 Convention would need in-depth consideration.[238] Nevertheless, and despite limited resources that could hinder the gathering of data, this practice was considered as necessary and one that should be supported.[239]

More than one third of the responses expressed the view that establishing a body competent to review States Parties' compliance with Convention obligations could serve a useful purpose,[240] since there is currently no way of enforcing a State's compliance with the 1980 Convention.[241] In one response, the committee established under the UNCRC was suggested as a model for such a body.[242] It was pointed out, however, that in considering the establishment of such a body, careful consideration should be given to the impact on the budget of the Conference and on other Hague Conventions.[243]

Two States indicated that their view on the issue would depend on the powers attributed to that review body[244] and on what, if any, penalties or obligations would result from non-compliance.[245]

A number of States took the view that the establishment of such a body would not be appropriate.[246] Such a proposal would require in-depth analysis,[247] since it would give rise to many questions such as how the assessment would be carried out, whether the body would have enforcement capacity, and what the effect of an adverse review would be.[248] It was also argued that the level of non-compliance with the 1980 Convention was not such as to necessitate establishing a review body.[249] According to some, co-operation and communication between Central Authorities should instead be supported as well as the current activities of the Hague Conference (*e.g.*, the judicial network, national and international meetings).[250]

(ii) The 2011 Special Commission (Part I)

The issue of statistics was discussed in some detail during the 2011 Special Commission (Part I).[251] In this regard, the meeting concluded by encouraging Central Authorities "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".[252]

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[238] Ukraine.
[239] New Zealand.
[240] Argentina, Armenia, Burkina Faso, Chile, China (Hong Kong SAR), Dominican Republic, Israel, Monaco, Switzerland, Zimbabwe.
[241] Chile, Switzerland.
[242] Switzerland.
[243] China.
[244] Ukraine.
[245] Australia.
[246] Bahamas, Canada, New Zealand, United States of America.
[247] China, Mexico.
[248] Australia (undetermined), Bahamas, Ukraine (undetermined).
[249] New Zealand.
[250] New Zealand, United States of America.
[251] See the Report of Part I of the Special Commission (*op. cit.* note 36), at paras 33 *et seq.*
[252] See the 2011 Conclusions and Recommendations (*op. cit.* note 7), at para. 22 (reaffirming Recommendation No 1.14 of the 2001 Special Commission and Recommendation No 1.1.16 of the 2006 Special Commission).

The topic of the 'review of the practical operation of the 1980 Convention' is on the proposed draft Agenda for the 2012 Special Commission (Part II) insofar as it forms an important part of the discussion which will take place concerning the services provided by the Hague Conference in relation to the 1980 Convention. For further details, reference should be made to Preliminary Document No 12.[253]

12. Others

Other matters which should be considered for inclusion in a protocol containing auxiliary rules to improve the operation of the 1980 Convention

(i) The responses to Questionnaire II

Costs of proceedings and funding the return

A few responses suggested the issue of reducing the cost of return and access proceedings under the 1980 Convention as a topic to be addressed in any discussions on a possible protocol.[254] One response observed in particular that in some States that had made a reservation to Article 26, the high cost of legal proceedings made it virtually impossible for applicants to start or pursue return proceedings.[255]

More specifically, another response suggested that there is a need to include rules to cover the situation where applicants are impecunious and have no financial resources to fund the return of the child(ren).[256]

Immigration issues

One State suggested that a protocol should contain provisions facilitating the granting of travel documents for children and parents for the return itself, as well as during the return proceedings, and for the exercise of access rights.[257]

Another State considered it desirable to have provisions related to the child's relocation in case of the deportation of a parent considering that there is no actual intent to abandon the place of habitual residence.[258]

Burden of proof

One State suggested that a protocol should contain provisions clearly placing on the taking parent the burden of proving possible exceptions to the return.[259]

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[253] "A 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 for the attention of the Special Commission of January 2012, available on the Hague Conference website at < www.hcch.net > under "Work in Progress" then "Child Abduction".
[254] Colombia, Switzerland.
[255] Switzerland.
[256] Australia.
[257] Switzerland.
[258] Mexico.
[259] Mexico.

Role of requesting Central Authorities before sending out applications

One State suggested that provisions be envisaged to the effect that requesting Central Authorities verify that applications contain all factual and legal bases before transmission, in order for the requested Central Authorities to be in a position to act swiftly.[260]

(ii) The 2011 Special Commission (Part I)

The 2011 Special Commission (Part I) discussed the issue of the costs of return and access proceedings at length in the context of the debate concerning 'access to justice'.[261]

The meeting reached a Conclusion and Recommendation which highlighted "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".[262] The meeting also emphasised "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".[263] Lastly, the meeting acknowledged "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 […]".[264]

In relation to immigration issues, these too were discussed during the 2011 Special Commission (Part I).[265] The meeting concluded:

> "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."[266]

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[260] Mexico.
[261] See the Report of Part I of the Special Commission (*op. cit.* note 36), at paras 131 *et seq*.
[262] See the 2011 Conclusions and Recommendations (*op. cit.* note 7), at para. 32.
[263] *Ibid.*, at para. 33.
[264] *Ibid.*, at para. 34.
[265] See the Report of Part I of the Special Commission (*op. cit.* note 36), at paras 58 *et seq.*
[266] See the 2011 Conclusions and Recommendations (*op. cit.* note 7), at paras 30 to 31.

Lastly, in relation to the role of the requesting Central Authority in terms of sending applications, the meeting concluded as follows:

> "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."[267]

B. The general question whether to embark on the formal process of developing a protocol to the 1980 Convention

The European Union reserved its position on this question. Of those responses that expressed a view, a majority expressed themselves to be in favour of embarking on the formal process of developing a protocol to the 1980 Convention.[268]

Responses that were undecided[269] raised a number of points to be taken into account in taking such a decision. First, it was noted that some perceived shortcomings of the 1980 Convention find their remedies in the 1996 Convention.[270] However, there has not yet been sufficient experience with the 1996 Convention to evaluate its practical operation and its interplay with the 1980 Convention to decide whether any additional rules need to be set out in a protocol.[271]

In addition, and according to this view, it should be considered carefully whether the objectives of a possible protocol could be achieved equally by the use of "soft law" such as Special Commission recommendations and assistance from the Permanent Bureau. The practical impact of such soft law should therefore be evaluated when considering any additional rules.[272]

A concern was expressed that any future negotiations on a protocol to the 1980 Convention must not substantially alter the interpretation of existing key Convention articles, as that would risk undermining the carefully balanced consensus among the Contracting States in the area of parental child abduction that also forms the basis of some regional instruments.[273]

Four States[274] expressed strong opposition to starting such an exercise and reservations about the need and benefits of developing a protocol and the likelihood of success. It was suggested that most of the difficulties experienced in the operation of the 1980 Convention relate to the fact that the already existing provisions are not being fulfilled, such as provisions on expeditious procedures.[275] With a view to promoting common understanding of the Convention's objectives and provisions, it was felt that support for training of Central Authorities and judges as well as in drafting implementing legislation should be given priority over developing a protocol to the Convention,[276] and that the use of Guides to Good Practice should more actively be promoted.[277] Another main concern was that, as raised by the undecided responses, some topics suggested in Questionnaire II were already dealt with by the 1996 Convention.[278] It was therefore felt

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[267] *Ibid.*, at para. 12.
[268] Argentina, Armenia, Australia, Burkina Faso, Chile, China (Hong Kong SAR), Colombia, Dominican Republic, Mexico, Monaco, Montenegro, Switzerland, Ukraine, Venezuela, Zimbabwe.
[269] Bahamas, European Union, Israel.
[270] European Union.
[271] European Union.
[272] European Union.
[273] European Union.
[274] Canada, New Zealand, Norway, United States of America.
[275] Norway, Israel (undetermined).
[276] Norway, Israel (undetermined).
[277] Canada.
[278] Canada, Israel (undetermined), New Zealand.

that support for ratification of the 1996 Convention should be pursued and promotion of international awareness should be strengthened.[279] International family relocation was one issue that, while seen as important, was viewed as falling under the scope of the 1996 Convention.[280]

Furthermore, some States opposing the idea of a protocol considered that such negotiations may have a possible negative impact in that prospective new Contracting States might wish to await the negotiations' completion before joining the 1980 Convention.[281] These States warned that a protocol may also lead to inconsistency in the application of the 1980 Convention if only part of the Convention's Contracting States were to sign up to the protocol,[282] especially if the protocol were to address substantive concepts such as "habitual residence" and "rights of custody".[283]

Some specific topics – mediation, expeditious procedures and enforcement of return orders – were seen as matters of domestic law, with support expressed for encouraging States to review their domestic law and implementing measures to meet the objectives of the 1980 Convention.[284] However, there was support for the current work of the Permanent Bureau in providing further guidance on mediation and judicial communications.[285]

Concerns were raised that possible work on certain areas referred to in Questionnaire II would consist in harmonising substantive law, which departs from the Hague Conference's general approach of working for harmonisation of private international law.[286]

Regarding the level of priority[287] that should be attached to this exercise, nearly half of responses expressed the view that a high priority should be given to this exercise[288] while two considered it as low.[289] Some responses also noted however that, as stated by the Council on General Affairs and Policy of the Conference in 2009 and 2010,[290] the decision for the Hague Conference on Private International Law to embark on the formal process of developing a protocol to the 1980 Convention can ultimately only be taken by the Council.[291]

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[279] New Zealand.
[280] New Zealand.
[281] United States of America.
[282] Canada, United States of America. Similarly Israel (undetermined).
[283] Canada.
[284] New Zealand.
[285] Canada, New Zealand.
[286] New Zealand.
[287] See question 2, Part II of Questionnaire II.
[288] Argentina, Australia, Chile, China (Hong Kong SAR), Colombia, Dominican Republic, Mexico, Montenegro, Switzerland, Venezuela, Zimbabwe.
[289] Monaco, New Zealand.
[290] See the Conclusions and Recommendations adopted by the Council on General Affairs and Policy of the Conference (31 March – 2 April 2009), at p. 2; and the Conclusions and Recommendations adopted by the Council on General Affairs and Policy of the Conference (7-9 April 2010), at p. 2; available on the Hague Conference website at < www.hcch.net > under "Work in Progress" then "General Affairs".
[291] European Union, Ukraine.