

**RAPPORT RELATIF AUX COMMUNICATIONS ENTRE JUGES
CONCERNANT LA PROTECTION INTERNATIONALE DE L'ENFANT**

établi par Philippe Lortie, Premier secrétaire

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**REPORT ON JUDICIAL COMMUNICATIONS
IN RELATION TO INTERNATIONAL CHILD PROTECTION**

drawn up by Philippe Lortie, First Secretary

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à l'intention de la Cinquième réunion de la Commission spéciale
sur le fonctionnement de la Convention de La Haye du 25 octobre 1980
sur les aspects civils de l'enlèvement international d'enfants
(La Haye, 30 octobre – 9 novembre 2006)*

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to review the operation of the Hague Convention of 25 October 1980
on the Civil Aspects of International Child Abduction
(The Hague, 30 October – 9 November 2006)*

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INTRODUCTION

1. Background

1. The creation of the International Network of Liaison Judges was first proposed at the 1998 De Ruwenberg Seminar for Judges on the international protection of children by Lord Justice Mathew Thorpe (Judge of the Court of Appeal, England and Wales). It was recommended that relevant authorities (*e.g.* court presidents or other officials, as appropriate within the different legal cultures) in the different jurisdictions designate one or more members of the judiciary to act as a channel of communication and liaison with their national Central Authorities, with other judges within their own jurisdictions and with judges in other Contracting States, in respect, at least initially, of issues relevant to the *1980 Hague Convention on the Civil Aspects of International Child Abduction* (hereinafter the "1980 Hague Convention"). It was felt that the development of such a network would facilitate at the international level communications and co-operation between judges and would assist in ensuring the effective operation of the 1980 Hague Convention.

2. The idea of an international network of liaison judges received further support at the two International Judicial Conferences held at De Ruwenberg in June 2000 and October 2001, and at the Common Law Judicial Conference on International Parental Child Abduction, hosted by the United States Department of State at Washington, D.C. in September 2000. Since its inception, a number of judicial conferences have supported the expansion of the International Network of Liaison Judges.¹ The Network currently includes 20 judges from 18 jurisdictions.² In the course of the last four years the Network has more than doubled.

3. The idea of direct international judicial communications has also received support from those seminars and conferences. In certain cases these connections can be very useful to resolve some of the practical issues surrounding return. Furthermore, they may result in immediate decisions or settlements between the parents before the court in the requested State. In particular, courts could suggest and produce settlements between the parents to facilitate the return process, to remove practical obstacles to return, to help to ensure that the prompt return may be effected in safe and secure conditions for the child (and sometimes for an accompanying custodial parent), and to pave the way for any proceedings on the custody issues which are to take place in the country to which the child is returned. Direct international judicial communications may reduce the number of decision refusing return. For example, some courts may refuse an application for return based on Article 13 *b*) of the 1980 Hague Convention because the mother who looks after the child is not allowed to enter the country to which the child is to be returned. In such cases, the concerned judges, through direct communications in writing and / or telephone, can ensure that arrangements are in place for the immediate return of the child, accompanied by the abducting parent. In some cases, the parent seeking the return of the child may offer some "undertakings" in relation to the return. Such undertakings cannot usually be enforced without permission of the court of the requesting State. In order to alleviate this difficulty, the concerned judges may agree that the "undertakings" and mutual obligations of the parents should be enforced by safe harbour orders or mirror orders.

¹ A list of judicial conferences on the international protection of children, organised, facilitated or attended by the Permanent Bureau where Conclusions and Recommendations on judicial communications were adopted can be found in Annex A to Prel. Doc. No 8 – Appendices – of October 2006.

² Argentina, Australia, Brazil (2), Canada (Civil Law (1) and Common Law (1)), China (Hong Kong, Special Administrative Region), Cyprus, Denmark, Iceland, Malta, the Netherlands (2), New Zealand, Norway, United Kingdom (England and Wales), United Kingdom (Northern Ireland), United Kingdom (Scotland), United States of America and Uruguay. Out of these 18 appointments 4 are informal: Argentina, China (Hong Kong, Special Administrative Region), Norway and the United States of America. A list of the International Network of Liaison Judges can be found in Annex B to Prel. Doc. No 8 – Appendices – of October 2006.

4. Moreover, direct international judicial communications can be very helpful from a general point of view: experiences regarding procedures and methods, which have been developed in the course of past and current proceedings, can be exchanged between judges. Through direct international judicial communications, judges from different jurisdictions may be able to inform each other and learn from one another about the handling of proceedings involving applications for return and custody under the 1980 Hague Convention; it will also assist in promoting consistent interpretation of other Conventions. Judges will then better understand how their colleagues work in other jurisdictions. Ultimately, such exchanges may well lead to an increased appreciation of different "jurisdictional cultures". These developments have also been assisted by the now bi-annual publication by the Permanent Bureau of *The Judges' Newsletter* on International Child Protection.³

2. The March 2001 Fourth Meeting of the Special Commission

5. During the Fourth Meeting of the Special Commission to review the operation of the *1980 Hague Convention on the Civil Aspects of International Child Abduction* (22-28 March 2001) (hereinafter the "Fourth Meeting of the Special Commission") the issue of the feasibility and limitations of direct judicial communications and the development of an international network of liaison judges was addressed in the context of issues surrounding the safe and prompt return of the child (and the custodial parent where relevant). The Special Commission adopted Conclusions and Recommendations that focused on international judicial communications between judges or between judges and other authorities.

"Direct judicial communications"

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

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

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

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

5.7 The Permanent Bureau should continue to explore the practical mechanisms for facilitating direct international judicial communications."

³ All Volumes of *The Judges' Newsletter* are available on the Hague Conference website at: < www.hcch.net >, under < Conventions >, < Convention No 28 >, and < HCCH Publications >.

3. Work of the Permanent Bureau between 2001 and 2002

6. In further exploration of the practical mechanisms for facilitating direct international judicial communications, William Duncan, Deputy Secretary General, drew up a Questionnaire (hereinafter the "2002 Questionnaire") addressed to Member States of the Hague Conference on Private International Law and to States Parties to the 1980 Hague Convention.⁴ Responses were also sought from the international governmental and non-governmental organisations invited to attend the Fourth Meeting of the Special Commission. Additionally, respondents were invited to identify and comment upon matters concerning direct international judicial communications, which were not addressed specifically in the 2002 Questionnaire.

4. The Special Commission of September / October 2002

7. A Preliminary Report on direct international judicial communications was presented to the Special Commission of September / October 2002.⁵ The Preliminary Report was in part a summary of the responses to the 2002 Questionnaire received before 15 August 2002 from 16 jurisdictions⁶ and one non-governmental international organisation.⁷ The Preliminary Report drew on conclusions and recommendations of various international judicial conferences and seminars, which had examined this subject before 2002,⁸ academic literature, existing national laws and regional norms in force at the time, *The Judges' Newsletter*,⁹ as well as contacts with a number of individuals.¹⁰ At its September / October 2002 meeting the Special Commission adopted the following Conclusions and Recommendations:

"The Permanent Bureau will:

(a) Continue the formal consultation with Member States of the Hague Conference as well as other States Parties to the 1980 Hague Convention, based on the Preliminary Report together with the Report that will be drawn up by the Permanent Bureau on the Conclusions and Recommendations of the Special Commission of September / October 2002.

(b) Continue informal consultations with interested judges based on the Preliminary Report together with the Report that will be drawn up by the Permanent Bureau on the Conclusions and Recommendations of the Special Commission of September / October 2002.

⁴ Permanent Bureau, "Questionnaire concerning Practical Mechanisms for facilitating Direct International Judicial Communications in the context of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*", Prel. Doc. No 2 of January 2002 for the attention of the Special Commission of September / October 2002. The 2002 Questionnaire is available on the Hague Conference website at: < www.hcch.net >, under < Conventions >, < Convention No 28 >, and < Questionnaires & Responses >.

⁵ Philippe Lortie, "Practical Mechanisms for Facilitating Direct International Judicial Communications in the Context of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*", Prel. Doc. No 6 of August 2002 for the attention of the Special Commission of September / October 2002. This document is available on the Hague Conference website at: < www.hcch.net >, under < Conventions >, < Convention No 28 >, and < Practical Operations Documents >.

⁶ Austria, Bosnia and Herzegovina, Chile, China (Hong Kong Special Administrative Region), Denmark, Finland, France, Germany, Iceland, Netherlands, Poland, Switzerland, the United Kingdom (England and Wales, Northern Ireland and Scotland) and Uzbekistan.

⁷ International Centre for Missing and Exploited Children (ICMEC).

⁸ *Supra*, note 1.

⁹ *The Judges' Newsletter* on International Child Protection, *supra*, note 3. Vol. III / Autumn 2001 and Vol. IV / Summer 2002 focused particularly on direct international communications between judges.

¹⁰ In this respect the author would like to thank Gordon Marantz, ADR Centre, Osler, Hoskin & Harcourt LLP (Toronto Office), former President of INSOL International for their discussions on cross-border insolvency. The *Maxwell* case and the practice and legislative work that followed were presented in Prel. Doc. No 6, *supra*, note 5, at paras. 73-100.

(c) Continue to examine the practical mechanisms and structures of a network of contact points to facilitate at the international level communications between judges or between a judge and another authority.

(d) Complete the Final Report that will include further analysis of policy issues and tentative conclusions.

(e) Draw up an inventory of existing practices relating to direct judicial communications in specific cases under the 1980 Hague Convention with the advice of a consultative group of experts drawn primarily from the judiciary.”

5. Work of the Permanent Bureau since 2002

8. Since the 2002 Meeting of the Special Commission, States Parties to the 1980 Hague Convention were invited to respond to the 2002 Questionnaire.¹¹ A question was included to that effect in a Questionnaire in preparation for the Fifth Meeting of the Special Commission to review the operation of the 1980 Hague Convention of October / November 2006¹² (hereinafter “the 2006 Questionnaire”) addressed to Member States of the Hague Conference on Private International Law and to States Parties to the 1980 Hague Convention.¹³ They were asked to describe any developments in the area of direct judicial communication. Furthermore, those who had responded to the 2002 Questionnaire were asked to describe any developments in this area since their response was made.

9. The present Report, like its predecessor, is based on the responses to the 2006 Questionnaire received before 20 October 2006 from 45 jurisdictions¹⁴ and on all of the responses to the 2002 Questionnaire. The Report also draws on conclusions and recommendations of various international judicial conferences and seminars that have examined this subject until September 2006,¹⁵ academic literature, existing national laws and regional norms in force and all volumes of *The Judges’ Newsletter*. In essence, this Report offers an inventory of the different mechanisms in place to facilitate direct international judicial communications. It also identifies the difficulties and constraints that States and judges may face with these mechanisms. The Report provides valuable information from which to draw conclusions and recommendations and to continue to explore the practical mechanisms for facilitating direct international judicial communications.

¹¹ Only two jurisdictions have responded the 2002 Questionnaire since the 2002 meeting of the Special Commission, namely, China (Macao, Special Administrative Region) and Malta.

¹² Permanent Bureau, “Questionnaire concerning the Practical Operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (Including questions on implementation of the Hague Convention of 19 October 1996 on Jurisdictions, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children)”, Prel. Doc. No 1 of April 2006 for the attention of the Special Commission of October / November 2006 on the Civil Aspects of International Child Abduction. This document is available on the Hague Conference website at: < www.hcch.net >, under < Conventions >, < Convention No 28 >, and < Questionnaires & Responses >.

¹³ As for the 2002 Questionnaire, responses were also sought from the international governmental and non-governmental organisations invited to attend the previous Special Commission.

¹⁴ Argentina, Australia, Austria, Canada, Chile, China (Hong Kong, Special Administrative Region), China (Macao, Special Administrative Region), Colombia, Costa Rica, Cyprus, Czech Republic, Denmark, Ecuador, El Salvador, Finland, France, Greece, Guatemala, Iceland, Ireland, Israel, Italy, Latvia, Lithuania, Malta, Mexico, Monaco, Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Poland, Portugal, Romania, Slovak Republic, South Africa, Spain, Switzerland, Sweden, United Kingdom (England and Wales, Northern Ireland), United Kingdom (Scotland), United States of America and Uruguay. Out of the 18 jurisdictions that replied to the 2002 Questionnaire only three States have not replied to the 2006 Questionnaire: Bosnia and Herzegovina, Germany and Uzbekistan.

¹⁵ *Supra*, note 1.

I – FEASIBILITY AND / OR DESIRABILITY OF THE APPOINTMENT OF A LIAISON JUDGE¹⁶

1. Responses from countries where a liaison judge is in place

10. In September 2002, six jurisdictions¹⁷ out of the 16 that had responded to the 2002 Questionnaire had a liaison judge in place in accordance with paragraphs 5.5 and 5.6 of the Conclusions and Recommendations of the Fourth Meeting of the Special Commission.¹⁸ In one jurisdiction out of these six, a nomination was informal; the judge volunteered to be a liaison judge.¹⁹ It is also interesting to note that, out of the six jurisdictions, two are of civil law tradition²⁰, one is a mixed system comprised of both civil law and common law traditions²¹, and two States are multi-unit States.²²

11. On 20 October 2006, 15 jurisdictions²³ out of the 45 that responded to the 2006 Questionnaire had one or more liaison judges in place in accordance with the Conclusions and Recommendations of March 2001. In four jurisdictions out of these 15, the appointments were informal; the judges volunteered to be liaison judges.²⁴ It is again interesting to note that, out of the 15 jurisdictions, six are of civil law tradition,²⁵ four are mixed systems combining both civil law and common law traditions,²⁶ two are federal States²⁷ and two States include jurisdictions from multi-unit States.²⁸

2. Responses from countries where a liaison judge is not in place

12. It is noteworthy that out of the 45 jurisdictions that have responded to the 2006 Questionnaire, only six States did not respond to Question 14 on direct judicial communications²⁹ and six States had no comments.³⁰ Out of the 19 jurisdictions that responded to Question 14 of the 2006 Questionnaire and which have not yet a liaison judge in place,³¹ seven States expressed support for direct judicial communications in relation to international child protection and are considering the possibility of

¹⁶ The text of the Report follows the same structure as set out in the 2002 Questionnaire.

¹⁷ China (Hong Kong Special Administrative Region), Denmark, Iceland, United Kingdom (England and Wales, Northern Ireland and Scotland).

¹⁸ See, *supra*, para. 5.

¹⁹ China (Hong Kong Special Administrative Region).

²⁰ Denmark and Iceland.

²¹ United Kingdom (Scotland).

²² United Kingdom and China. China (Hong Kong, Special Administrative Region) mentioned in its response to the 2002 Questionnaire that even though the Convention does not apply between different jurisdictions within the State there are no particular difficulties for liaison judges from national jurisdictions to conduct informal consultations between their national jurisdictions.

²³ Argentina, Australia, Canada (Civil Law - Quebec (1) and common law jurisdictions (1)), China (Hong Kong, Special Administrative Region), Cyprus, Denmark, Iceland, Malta, the Netherlands (2), New Zealand, Norway, United Kingdom (England and Wales and Northern Ireland), United Kingdom (Scotland), United States of America and Uruguay. Responses highlight interesting developments that are presented in this Report, in four cases, namely, Canada (establishment of a "Liaison Judge International Parental Child Abduction Special Committee" by the Canadian Judicial Council and formal appointment of two liaison judges), the Netherlands (formal appointment of two liaison judges through legislative authority), United Kingdom (work with non-Hague Convention States Parties and creation of the post Head of International Family Law for the jurisdiction of England and Wales) and the United States of America (possible creation of a Judicial Advisory Council by NCMEC).

²⁴ Argentina, China (Hong Kong, Special Administrative Region), Norway and United States of America.

²⁵ Argentina, Denmark, Iceland, the Netherlands, Norway and Uruguay.

²⁶ Canada, Cyprus, Malta and United Kingdom (Scotland).

²⁷ Australia and Canada. Therefore, it would appear there is no problem for such appointment in a federal State. However, in Canada the geographical scope of the Liaison Judge is different than the one of the Central Authorities as there is one liaison judge for civil law (Quebec) and one for common law (the rest of Canada).

²⁸ United Kingdom and China (Hong Kong, Special Administrative Region).

²⁹ El Salvador, Finland, Greece, Guatemala, Mexico and Switzerland. However, Switzerland responded to the 2002 Questionnaire.

³⁰ Costa Rica, Ireland, Monaco, Nicaragua and Norway.

³¹ That is 45 jurisdictions minus 15 jurisdictions that have a liaison judge in place and 11 jurisdictions that either did not respond to Question 14 or did not have any comment.

participating in the International Network of Liaison Judges,³² five States indicated that they have direct judicial communication experience in areas other than international child protection or through other networks,³³ two States were not aware if direct judicial communications took place in their country,³⁴ two States indicated that direct judicial communications did not take place in their country,³⁵ three jurisdictions did not have any developments to share,³⁶ and one State reiterated its response to the 2002 Questionnaire to the effect that Central Authorities can assume a role similar to the one of a liaison judge.³⁷ Of all of the jurisdictions that responded to the 2002 and 2006 Questionnaires none objected to direct judicial communications.

13. Out of the jurisdictions that have not yet appointed liaison judges, it does not appear that such nominations would face any legal difficulties or constraints, with the exception of two jurisdictions, as mentioned in their response to the 2002 Questionnaire.³⁸ The reasons stated for not nominating a liaison judge range from the need for administrative and law reforms to reasons of practicality and necessity.

14. For one of the two mentioned exceptions,³⁹ it appears that there is no legal barrier to such appointments; the difficulty in that jurisdiction would seem to be limited to having the appropriate court administrative regulation in place. For the other exception,⁴⁰ it appears that it would not be possible to make such an appointment if it entails the delegation of executive functions or, for instance, the obligation to consult or inform public authorities. The only viable way to carry out such functions would be through the creation of a public authority ("liaison officer").⁴¹

15. Without being opposed to direct judicial communications, some jurisdictions⁴² have not appointed a liaison judge because it would seem that the Central Authority is able to play a liaison role somewhat similar to the one envisioned for a liaison judge (*i.e.* the conduit role of the liaison judge).⁴³ These jurisdictions indicate that, if the need for cross-border communication arises in a specific case, the judges dealing with the case in different Contracting States could co-operate directly with each other. However, it is their view that the initiation of such direct contact should be established with the assistance of their Central Authority.⁴⁴ It would therefore seem appropriate that where a liaison judge is not in place in a country, the initial contact between two judges from different States be done through the conduit of a liaison authority (*e.g.* Central Authority) provided that the ensuing cross-border communication arising in a specific case takes place between judges. The liaison judge in the other country could either communicate directly with that liaison authority or through his or her own Central Authority. However, it is important to

³² Chile, Colombia, Israel, Italy, Panama, Poland and Sweden.

³³ Czech Republic, Lithuania, Portugal, Slovak Republic and Spain.

³⁴ Paraguay and Romania.

³⁵ Ecuador and Latvia.

³⁶ China (Macao, Special Administrative Region), France and South Africa.

³⁷ Austria. It is to be noted that Finland, France and Poland shared a similar view in their response to the 2002 Questionnaire.

³⁸ Bosnia and Herzegovina, and Germany. It is to be noted that these two States have not responded to the 2006 Questionnaire.

³⁹ Bosnia and Herzegovina.

⁴⁰ Germany.

⁴¹ Under German law governing judges, a judge can only voluntarily assume the function of a "judicial contact" in the aforementioned area. However, according to the German response to the 2002 Questionnaire, the transfer of a function that is solely assumable on a voluntary basis does not seem to be the most efficient solution.

⁴² This is according to the responses of Austria and Finland to the 2002 Questionnaire. Only Austria has reiterated its position in its response to Question 14 of the 2006 Questionnaire. Finland did not respond to Question 14.

⁴³ The fact that judges in many jurisdictions are not vested with administrative tasks and logistic functions would explain the reluctance to nominate a liaison judge tasked with similar cross-border administrative responsibilities.

⁴⁴ In its response to the 2002 Questionnaire Austria indicated that a judge could initiate such contacts on his / her own.

understand that some judges are only comfortable communicating with other judges who are subject to the same principles of natural justice vis-à-vis the parties that have seized their court.⁴⁵

16. Finally, most of the jurisdictions that have not nominated a liaison judge / authority note the need to make the division of tasks between the liaison judge or authority and the Central Authority under the 1980 Hague Convention very clear to avoid overlap and duplication of work. All of the liaison appointments that have been made were of actual judges and the same is contemplated for the jurisdictions, which have answered both Questionnaires in that respect and have not yet made an appointment. To date a Central Authority or person acting in a non-judicial capacity has not been nominated to fulfil the liaison role.

17. Certain *Magistrats* expressed some concerns at the October 2001 De Ruwenberg (Netherlands) International Judicial Seminar on the 1980 Hague Convention.⁴⁶ The first difficulty concerned the anonymity of direct cross-border telephone conversations. "How can one be certain that the interlocutor is indeed a colleague?"⁴⁷ The issue of the timing of the communication was also raised. "Should it take place before the rendering of a decision on the return?" "Would that not appear as a prejudgment?" "How can communication take place after a decision ordering the return since the judge is no longer seized of the matter?"⁴⁸ Furthermore, another jurisdiction indicated in its response to the 2002 Questionnaire that a judge could only be contacted to discuss a specific case if he or she was seized by one of the parties.⁴⁹ In relation to the issue of the identity of the interlocutor, it would appear that if the initial contact between judges of different States is to initially take place through the offices of the appointed liaison judges or authority of both States concerned this should ensure the identity of all parties involved.⁵⁰ As for the issue of the timing of the communication, the answer probably depends on the laws and procedures in force in the jurisdiction.⁵¹ Seeking general information on the laws and procedures in force as well as court administration issues may not amount to prejudgment. Knowing the whole context helps to make an informed decision.⁵² Contextualising after a decision is made may also be possible where enforcement issues have yet to be decided. As for the appropriateness of contacting a foreign judge, it would appear that where the contacted foreign judge is seized by at least one of the parties the judicial communication could be case-specific but without going into the merits and where the foreign judge is not seized by any of the parties, the judicial communication could be limited to general issues. It would be left to the contacted judge to decide the nature of his or her communication and the appropriateness of the call according to the laws and procedures in force in his or her jurisdiction.⁵³

⁴⁵ It is interesting to note that under the *Dutch International Child Protection Implementation Act, infra*, note 63, case specific direct judicial communications are limited to courts.

⁴⁶ In an article published in the Summer 2002 Issue of *The Judges' Newsletter*, Marie-Caroline Celeyron-Bouillot outlined some of the concerns expressed by French *Magistrats* attending the Seminar. See Marie-Caroline Celeyron-Bouillot, *Juge aux affaires familiales, Tribunal de grande instance de Lyon (France)*, "Direct Relationships between Judges of Different Competent Countries: The Opinion of a Judge", *The Judges' Newsletter*, Vol. IV / Summer 2002, *supra*, note 3, at pp. 8-11.

⁴⁷ To Mathew Thorpe, Judge of the Court of Appeal in London "that fear seems fanciful", see Mathew Thorpe, "International Liaison Judges", at pp. 5-7, *ibid*. He explained that judges in most common law jurisdictions are inaccessible to any caller who has not passed through the protective barrier of the judge's dedicated clerk or secretary.

⁴⁸ See, *supra*, note 46.

⁴⁹ China (Macao, Special Administrative Region).

⁵⁰ See, *supra*, para. 15.

⁵¹ The expression "laws and procedures" used in this Report includes international treaties.

⁵² According to Article 11(4) of 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 (hereinafter Brussels II *bis*), "a court cannot refuse to return a child on the basis of Article 13 *b*) of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return".

⁵³ What probably counts is that the judge would have jurisdiction in such matter. A provision to that effect is included in the *Dutch International Child Protection Implementation Act, infra*, para. 44.

3. Possible Conclusions and Recommendations

18. It appears that the concerns raised regarding the feasibility and / or desirability of the appointment of a liaison judge relate mainly to ensuring the identity of the persons that contact each other, the impossibility in some States for judges to initiate an international communication with a foreign judge on their own and the moment at which this contact should take place. The first step to ensure the identity of the members of the International Network of Liaison of Judges would be to task the Permanent Bureau to keep up to date a list of these members⁵⁴ and to make it available to all members. Central Authorities should keep the Permanent Bureau informed of the name and contact details of the designated liaison judge for their jurisdiction, and where a judge directly informs the Permanent Bureau of his or her designation, the Permanent Bureau should keep the Central Authority informed of this designation. Therefore, if the initial contact between judges of different States is to take place through the offices of the appointed liaison judges or authority of both States concerned, this should ensure the identity of all parties involved. Furthermore, where there is no liaison judge in place in a particular country, the initial contact between two judges from different States should be done through the conduit of a liaison authority (*e.g.* Central Authority), provided that the ensuing cross-border communication arising in a specific case takes place between two "sitting" judges. Finally, the timing of the communication should be left to the judge initiating the communication, which should be in accordance with the procedural rules in force in his / her jurisdiction.

⁵⁴ The Permanent Bureau already maintains such a list.

II – ADMINISTRATIVE ASPECTS SURROUNDING JUDICIAL COMMUNICATIONS

1. Procedure used in making the appointment

A. Responses from countries where a liaison judge is in place

19. All the appointments that have been made are formal appointments except for four. In these cases judges volunteered to serve as liaison judges.⁵⁵ The procedures for the formal appointments differ but all appointments involved the judiciary either in a consultative or in an appointing capacity. It appears that in most cases appointments concern the administration of the justice system or the management of the courts. The appointment procedures can be summarised as follows:

- a) The appointment is at the discretion of the Chief Judge⁵⁶
- b) The appointment is at the discretion of the Supreme Court⁵⁷
- c) The Central Authority consults the Chief Judge before making the appointment⁵⁸
- d) The Chief Judge endorses the proposal of the Central Authority⁵⁹
- e) The Judicial Council makes the appointment after consulting the National Association Judges⁶⁰
- f) The Judges' Association makes the appointment after consulting the concerned Judge⁶¹
- g) The Judicial Council makes the appointment *sui generis*⁶²
- h) The Judicial Council makes the appointment in accordance with the law.⁶³

20. Formal appointments, whether made by the judicial branch alone or with the involvement of the executive branch, and sometimes in accordance with a law, should provide the office of the liaison judge with the necessary recognition and authority to function effectively,⁶⁴ especially in relation to direct judicial communications concerning a specific case. Informal designations may be less valuable in that respect. However, it is recognised that informal designations can be useful when it comes to general non-case specific judicial communications.

B. Responses from countries where a liaison judge is not in place

21. Some of the States that have not yet appointed a liaison judge contemplate similar procedures. In two States, it appears that the Supreme Court will have the authority to make the appointment.⁶⁵ In another State it seems that the judicial council will make the appointment.⁶⁶ Finally, one State has indicated that its Central Authority would make the appointment after consulting the National Association of Judges and the different national courts.⁶⁷ While France has not yet made an appointment, a law enacted on 4 March

⁵⁵ Argentina, China (Hong Kong, Special Administrative Region), Norway and the United States of America.

⁵⁶ Australia, New Zealand and United Kingdom (England and Wales).

⁵⁷ Cyprus and Uruguay.

⁵⁸ United Kingdom (Scotland).

⁵⁹ United Kingdom (Northern Ireland).

⁶⁰ Denmark.

⁶¹ Iceland.

⁶² Canada.

⁶³ The Netherlands. A copy of the Dutch legislation providing for legal authority for the appointment of liaison judge(s) can be found in Annex C to Prel. Doc. No 8 – Appendices – of October 2006. See Article 24 of the Bill concerning the Application of the *Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*, done at The Hague on 19 October 1996, and Council Regulation (EC) No 2201/2003 of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility, repealing Council Regulation (EC) No 1347/2000 (OJ L 338), and amending the Civil Code, the Code of Civil Procedure and the Act concerning the Application of the EC Enforcement Regulation (hereinafter the *Dutch International Child Protection Implementation Act*).

⁶⁴ See the examples of roles and functions described at para. 23-29 and 61-65, *supra*.

⁶⁵ Chile and Israel.

⁶⁶ Colombia.

⁶⁷ Switzerland.

2002⁶⁸ has attributed exclusive jurisdiction to the courts of appeal to hear cases relating to international instruments dealing with the international removal of children. The objective of this law is to allow for better coordination, to facilitate communications with the Central Authority and to establish progressive contacts with other States' judicial authorities. It is, therefore, expected that if France were to designate one or more liaison judge, it should belong to the courts of appeal.⁶⁹ It is interesting to note that recent judicial seminars have encouraged the appointment of liaison judges in States that are not Parties to the 1980 Hague Convention.⁷⁰

C. Possible Conclusions and Recommendations

22. The Special Commission may want to consider encouraging States in which liaison judges were informally designated to proceed as soon as possible to formal designations. Furthermore, informally designated liaison judges could be invited to explore in their jurisdictions, with the support of the Permanent Bureau, where appropriate, the feasibility of formally designating a liaison judge.⁷¹

2. Roles and Functions attributed to the liaison judge

A. Responses from countries where a liaison judge is in place

23. Out of the 15 jurisdictions that have made appointments and have responded to either the 2002 or 2006 Questionnaire, three have specifically indicated in their responses that they did not strictly define the formal role or functions of their liaison judges.⁷² In their response to the 2002 Questionnaire, three jurisdictions were more specific as to the role and functions attributed to their liaison judges.⁷³ Another one described the liaison judge functions in a recent article published in *The Judges' Newsletter*.⁷⁴ The attributions are different, but all four jurisdictions include at least one or more of the following:

- a) The liaison judge will be advising his or her colleagues in the jurisdiction on the Convention in general and about its application in practice.
- b) The liaison judge will be able to answer enquiries from foreign judges and Central Authorities about general matters concerning legislation on child abduction and authorities in its jurisdiction.
- c) The liaison judge will participate and represent the jurisdiction in international judicial family law conferences in so far as it is relevant and possible.
- d) The liaison judge will receive and channel as need be incoming international judicial communications and initiate or facilitate outgoing judicial communications.

⁶⁸ La Loi du 4 mars 2002.

⁶⁹ As mentioned earlier, in the case of Germany the appointment of a liaison authority may require the creation of a "liaison officer" position. See, para. 14, *supra*.

⁷⁰ See Recommendation No 9 of the Malta II Judicial Conference, St. Julian's, Malta, 19-22 March 2006, and Recommendation No 2(b) of the South and Eastern African Region Judicial Seminar, The Hague, 3-6 September 2006, that can be found in Annex A to Prel. Doc. No 8 – Appendices – of October 2006.

⁷¹ See Recommendation No 6 of the 28 November-3 December 2005 Hague Latin American Judges' Seminar that can be found in Annex A to Prel. Doc. No 8 – Appendices – of October 2006.

⁷² United Kingdom (Scotland), United Kingdom (Northern Ireland) and China (Hong Kong, Special Administrative Region) in accordance with their responses to the 2002 Questionnaire. Northern Ireland has done so intentionally, the assumption being that a measure of fluidity confers a greater opportunity to explore and develop methods of communication and co-operation that facilitate the achievement of the objectives underpinning the Convention (see Article 1 of the 1980 Hague Convention). Accordingly, the liaison judge of the jurisdiction operates within the limits of his own discretion and judgment. China (Hong Kong, Special Administrative Region) indicates that "the liaison judge is to act as a channel of communication and liaison with judges of other Contracting States and territories" leaving thereto some discretion to the judge.

⁷³ United Kingdom (England and Wales), Denmark and Iceland.

⁷⁴ Robine de Lange-Tegelaar, "The Dutch Liaison Judges' Office", *The Judges' Newsletter*, Vol. XI / 2006, *supra*, note 3, at p. 28.

- e) The liaison judge will promote international family law collaboration generally.
24. In another contribution to *The Judges' Newsletter*,⁷⁵ the following additional roles and functions that an international liaison judge may assume were highlighted:
- a) The liaison judge will have responsibility for the collection of information and news relevant to the 1980 Hague Convention.
 - b) The liaison judge will be responsible for ensuring that important judgments are posted on the International Child Abduction Database (INCADAT), accessible at: < <http://www.incadat.com> >.
 - c) The liaison judge will equally be responsible for contribution to the Permanent Bureau's *Judges' Newsletter*.
 - d) The liaison judge will be responsible for the reverse-flow, ensuring that other judges within his jurisdiction with responsibility for hearing Hague cases receive their copy of *The Judges' Newsletter* and any other information that might contribute to the development of the expertise of the individual judge.

25. All these roles and functions have been reported by judges at most of the judicial seminars and conferences organised or facilitated by the Permanent Bureau⁷⁶ and on some occasions were the subject of conclusions and recommendations.⁷⁷ Some States have reported additional roles. One State has tailored the role and functions of its liaison judge to the 1996 Hague Convention on the Protection of Children.⁷⁸ The judge or authority will be responsible for liaising in cases involving the transfer of jurisdiction on the basis of Articles 8 or 9 of that Convention, as well as in cases where a court within the jurisdiction would require information, evidence or follow-up on a local decision by a foreign court.⁷⁹ In the case of one State, the liaison judges will have to report yearly to their Judicial Council.⁸⁰ Another State contemplates specifying that its liaison judges could be consulted on treaty implementation and law reform.⁸¹ Finally, one jurisdiction reports the creation in January 2005 of the post of Head of International Family Law.⁸² The promotion of direct international judicial communication, both in specific cases and more generally, is one of many responsibilities of the office holder.

B. Responses from countries where a liaison judge is not in place

26. In its response to the 2002 Questionnaire, one State contemplated a very formal role for its liaison judge.⁸³ The liaison judge would take over the Central Authority's role when the treatment of a request, in a requested State, would not be optimal or complete if done by that Central Authority. This would be the case when:

- a) It is required to have the same level of authorities in both States discussing the matter;
- b) The question to deal with is one within the jurisdiction of a court and not within that of a Central Authority; and
- c) The protection of the child requires an exchange of views or simultaneous seizure of the court of the requesting and requested States in order to make mirror orders or other similar measures.

⁷⁵ Mathew Thorpe, "International Liaison Judges for Family Proceedings", *The Judges' Newsletter*, Vol. III / Autumn 2001, *supra*, note 3, at p. 20.

⁷⁶ *Supra*, note 1.

⁷⁷ See Recommendations Nos 2, 3 and 4 of the De Ruwenberg Judicial Seminar, 22-25 June 1998, Recommendation No 3 of the De Ruwenberg Judicial Seminar, 2-6 June 2000, Recommendations Nos 10 and 11 of the De Ruwenberg Judicial Seminar, 20-23 October 2001.

⁷⁸ The Netherlands.

⁷⁹ See the Dutch International Child Protection Implementation Act, *supra*, note 63, and, *infra*, para. 44, for further discussion of the 1996 Hague Child Protection Convention.

⁸⁰ Canada.

⁸¹ The United States of America in its response to the 2006 Questionnaire.

⁸² United Kingdom (England and Wales).

⁸³ Switzerland.

3. Relationship of the liaison judge with the Central Authority in carrying out his / her functions

A. Responses from countries where a liaison judge is in place

27. In three jurisdictions that have responded to the 2002 Questionnaire, it was reported that the judiciary and the Central Authority maintain very close communications and co-operation.⁸⁴ These jurisdictions mentioned that the liaison judges have the full support of their Central Authority.⁸⁵ They can contact the Central Authority directly by phone, e-mail or mail services. The communications in these cases are described as being mutually beneficial. Another jurisdiction indicated in its response to the 2002 Questionnaire that the liaison judge and the Central Authority will be in contact only in so far as it is necessary, and that the Central Authority might inform other judges to contact the liaison judge for information and advice.⁸⁶ In one jurisdiction where the liaison judge was informally designated, it was reported in 2002 that the liaison judge should in no way impinge on the work of the Central Authority.⁸⁷ Finally, it is noteworthy that the Dutch International Child Protection Implementation Act does not specify a formal relationship between the liaison judge and a Central Authority.⁸⁸

B. Responses from countries where a liaison judge is not in place

28. Some responses to the 2002 Questionnaire from jurisdictions that have not appointed a liaison judge indicate that a clear division of tasks, determined in advance between the Central Authority and the liaison judge, will be important to enable them to carry out their respective functions. It also appears from a number of responses that the Central Authority may be at the disposal of the liaison judge for different purposes. For example, on some occasions the liaison judge may need the Central Authority's intervention in order to contact a foreign judicial authority. Another suggested example would be for the Central Authority to co-ordinate with its counterparts abroad, if necessary, common measures decided by the competent judges to be taken or to be put in place.⁸⁹ The Central Authority could also disseminate useful information to the liaison judge emanating from the Permanent Bureau or other sources.⁹⁰

C. Possible Conclusions and Recommendations

29. Given that the 1980 Hague Convention is in force in States of different legal traditions and of different structures and that it is implemented differently from one State to another, there is not a single method, applicable to all States, for organising the relationship between the liaison judge and the Central Authority. However, the adoption of some general principles could lead to a sound relationship between the liaison judge and its Central Authority.⁹¹ First, the Central Authority should facilitate direct judicial communications. On the other hand, liaison judges should in general act in cooperation and coordination with Central Authorities. In any communication with the Central Authority in relation to a specific case, the liaison judge should always observe the applicable principles of natural justice. Furthermore, it should be noted that successful cooperation depends on the development of mutual trust and confidence between judges and Central Authorities. It should also be recognised that effective functioning of the 1980 Hague Convention depends on the close co-operation among judges and Central

⁸⁴ United Kingdom (England and Wales), United Kingdom (Northern Ireland) and United Kingdom (Scotland).

⁸⁵ As the Iceland appointment is very recent, specific arrangements in this regard are not in place yet.

⁸⁶ Denmark.

⁸⁷ China (Hong Kong Special Administrative Region). Therefore, the liaison judge will do no more than provide an informal channel of communication to judges in other jurisdictions concerning the working of their system.

⁸⁸ See, *supra*, note 63.

⁸⁹ Switzerland.

⁹⁰ *Ibid.*

⁹¹ See, for example, Recommendation No 10 of the Malta II Judicial Conference, St. Julian's, 14-17 March 2004, Recommendation No 1 of the Latin American Judges' Seminar, Mexico, 1-4 December 2004, and Recommendations Nos 1, 4, 7 and 37 of the Latin American Judges' Seminar, The Hague, 28 November-3 December 2005, which can be found in Annex A to Prel. Doc. No 8 – Appendices – of October 2006.

Authorities on internal and international levels. Meetings involving Judges and Central Authorities at a national, bilateral or multilateral level are a necessary part of building this trust and confidence and can assist in the exchange of information, ideas and good practice.

4. Arrangements with respect to possible language difficulties

A. Responses from countries where a liaison judge is in place

30. In their response to the 2002 Questionnaire, the jurisdictions that appointed a liaison judge indicated that they had not encountered language difficulties as most of their communications are conducted in English.⁹² If they were to have language difficulties the jurisdictions indicated that interpretation services could be arranged without problems.⁹³ One jurisdiction has indicated that its judiciary maintains a list of certified interpreters for different purposes.⁹⁴ One jurisdiction pointed out that its contact judge and Central Authority agreed that international communications should take place in English.⁹⁵

B. Responses from countries where a liaison judge is not in place

31. Some of the jurisdictions that have not appointed a liaison judge indicated in their response to the 2002 Questionnaire that they could have recourse to interpretation facilities if necessary either from their Department of Foreign Affairs or from private service providers. One jurisdiction hopes to favour the nomination of multilingual liaison judges, with capacity to communicate in French and English.⁹⁶ In its response to the 2006 Questionnaire, one State indicated that a negative element of direct judicial communications is the language obstacles that may occur. This can lead to misunderstandings and consequently delay the process.⁹⁷

⁹² The United States of America informed the Permanent Bureau that AT&T Language Line offers interpretation services over the telephone in more than 140 languages. More information is available at < www.languageline.com/page/news/9/ >.

⁹³ In his contribution to the Summer 2002 Issue of *The Judges' Newsletter*, Nicholas Wall, Judge of the Family Division of the High Court (England and Wales) recounts useful written communications he had with a Spanish colleague and adds "if I thought it important for there to be written communications between myself and a judicial colleague whose language I did not speak, I would have no hesitation in asking the English Central Authority to facilitate the translation of any letter I might wish to write", *The Judges' Newsletter*, Vol. IV / Summer 2002, *supra*, note 3, at p. 23.

⁹⁴ China (Hong Kong Special Administrative Region).

⁹⁵ Furthermore, Iceland indicated that communications between Scandinavian judges could take place in the Nordic languages.

⁹⁶ Switzerland.

⁹⁷ Sweden. See also the article of Marie-Caroline Celeyron-Bouillot in *The Judges' Newsletter*, *supra*, note 46, and the Report from Germany presented at the Noordwijk Seminar, 19-22 October 2003, reproduced in *The Judges' Newsletter*, Vol. VII / Spring 2004, at p. 28, *supra*, note 3.

III - PRACTICAL AND LEGAL ASPECTS

1. Examples of case specific communications regarding child protection⁹⁸

A. *Under the 1961 Convention concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Minors*

32. Communications between authorities (e.g. courts) was foreseen in a Hague Convention long before the current practice that has emerged from the 1980 Hague Convention. Article 10 of the 1961 Hague Convention on the Protection of Minors provides that:

"In order to ensure the continuity of the measures applied to the infant, the authorities of a Contracting State shall, as far as possible, not take measures with respect to him save after an exchange of views with the authorities of the other Contracting States whose decisions are still in force."

33. In its response to the 2002 Questionnaire the Swiss Central Authority made reference to the 1961 Convention. It mentioned that direct judicial communications are sometimes necessary in order to resolve matters that cannot normally be dealt with between Central Authorities. According to the Swiss Central Authority, the 1961 Convention complements the 1980 Hague Convention as to direct judicial communications. Swiss judges have been applying Article 10 by analogy vis-à-vis non-Contracting States such as Brazil and the United States.

34. Unfortunately, the system of communication and co-operation set out under the 1961 Convention has never fully matured. "The reason is no doubt that international collaboration between courts and authorities which only rarely have occasion to deal with each other, can hardly be expected to work. Only a coordinated system of co-operation, such as those provided for under the Service⁹⁹ and Evidence¹⁰⁰ Conventions, can provide the infrastructure, and the incentive, which permit a lasting form of co-operation".¹⁰¹

B. *Under the 1980 Hague Convention on International Child Abduction*

35. In their responses to the 2002 Questionnaire, China (Macao, Special Administrative Region) and Finland indicated that in cross-frontier family cases communication is mostly practised by way of written requests for judicial assistance (taking of evidence, information on foreign law, etc.). Furthermore, in family proceedings between the Nordic countries, consultations concerning another country's family law have been made by

⁹⁸ Direct judicial communications schemes in relation to cross-border insolvency and the taking of evidence were examined in Prel. Doc. No 6, *supra*, note 5, at paras. 73-100. It is interesting to note that direct judicial communications also take place in mutual legal assistance in criminal matters. See, D. Baragwanath, "Who now is my Neighbour? Cross-Border Co-operation of Judges in the Globalised Society", (2004-2005) *Inner Temple Yearbook*, pp. 22-36, for other examples of direct international judicial communication.

⁹⁹ *Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*.

¹⁰⁰ *Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*.

¹⁰¹ Hans van Loon, "The Increasing Significance of International Co-operation for the Unification of Private Law", in *Forty Years on: The Evolution of Postwar Private International Law in Europe*, Centrum voor Buitenlands Recht en International Privaatrecht Universiteit van Amsterdam, Kluwer, 1990, pp. 101-122, at p. 117. See also, Peter Schlosser, "Jurisdiction and International Judicial and Administrative co-operation", R.C.A.D.I. Tome 284, Martinus Nijhoff Publishers, The Hague, 2000, 428 p., at pp. 303-307.

phone and / or e-mail with the help of judges belonging to the Nordic family law group.¹⁰² In its answer to the 2002 Questionnaire, Finland reported a rare example of a direct international judicial communication:

"In one child abduction case hearing of witnesses was arranged in the form of a telephone conference between a court in the United States and a court in Finland. The communication between the judges was limited only to the practical details of the hearing. The Central Authority assisted in the arrangements on the hearing."

36. The instances where communications at the international level arise in Northern Ireland are also rare. Only the High Court of Justice in Northern Ireland deals with the 1980 Hague Convention cases. However, the Court is ready to participate in such communications and has done so on at least one occasion. The circumstances were as follows:

"On 26 April 2001, a Hague Convention application came before the Court regarding three children who had allegedly been abducted from the United States and taken to Northern Ireland by their mother. The application was mounted on behalf of the father, who was then residing in America. The mother expressed concerns as to what would happen if she returned to the United States with the children. Having discussed the case with Counsel for each party, Mr Justice Gillen contacted, by telephone, Assistant Superior Judge McElyea in Georgia, United States. At Appendix A,¹⁰³ there is a precise note (headed "Direct Judicial Communications") of what Mr Justice Gillen revealed to the Assistant Superior Judge. Before making contact, Mr Justice Gillen discussed, and agreed, with Counsel precisely what would be revealed to the Assistant Superior Judge. Needless to say, the communications were conducted in the presence of Counsel who could hear both what Mr Justice Gillen was saying and what the Assistant Superior Judge was saying. At appendix B¹⁰⁴ there is a copy of the Assistant Superior Judge's responses (headed "Direct Judicial Communication between The Honourable Mr Justice Gillen and The Honourable Ellen McElyea etc."). Both documents were circulated to Counsel."

37. Several examples of international direct judicial communications were also reported in Volumes III and IV of *The Judges' Newsletter*.¹⁰⁵ Case law that discusses this matter is reported in Annexe E to the Appendices to this document.¹⁰⁶

38. In one article Justice Joseph Kay, Judge of the Appeal Division of the Family Law Court of Australia, reports on three communications he had with Judge Patrick Mahony, then Liaison Judge and Principal Judge of the Family Law Court of New Zealand.¹⁰⁷ The first case dealt with a family where one child was being retained in Australia and the other in New Zealand. Convention proceedings had been brought in each country and issues of timing and sequence were important. After obtaining the permission of both parents to make contact with Judge Mahony, Judge Kay prepared a memorandum to the parties setting out the particulars of their discussion, which clearly set out the facts and procedures as they occurred in both States.¹⁰⁸ On a second occasion, Judge Kay had cause to rule upon some conditions that had been imposed by a Judge of New Zealand for the return of a child to Australia. After having made the orders the New Zealand Judge had thought appropriate, Judge Kay wrote to Judge Mahony to draw his attention to some issues of jurisdiction he had identified in his reasons. These were indicative of

¹⁰² See, *infra*, para. 58.

¹⁰³ See "Appendix A" which can be found in Annex D to Prel. Doc. No 8 – Appendices – of October 2006.

¹⁰⁴ See "Appendix B" which can be found in Annex D *ibid*.

¹⁰⁵ *Supra*, note 3.

¹⁰⁶ See Annex E to Prel. Doc. No 8 – Appendices – of October 2006.

¹⁰⁷ Joseph Kay, "Memoirs of a Liaison Judge", *The Judges' Newsletter*, Vol. III / Autumn 2001, *supra*, note 3, at pp. 20-24.

¹⁰⁸ A copy of this memorandum can be consulted in "Appendix C" which can be found in Annex D to Prel. Doc. No 8 – Appendices – of October 2006.

the New Zealand Judge having possibly infringed upon aspects of the Australian court's jurisdiction. On the third occasion, Judge Kay, at the request of Judge Mahony, enquired about some proceedings being carried at a slow pace. After receiving the information, Judge Kay reported back to Judge Mahony briefly explaining the reasons behind the long process.

39. On 21 February 2002, Justice James Garbolino, then Presiding judge of the Superior Court of California, settled a Hague Convention case between New Zealand and the United States.¹⁰⁹ In this case, a mother in New Zealand had filed an application for the return of four children retained by the father in breach of a custody agreement. In the course of the proceedings the parties indicated that settlement was possible. On a set date, the New Zealand court, with the mother, her counsel and the father's solicitor before it, called the California court where the father, the mother's counsel and the District Attorney were present. On the record, via a speakerphone the parties arrived at a mutually acceptable resolution of issues.

40. Early in 2002, Lord Justice Mathew Thorpe received a request for communication from Justice James Garbolino.¹¹⁰ After setting a convenient time for a telephone call through the clerk, Lord Justice Thorpe answered a series of questions that had been sent to him in advance. The questions sought expert opinion as to the law and practice in England and Wales. Justice Nicholas Wall also reported on direct communications between England and Wales and the United States.¹¹¹ Justice Wall described these communications as case management. In his view it would be wrong to discuss the merits of a case with a foreign colleague. The case dealt with a young child who had been wrongfully removed by his English mother from his home in Minnesota. After ordering the prompt return of the child to the United States, Justice Wall was told by the parties' lawyers that there could be substantial delay in having the case heard in the United States. In response to a fax sent to Judge Charles Porter in Minnesota, Justice Wall was told that a preliminary hearing could take place within seven days.

41. Justice Eberhard Carl, in his article on international communications between judges, recounts two cases of direct communications he had in Germany with two fathers who had initiated return proceedings in the United States.¹¹² A first case arose in 1984, before the 1980 Hague Convention entered into force for Germany. The second case took place in 1996. In the two cases, Justice Eberhard Carl managed to persuade the fathers to come to Germany to participate in the hearing. In both cases, both parents agreed to rights of access.

42. In a recent article,¹¹³ Judge Peter Boshier, Liaison Judge and Principal Family Court Judge, New Zealand, reported three cases, that demonstrated that direct judicial communications can improve the efficiency of the 1980 Hague Convention process. In no case were the merits discussed. In the first case,¹¹⁴ the Liaison Judge for the jurisdiction of England and Wales, which was seized of a return application under the Convention,

¹⁰⁹ James Garbolino, "International Communications", *The Judges' Newsletter*, Vol. IV / Summer 2002, *supra*, note 3, at pp. 12-13.

¹¹⁰ *Supra*, note 47.

¹¹¹ Nicholas Wall, Judge of the Family Division, "Judicial Co-operation in cases under the Hague and Luxembourg Conventions", *The Judges' Newsletter*, Vol. IV / Summer 2002, p. 19, *supra*, note 3. In his correspondence to Judge Porter, Minnesota, initiating the judicial communication, Judge Wall made it clear that he was not in any way seeking to interfere with the way in which he dealt with the case on its merits. He indicated: "May I make it absolutely clear that my only concern is to ensure that [the child] returns to Minnesota as soon as possible, and that his future is decided in your court as soon as possible. I have no view on the merits and am very concerned to ensure that I do not express a view or interfere with your procedures in any way." Judge Wall also ensured, of course, that the parties had a copy of his correspondence to Judge Porter, and that they were given the gist of his conversation with him.

¹¹² Eberhard Carl, Judge at the First Family Senate, Regional Court of Appeal Frankfurt/Main, Mediator (BAFM), "International Communications between Judges – Two cases of cross-border communications", *The Judges' Newsletter*, *supra*, note 3, at pp. 14-16.

¹¹³ Peter Boshier, "Direct Judicial Communication in the context of the *Hague Convention on the Civil Aspects of International Child Abduction*: Positive Examples from New Zealand", *The Judges' Newsletter*, *supra*, note 3, at pp. 19-22.

¹¹⁴ *Hunter v. Murrow* [2005] EWCH 976 (Fam).

contacted his New Zealand counterpart to find out how long it would take the New Zealand court to process the Article 15 request made by English High Court. In another case,¹¹⁵ a New Zealand Judge contacted a judge in Australia to seek information about what appeared to be unusual undertakings offered by an Australian authority appearing before the New Zealand court. After gaining an understanding of the nature of the undertakings the Judge in New Zealand was able to render a decision. The third case involved grave risk and return contrary to fundamental principles of New Zealand law.¹¹⁶ Judicial communication allowed for the clarification of a jurisdictional uncertainty in the State to which the child would be returned. A child was brought from New Mexico in the United States to New Zealand. It was unclear whether the substantive issue of care would be heard by a State court or an aboriginal court if the child were returned. The aboriginal court did not subscribe to the “best interests” principle, nor did it abide by what New Zealand considers to be due process rights. Judge Ellis telephoned a judge in New Mexico to discuss the issue. Counsel sat in on the conference call. The result was that the parents had to apply to the New Mexico court for a ruling on the issue of jurisdiction with the aboriginal group also being represented in these proceedings.¹¹⁷

C. *Under the 1996 Hague Convention on Child Protection*

43. The 1996 Hague Convention on Child Protection marks a new phase in the development of co-operation mechanisms within Hague Conventions. “What is new in the Convention, in juridical terms, is the way in which the private international law rules themselves, particularly those dealing with jurisdiction, have begun to embody co-operation mechanisms. In particular Articles 8 and 9 contain procedures whereby jurisdiction may be transferred from one Contracting State to another in circumstances where the judge normally exercises jurisdiction (*i.e.* in the country of the child’s habitual residence) [...]”.¹¹⁸ For example, under Article 8 of the 1996 Convention, by way of exception, an authority having jurisdiction under Article 5 or 6, if it considers that the authority of another Contracting State would be better placed in a particular case to assess the best interests of the child, may either: (i) request that other authority, directly or with the assistance of the Central Authority of its State, to assume jurisdiction to take such measures of protection as it considers to be necessary, or (ii) suspend consideration of the case and invite the parties to introduce such a request before the authority of that other State. Article 9 of the 1996 Hague Convention sets a mirror scheme for the counterpart authorities identified in Article 8(2). The judicial co-operation system necessary to support these communications is laid-out in Articles 31 and following of the Convention.¹¹⁹

¹¹⁵ *The Secretary for Justice v. Te N FC WAI FAM 2005-081-000049* 6 October 2005, (Judge von Dadelszen).

¹¹⁶ *RES v. BJS* (Hague Convention – Child Abduction) FC WN 23 December 2005, (Judge Ellis).

¹¹⁷ It appears that the return was refused based on Article 20. The Judge did not make a return order subject to such a ruling being made in New Mexico, as it was considered inappropriate to dictate to that Court what steps should be taken. However it was noted that the applicant was now well aware of the New Zealand Court’s concerns, and was open to apply to the Court in New Mexico to rule on jurisdiction. The applicant could then apply to the New Zealand Family Court to have the return order reconsidered.

¹¹⁸ William Duncan, “Administrative and judicial Co-operation with regard to the International Protection of Children”, in *International Law and The Hague’s 750th Anniversary*, edited by W.P. Heere, T.M.C. Asser Press, The Hague, 1999, pp. 199-208, at p. 206.

¹¹⁹ As the operation of the 1996 Hague Convention is still very young there is not yet any known case law on this matter under the Convention.

44. The Dutch International Child Protection Implementation Act,¹²⁰ in addition to creating the office of the Liaison Judge, sets out rules that govern judicial communications in relation to Articles 8 and 9 of the 1996 Hague Convention. It is noteworthy that communication between the two courts can only take place where the proceedings are pending before at least one court and the other court is one that would have jurisdiction in this matter. States should be encouraged to provide for liaison judges in their implementation of the 1996 Convention. Furthermore, consideration should be given to whether reiterate Conclusions and Recommendations 5.5 and 5.6 of March 2001 in this context.¹²¹

D. *The Brussels II bis Regulation*

45. The Brussels II *bis* Regulation¹²² which applies to civil proceedings relating to matrimonial matters and the matters of parental responsibility includes the same rules on transfer of jurisdiction as the ones found in Articles 8 and 9 of the 1996 Hague Convention.¹²³ Furthermore, in relation to child abduction, the Regulation builds on the 1980 Hague Convention, by adding a rule to the effect that a court cannot refuse to return a child on the basis of Article 13 *b*) of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return.¹²⁴ These two provisions will undoubtedly invite direct judicial communications.¹²⁵ Judges could communicate directly in order to determine whether adequate arrangements can be or have been made to secure the protection of the child upon his or her return.

E. *The Pakistan Protocol and Cairo Declaration (Non-Hague Convention Cases)*

46. In its response to the 2006 Questionnaire, the United Kingdom (England, Wales and Northern Ireland) reported that in January and September 2003 the Judges of the United Kingdom entered into a Protocol with Judges of Pakistan.¹²⁶ Essentially the Pakistan Protocol, which recognises and respects existing laws and procedures in both countries, introduces a jurisdictional rule to determine which State has primary jurisdiction and ensures the reciprocal enforcement of orders made in the primary jurisdiction. The Protocol also provides for the appointment of a liaison judge for each State. At a meeting of judges from both States in March 2006, the operation of the Protocol was reviewed and refinements were agreed upon. A Declaration was the result of meetings in London in January 2004 and in Cairo in January 2005 between the judges of the United Kingdom

¹²⁰ *Supra*, note 63.

¹²¹ *Supra*, para. 5.

¹²² *Supra*, note 52.

¹²³ *Ibid.*, Article 15.

¹²⁴ *Ibid.*, Article 11(4).

¹²⁵ In Chapter X of the European Commission's Guide on the Brussels II *bis* Regulation it is written "In parallel with the requirements for Central Authorities to co-operate, the Regulation requires that the courts of different Member States co-operate for various purposes. Certain provisions impose specific obligations upon judges of different Member States to communicate and to exchange information in the context of a transfer of a case (see chapter III) and in the context of child abduction (see chapter VII). To encourage and facilitate such co-operation, discussions between judges should be encouraged, both within the context of the EJM and through initiatives organised by the Member States. The experience of the informal 'liaison judge arrangement' organised in the context of the 1980 Hague Convention may prove instructive in this context. It may be that some Member States may consider it worthwhile to establish liaison judges or judges specialised in family law to assist in the functioning of the Regulation. Such arrangements, within the context of the EJM, could lead to effective liaison between judges and the Central Authorities as well as between judges, and thus contribute to a speedier resolution of cases of parental responsibility under the Regulation."

¹²⁶ The Pakistan Protocol can be found in Annex F to Prel. Doc. No 8 – Appendices – of October 2006. For additional information on the Pakistan Protocol, see, "United Kingdom-Pakistan Judicial Conference on Child and Family Law, 15-17 January 2003, London, England", *The Judges' Newsletter*, Vol. V / Spring 2003, p. 3, *supra*, note 3, and Elizabeth Butler-Sloss, "Special Focus: Malta Judicial Conference on Cross-Frontier Family Law Issues", *The Judges' Newsletter*, Vol. VIII / Autumn 2004, p. 9, *ibid.*, James Young, "The Constitutional Limits of Judicial Activism: Judicial Conduct of International Relations and Child Abduction", (2003) 66(6) *Modern Law Review*, p. 823, and Femi Ogunlende, "The UK-Pakistan Judicial Protocol on Children Matters", (2004 - September) *Int'l Family Law*, p. 176.

and Egypt with the support of the Justice Ministers.¹²⁷ As opposed to the Pakistan Protocol, the Declaration of Cairo does not go beyond a recommendation to the governments of the two countries.¹²⁸

F. *The French System of Magistrats abroad*

47. The French Ministry of Justice has at its disposal a network of French Liaison *Magistrats* abroad located in Canada, Czech Republic, Germany, Italy, Morocco, Netherlands, Russia, Spain, the United Kingdom and the United States of America. Furthermore, France is hosting six foreign *Magistrats* in France from Germany, Italy, Netherlands, Spain, United Kingdom and the United States of America. The main role and functions of these *Magistrats* is to reinforce judicial co-operation and to facilitate the dissemination of the "legal culture" through privileged contacts abroad. In this respect, they come to learn and know about specific cases of child abduction and others in relation to rights of access and visitation. In its response to the 2002 Questionnaire, France indicates that in these situations, the communications between the *Magistrats* and the Central Authorities as well as the communications between the Central Authorities are not to be transmitted to the parties, their counsel or third parties without the prior consent of all the authorities involved.

G. *United States legislation dealing with direct judicial communications*

48. The states in the United States of America have specifically provided for direct judicial communications. The United States Uniform Child Custody Jurisdiction Act (UCCJA) provides for direct judicial communications both at the national and international levels. In this respect, judges of different jurisdictions can communicate with each other in respect of a matter which may be pending in both jurisdictions or which may need to be transferred from one jurisdiction to another.¹²⁹

49. The successor to the UCCJA, the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) makes more extensive provisions for judicial communication.¹³⁰ Examples of these provisions are found in Section 110. The Act allows a court of one state to communicate with a court in another state with regard to any proceeding arising under the UCCJEA.¹³¹ Parties to the proceedings will be allowed to participate in the proceedings, but the participation of the parties is not required. If the parties are not available when the communication occurs, they must be given the opportunity to present facts and legal arguments before a decision is made. The provision requires that a record of the communication must be made, unless the communication deals with minor issues such as schedules, calendars, court records and other similar matters. The parties must be informed promptly of the communication and granted access to the record. Direct communications are also allowed with regard to temporary emergency jurisdiction issues¹³² and in the case of simultaneous proceedings.¹³³

¹²⁷ The Egypt Agreement can be found in Annex G to Prel. Doc. No 8 – Appendices – of October 2006. For additional information on the Egypt Agreement, see, Mathew Thorpe, "Anglo-Egyptian Congress, London, England / 19-20 January 2004", *The Judges' Newsletter*, Vol. VII / Spring 2004, p. 99, Elizabeth Butler-Sloss and James Young, *ibid*.

¹²⁸ The Foreign and Commonwealth Office has supported direct international co-operation with the judiciary in a number of States that have not ratified the 1980 Hague Convention. These include Bangladesh, Egypt and Pakistan.

¹²⁹ See, *e.g.* the relevant Sections of Illinois State No 750 ILCS 35 reproduced in Annex H to Prel. Doc. No 8 – Appendices – of October 2006.

¹³⁰ The relevant Sections of the UCCJEA in this regard can be consulted in Annex I to Prel. Doc. No 8 – Appendices – of October 2006.

¹³¹ R.G. Spector, "International Child Custody Jurisdiction and the Uniform Child Custody Jurisdiction and Enforcement Act", (2000) 33:1 N.Y.U. J. Int'l L. Pol., pp. 251-283, at p. 281.

¹³² Section 204 of the UCCJEA can be consulted in Annex I to Prel. Doc. No 8 – Appendices – of October 2006.

¹³³ Sections 206 and 306 of the UCCJEA can be consulted in Annex I, *ibid*.

2. Examples of general non-case specific communications

A. *The London Convention of 7 June 1968*

50. Many States Parties to the 1980 Hague Convention are Contracting States¹³⁴ to the *European Convention of 7 June 1968 on information on foreign law*.¹³⁵ Under this Convention, mechanisms are put in place in order to help States inform each other on their respective laws. Requests for information are formal and must always emanate from a judicial authority. Outside the scope of the Convention, communications are carried through diplomatic channels.

B. *Seminars and conferences*

51. In recent years, an increasing number of international judicial seminars and conferences have occurred throughout the world. On several occasions, the Permanent Bureau has attended and / or provided support for the preparation of such seminars and conferences.¹³⁶

52. There are several international associations that provide a forum for judges to regularly meet and exchange views. The International Association of Judges and the International Association of Women Judges are examples of such organisations. The International Appellate Judges Conference and the Commonwealth Chief Justices Conference are other examples of venues where judges meet from time to time.¹³⁷

C. *The Judges' Newsletter*¹³⁸

53. *The Judges' Newsletter* on International Child Protection, now published bi-annually by the Permanent Bureau of the Hague Conference on Private International Law, has the objective of promoting co-operation, communication and the exchange of ideas between judges and others who deal with international child protection cases. *The Judges' Newsletter* is now distributed to more than 700 judges and Central Authorities appointed under the 1980 Hague Convention around the world.

3. The emergence of networks

A. *European Community Network*

54. At the European Community level a European Judicial Network in civil and commercial matters is in place, as in criminal matters, in order to improve, simplify and expedite effective judicial cooperation between the Member States. The members of the Network are: (a) contact points designated by the Member States; (b) central bodies and Central Authorities provided for in Community instruments, instruments of international law to which the Member States are parties or rules of domestic law in the area of judicial cooperation in civil and commercial matters; (c) the liaison magistrates to whom the Joint Action concerning a framework for the exchange of liaison magistrates

¹³⁴ States Parties to the *European Convention of 7 June 1968 on information on foreign law* are: Albania, Austria, Azerbaijan, Belarus, Belgium, Bulgaria, Costa Rica, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Mexico, Moldova, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, The former Yugoslav Republic of Macedonia, Turkey, Ukraine, United Kingdom and Yugoslavia.

¹³⁵ *European Convention of 7 June 1968 on information on foreign law*, U.N.T.S. 1970, 148.

¹³⁶ See, *supra*, note 1, and Prel. Doc. No 6, *supra*, note 5, at para. 46.

¹³⁷ The Seventh International Appellate Judges Conference and the Sixth Commonwealth Chief Justices Conference met jointly in Ottawa, Canada, on 24-29 September 1995. Judges representing 115 countries attended the Joint Conference. The Program of the Joint Conference included a presentation by Louise Lussier, Department of Justice of Canada, on International Child Abduction and Adoption.

¹³⁸ See, *supra*, note 3.

applies;¹³⁹ and, (d) any other appropriate judicial or administrative authority with responsibilities for judicial cooperation in civil and commercial matters whose membership of the Network is considered to be useful by the Member State to which it belongs.¹⁴⁰ The Network is supported in each State by a point of contact whose responsibility is to supply to the network, and up date information in relation to their national legal system.¹⁴¹

55. A first set of information¹⁴² concerning the members of the Network such as their names, full addresses of the authorities, specifying their communication facilities and knowledge of other languages made available only to the members of the Network.¹⁴³ This information is used in order to ensure, without prejudice to other Community or international instruments, the smooth operation of procedures having a cross border impact and the facilitation of requests for judicial co-operation.¹⁴⁴ It could thus encompass direct judicial communications in relation to the 1980 Hague Convention.

56. A second set of information gathered by the Network is made available to the public. The public information system includes information on subjects such as: (a) principles of the legal system and judicial organisation of the Member States; (b) procedures for bringing cases to court [...]; (c) conditions and procedures for obtaining legal aid [...]; (d) national rules governing the service of documents; (e) rules and procedures for the enforcement of judgments given in other Member States; (f) possibilities and procedures for obtaining interim relief measures [...]; etc.

B. Other networks in Europe

57. Austria has indicated that in different areas of civil law there is a close co-operation in general on an informal basis (*i.e.* seminars and conferences) with the judiciary of neighbouring jurisdictions (*e.g.* Germany (Bavaria), Switzerland, Czech Republic, Hungary, etc.).

58. In the Nordic States there is a Group of family law judges that was established seven years ago. The Group is made up of three judges from each country (Norway, Denmark, Sweden and Finland). The Group has an informal structure and has so far concentrated on providing information on the family law system in each State by way of seminars and study visits. The Iceland Judges Assembly co-operates with the Associations of Judges in the other Nordic Countries.

C. Iber-RED

59. Iber-RED, which stands for the Ibero-American Network of Judicial Cooperation in Civil and Criminal Matters, was created as an initiative of the General Secretariat of the Ibero-American Conference of Ministers of Justice, at a special meeting that took place in October 2004 in Cartagena de Indias, Colombia, which was attended by members of the Ministries of Justice, Judicial Councils, and Prosecutors of States from the region. Rules, which are not binding on States, were approved at that meeting.¹⁴⁵ As for the European Judicial Network, Iber-RED calls upon the designation of contact points. Contact points

¹³⁹ Joint Action 96/277/JAI of 22 April 1996 concerning a framework for the exchange of liaison magistrates to improve judicial cooperation between the Member States of the European Union (OJ L 105, 27.4.1996, p. 1).

¹⁴⁰ Decision 2001/470/EC establishing a European Judicial Network in civil and commercial matters (OJ L 174, 27.6.2001, p. 25).

¹⁴¹ In its implementation of the European Judicial Network, Spain has designated in each Spanish region experts judges to support the Network.

¹⁴² *Ibid.* Article 2(5).

¹⁴³ *Ibid.* Article 13(1) a).

¹⁴⁴ *Ibid.* Article 3(2) a).

¹⁴⁵ The Rules can be consulted in English, Portuguese and Spanish at the following website: < www.cumbrejudicial.org >. The Iber-RED Secretary has its own website at < www.iberred.org >.

will come from the Ministry of Justice, the Prosecutor's office and the Courts to deal with questions of family, commercial and criminal law.¹⁴⁶

D. Possible Conclusions and Recommendations

60. The number of emerging judicial networks certainly calls for some synergy. The Special Commission could certainly consider inviting States that have appointed a judge specialised in family law under other networks to do the same within the context of the International Network of Liaison Judges and vice versa.¹⁴⁷

4. Procedural and legal safeguards surrounding communications at the international level between judges or between a judge and another authority in the context of cases involving child abduction or access / contact

61. All jurisdictions that have responded to the 2002 Questionnaire, except one, agree that there should be safeguards regarding direct judicial communications.¹⁴⁸ Chile is of the view that procedural safeguards, should only be necessary in exceptional cases. In the same vein, without being opposed to safeguards, Switzerland is of the view that their application should not be too rigorous. The response from England and Wales indicates that they share this vision; a measure of discretion must be afforded, provided that rules of natural justice are always regarded as paramount.

62. Most jurisdictions confirm their agreement with paragraph 5.6 of the Conclusions and Recommendations of the Fourth Special Commission meeting of March 2001.¹⁴⁹ However, some jurisdictions indicate that the limits of the discussions have to be clearly defined¹⁵⁰ and depend on the subject matter and the purpose of the communication.¹⁵¹ Furthermore, the safeguards must depend on the law in the particular country.¹⁵² In that respect, it would appear to be appropriate to recommend that judicial communications should respect the laws and procedures in force in both of the jurisdictions involved.

A. Limits on the subject-matter of communications

63. In responding to the 2002 Questionnaire, Northern Ireland indicated that the procedure of direct communications should be used sparingly and in a limited number of instances. For example:

- a) To ascertain reassurances concerning potential or outstanding criminal charges, which may be a stumbling block in negotiations between the parties;

¹⁴⁶ See the response from Spain to the 2006 Questionnaire.

¹⁴⁷ The Minutes of the Lecco Conference on Judicial Co-operation in Cross-border Family Law Matters, organized jointly by the European Commission and Italy (Presidency) on 9-11 October 2003 records that "the liaison judge specialised in family law shall be effectively integrated into the Network and will disseminate information about the new [Brussels II *bis*] Regulation at national level". Under its Presidency, the United Kingdom wrote to all the Ministers of Justice of the European Union advocating the appointment of liaison judges to achieve greater collaboration in the application of Community Family Law.

¹⁴⁸ Austria. Under Austrian law the involvement of the parties is unnecessary because child abduction cases are dealt with in informal *ex officio* proceedings (so-called "*ausserstreitiges Verfahren*") without formal hearings. Under this procedure, the national judge should record the main concern of the discussion with the foreign counterpart. Therefore, there are no limitations for international communications in this process.

¹⁴⁹ *Supra*, para. 5.

¹⁵⁰ Netherlands.

¹⁵¹ Finland.

¹⁵² Denmark and France.

- b) To clarify the nature of any undertakings which may have been given in the past or which are now being given and, if necessary, to establish the effect of such undertakings;
- c) To ensure that jurisdictional conflict is, if possible, removed or at least the risks minimised;¹⁵³ and,
- d) In some cases, to reassure the abducting parent that, upon return to the country from where the child was abducted, there will be the opportunity for a prompt hearing to deal with matters of concern,¹⁵⁴ such as protection for her or the abducted child, provision of legal representation, contact, custody and, perhaps, the involvement of social services etc.

64. It appears from the examples of communications and case law cited in this Report that communications can also be used to encourage mediation, or other similar mechanisms, and to ensure swift proceedings.

B. Requirements concerning advance notification to parties, the presence of parties or their legal representatives, record keeping and confirmation in writing of the substance of the communication

65. Northern Ireland proposed some requirements in order to safeguard natural justice principles.¹⁵⁵ For example:

- a) It is crucial that steps are taken to ensure that the procedures in EU countries comply with Article 6 of the European Convention on Human Rights and that, in countries outside the EU, fair procedures are adopted. The subject matter of communications should not, therefore, include any discussion on the merits of the case, which may well be heard in the country to which the child is being returned or even in the country to which the child has been taken. It must also be made clear to all the parties that the purpose of the communication is to afford an opportunity to clarify matters of procedure in both countries and to exchange information on defined issues, as undertakings, the possibility of criminal prosecution on foot of the abduction etc. The issues to be raised should, therefore, be narrowly confined and carefully agreed upon before the communication takes place;¹⁵⁶
- b) In no circumstances should there be judicial communication or judicial liaison in the context of a specific case, unless all the parties have been advised in advance of the precise nature of the proposed communication and their views carefully canvassed;¹⁵⁷

¹⁵³ On this point, Finland is of the view that courts' jurisdiction is quite strictly defined by the law and that there is rarely a need for international communications on the conflict of jurisdictions.

¹⁵⁴ See the first ground rule with a similar objective proposed by Nicholas Wall, *supra*, note 111, at p. 23. The author concludes his article indicating that "[a]lthough I have sought to reduce the 'ground rules' to writing, nothing in my view should be written in stone. Judges must be free to use their judicial discretion creatively, and must be trusted to do so. Most Hague Convention law and procedure is judge made. Judicial initiatives which facilitate the proper implementation of the Hague and Luxembourg Conventions are in my judgment to be encouraged".

¹⁵⁵ Nicholas Wall, *ibid.* adds one more rule that reads: "where, at the end of a case in which there has been communication with a judge in another Member State, the judge initiating the communication gives a reasoned judgment, the judgment should contain details of the communication which has taken place". The rules proposed in this article can be found in Annex J to Prel. Doc. No 8 – Appendices – of October 2006.

¹⁵⁶ Rules No (2) and (3) proposed by Nicholas Wall, *ibid.*, are to the same effect. Scotland in its response to the Questionnaire made a similar proposal. See also, Mathew Thorpe, *supra*, note 75, at pp. 18-20.

¹⁵⁷ Rule No (5) proposed by Nicholas Wall, *ibid.*, is to the same effect. Scotland in its response to the Questionnaire made a similar proposal. See *also*, Mathew Thorpe, *ibid.* at pp. 18-20.

- c) The parties or their representatives should be present to hear all of the communications (for example, by means of a conference call facility).¹⁵⁸ The judge should have the discretion to raise, again in the presence of the parties, with his opposite number any further issue, which the parties wish to have clarified, provided he deems it appropriate;
- d) It is imperative that a record be kept of these communications, not only for the purposes of any appeal that may be instituted, but also for the removal of ambiguity or doubt as to what has been said. That record should be forwarded to the judge in the receiving country, with whom the communication has been carried on, as well as the representatives of the parties;¹⁵⁹
- e) There should be confirmation in writing of any agreement which is made on foot of the communications and the record of the communications should be appended to the agreement;
- f) If the child is to be returned, s/he should not be returned until the record / confirmation mentioned above has been circulated to all the parties and to the judge of the receiving country, so as to remove any uncertainty or ambiguity. This is particularly important where the parties or judges communicating do not share a common language and translation is being relied upon. All the records and agreements should be drawn up in the language of both judges and parties; and
- g) Such communications should only be embarked on with the consent of the parties and should not be executed by a judge in the absence of such agreement.¹⁶⁰

¹⁵⁸ Scotland in its response to the 2006 Questionnaire indicated that it has included a similar rule in its procedures. See also, Mathew Thorpe, *ibid.* at pp. 18-20.

¹⁵⁹ Rules No (6) and (7) proposed by Nicholas Wall, *supra*, note 111, are to the same effect. Scotland in its response to the Questionnaire made a similar proposal. See *also*, Mathew Thorpe, *ibid.* at pp. 18-20.

¹⁶⁰ In his proposed rule No (4) Nicholas Wall goes further by indicating that “[h]owever, judges must retain a discretion to communicate with colleagues in other Member States if they take the view that it is necessary for the proper resolution of a particular case for them to do so”, *ibid.*

IV – MOVING THE NETWORK FORWARD

66. In their responses to the 2002 Questionnaire, jurisdictions have identified mainly two types of support with regard to the development of the International Network of Liaison Judges. The first is general: the development of an international network of judges where general information (*i.e.* non case specific) with regard to the implementation of, application of and practice under the Convention in the different jurisdictions will be shared among the judges. The second is case specific: a list of judges from the different jurisdictions that can be directly contacted in order to obtain answers on questions of procedures and related issues with regard to specific cases.

1. Development of an international network of judges

67. All jurisdictions that have replied to the 2002 Questionnaire are of the view that the creation of an international communication network among judges and, in some cases between judges and Central Authorities or other bodies, is highly useful and of great importance. They regard such a network as possibly having in the long run a significant influence on the safe and prompt return of children to their habitual residence by avoiding the long and complex judicial processes thus simplifying the application of the Convention. By disseminating, through the network, knowledge of and information concerning the law and practice of other States, judicial confidence in ordering returns to requesting States will thereby be encouraged. The French delegation to the De Ruwenberg Seminar has proposed the creation of an international discussion list in which all judges who need to understand the application of the Convention could take part.¹⁶¹

2. Development of an international network of liaison judges

68. Most jurisdictions consider that direct communications between the competent judges in individual cases should be encouraged. The possibility of direct and rapid contacts, as well as the opportunity to obtain the required information, may significantly influence the pace of proceedings. International judicial liaison can be crucial to the resolution of particular problems that may present a stumbling block in the absence of early judicial liaison. Often, the abducting parent has real and genuine fears of a return, which can be speedily resolved without resorting to a lengthy and acrimonious hearing, which may only be likely to inflame raw wounds. Direct judicial contact is especially beneficial between jurisdictions that share a common border or a common legal tradition. The role and function of a judge may differ, and therefore there should be more discussions on the interface between different legal traditions.

69. Finally, one non-governmental international organisation (ICMEC) invites each Contracting State to analyse their laws in relation to direct judicial communications and to review them, as necessary, in order to allow protocols to that effect between parties, as it is done in insolvency cases.¹⁶² Thereafter, a model protocol for direct communication in individual cases could be encouraged by liaison judges for use by judges handling individual cases.

¹⁶¹ See "Extract from the French Report on the De Ruwenberg Judicial Seminar" by C. Gaudet (*Conseiller à la Cour d'appel de Bourges*) and D. Martin Saint Léon (*V.P. Tribunal de Grande Instance de Mulhouse*), with the collaboration of M.-C. Celeyron-Bouillot (*Juge aux affaires familiales du Tribunal de Grande Instance de Lyon*) (France), *The Judges' Newsletter* Vol. IV / Summer 2002, *supra*, note 9, at p. 13-14.

¹⁶² See to this effect the *Guidelines Applicable to Court-to-Court Communications In Cross-Border Cases* which can be found in Annex K to Prel. Doc. No 8 – Appendices – of October 2006.

3. Supporting the holding of judicial and other seminars, both national and international

70. All jurisdictions that have responded to the 2002 Questionnaire support the holding of more judicial and other seminars, both national and international, on issues concerning the 1980 Hague Convention. Suggestions were made for specific seminars such as seminars focusing on the different aspects of cross-frontier access cases. Seminars for the new States Parties to the 1980 Hague Convention were also suggested.

71. This unanimous response is in the same spirit as one of the Conclusions and Recommendations from the 2001 De Ruwenberg (Netherlands) International Judicial Seminar on the 1980 Hague Convention which was agreed to unanimously by thirty-one judges.¹⁶³ Conclusion and Recommendation No 12 provides:

*"[T]he De Ruwenberg seminar has offered an opportunity for judges and experts from seven jurisdictions to explain and compare the operation of the 1980 Hague Convention in their countries, to share experiences and to develop the mutual confidence necessary for the operation of international instruments of this kind. The Hague Conference is invited to facilitate more international judicial conferences of this nature. States Parties are asked to recognise the importance of such events in reinforcing the international protection of their children, and to make available the necessary funding."*¹⁶⁴

¹⁶³ The seminar was attended by thirty-one judges from seven jurisdictions (England and Wales (2), France (3), Germany (15), Netherlands (2), Scotland (1), Sweden (3), United States of America (5)).

¹⁶⁴ The full Conclusions and Recommendations from this Seminar can be read in *The Judges' Newsletter*, Vol. IV / Summer 2002, *supra*, note 3, at pp. 34-38.

V - POSSIBLE CONCLUSIONS AND RECOMMENDATIONS AND FUTURE WORK

72. In essence, this Report offers an inventory of the different mechanisms in place to facilitate direct international judicial communications. It also identifies the difficulties and constraints States and judges may have with regard to these mechanisms. The Report provides information to enable continued exploration of the practical mechanisms for facilitating direct international judicial communications.

73. The Special Commission may want to consider adopting some Conclusions and Recommendations in relation to direct judicial communications. The following is a consolidated list of possible conclusions and recommendations inspired in part by this Report and the work of recent international judicial conferences and seminars.

1. Encouraging direct judicial communications

- (a) Answers to the 2002 and 2006 Questionnaires broadly support Conclusions and Recommendations 5.5 and 5.6 of the Fourth meeting of the Special Commission to review the operation of the 1980 Hague Convention.

2. Ensuring cooperation

- (b) It is recognised that the relationship between judges and Central Authorities can take different forms.
- (c) Central Authorities are encouraged to facilitate direct judicial communications.
- (d) Liaison judges should act in cooperation and coordination with Central Authorities
- (e) Successful cooperation depends on the development of mutual trust and confidence between judges and Central Authorities.
- (f) It is recognised that effective functioning of the 1980 Hague Convention depends on the close co-operation among judges and Central Authorities on internal and international levels.
- (g) Meetings involving Judges and Central Authorities at a national, bilateral or multilateral level are a necessary part of building this trust and confidence and can assist in the exchange of information, ideas and good practice.

3. Consolidating the international network of liaison judges

- (h) The Permanent Bureau should keep up-to-date a list of members of the International Network of Liaison Judges and to make it available to all its members.
- (i) Central Authorities should keep the Permanent Bureau informed of the name and contact details of the appointed liaison judge for their jurisdiction, and where a judge directly informs the Permanent Bureau of his or her designation, the Permanent Bureau should keep the Central Authority informed of this designation.
- (j) States in which a liaison judge has been informally designated are invited to proceed as soon as possible to a formal designation. Furthermore, informally designated liaison judges are invited to explore in their jurisdictions, with the support of the Permanent Bureau, where appropriate, the feasibility of being formally designated.
- (k) Appointment of liaison judges in States that are not Parties to the 1980 Hague Convention is encouraged.

4. Encouraging synergy

- (l) States that have appointed a judge specialised in family law in the context of other networks are invited to do the same within the context of the International Network of Liaison Judges and vice versa.

5. Case specific communications

- (m) Direct judicial communications should respect the laws and procedures in force in both of the jurisdictions involved.
- (n) The timing of the communication should be left to the judge initiating the communication.
- (o) In order to ensure the identity of the judges involved, the initial contact between judges of different States should initially take place through the offices of the appointed liaison judges of both States concerned.
- (p) Where there is no liaison judge in place in a particular State, the initial contact between two judges from different States should be done through the conduit of a liaison authority (e.g. Central Authority), provided that the ensuing communication takes place between two "sitting" judges.

6. 1996 Convention on the international protection of children

- (q) States are encouraged to provide for liaison judges in their implementation of the 1996 Convention and to encourage the application of the same safeguards as the ones accepted under the 1980 Hague Convention.

7. Future work

The Permanent Bureau would like to suggest the following possible Work Programme:

- (r) Continue informal consultations with interested judges based on the Report, together with the Report that will be drawn up by the Permanent Bureau on the Conclusions and Recommendations of the Fifth Meeting of the Special Commission of October / November 2006.
- (s) Continue to develop the practical mechanisms and structures of the International Network of Liaison Judges.
- (t) Continue to develop contacts with other judicial networks and to promote the establishment of regional networks.
- (u) Maintain an inventory of existing practices relating to direct judicial communications in specific cases under the 1980 Hague Convention and with regard to international child protection.
- (v) Draw up a short information document on direct judicial communications that could be used by judges when contacting a judge who is not familiar with direct judicial communications under the 1980 Hague Convention.
- (w) Explore the value of drawing up more detailed guidelines concerning direct judicial communications, which could serve as a model for the development of norms at national, bilateral and regional level with the advice of a consultative group of experts drawn primarily from the judiciary.
- (x) Develop a secured system of communications for members of the International Network of Liaison Judges.

8. Note

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