

**CONSULTATIONS RELATIVES À L'OPPORTUNITÉ ET À LA FAISABILITÉ D'UN PROTOCOLE À
LA CONVENTION DE LA HAYE DU 25 OCTOBRE 1980 SUR LES ASPECTS CIVILS DE
L'ENLÈVEMENT INTERNATIONAL D'ENFANTS**

RAPPORT PRÉLIMINAIRE

établi par le Bureau Permanent

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**CONSULTATIONS ON THE DESIRABILITY AND FEASIBILITY OF A
PROTOCOL TO THE HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE
CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION**

A PRELIMINARY REPORT

drawn up by the Permanent Bureau

*Document préliminaire No 7 de mai 2011 à l'intention de la
Commission spéciale de juin 2011 sur le fonctionnement pratique de la
Convention Enlèvement d'enfants de 1980 et de la
Convention Protection des enfants de 1996*

*Preliminary Document No 7 of May 2011 for the attention of the
Special Commission of June 2011 on the practical operation of the
1980 Hague Child Abduction Convention and the
1996 Hague Child Protection Convention*

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I. MANDATE

The Council on General Affairs and Policy of the Hague Conference, at its meeting of April 2009

"... authorised the Permanent Bureau to engage in preliminary consultations concerning the desirability and feasibility of a protocol to the [*Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*] containing auxiliary rules to improve the operation of the Convention".¹

Furthermore, the Council on General Affairs and Policy requested the Permanent Bureau to prepare a report on the consultations for discussion at the next meeting in 2011 of the Special Commission on the practical operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (hereinafter "the 1980 Convention") and the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* (hereinafter "the 1996 Convention"). This was on the understanding that any decisions on the question of a protocol can only be taken by the Council. The Council stated that the report should also "take into account the extent to which the provisions of the 1996 Hague Convention supplement those of the 1980 Hague Convention."

To assist in the preparation of the report, in April 2010 the Council on General Affairs and Policy authorised the Permanent Bureau to circulate a questionnaire "to States Parties and Members later this year seeking general views as well as views in relation to the specific elements which might form part of a protocol"² to the 1980 Convention.

II. BACKGROUND

The issue of a possible protocol to the 1980 Convention was first mooted at the Hague Conference on Private International Law in the context of discussions concerning transfrontier access / contact. In May 2000, in response to a proposal by the delegations of Australia, Spain, the United Kingdom and the United States of America,³ the Special Commission on General Affairs and Policy of the Conference asked the Permanent Bureau to prepare a report on the desirability and usefulness of a protocol which might improve Article 21 of the Convention.⁴ In response to this request, in July 2002, the Report on Transfrontier Access / Contact was published.⁵ The Special Commission of October 2002

¹ "Conclusions and Recommendations of the Council on General Affairs and Policy of the Conference (31 March – 2 April 2009)", p. 2, available on the Hague Conference website at < www.hcch.net > under "Work in Progress" then "General Affairs".

² "Conclusions and Recommendations of the Council on General Affairs and Policy of the Conference (7-9 April 2010)", p. 2, available on the Hague Conference website at < www.hcch.net > under "Work in Progress" then "General Affairs".

³ Work. Doc. No 3, Proposal submitted by the delegations of Australia, Spain, the United Kingdom and the United States of America at the Special Commission on General Affairs and Policy of the Conference (8-12 May 2000).

⁴ The Special Commission on General Affairs and Policy of the Hague Conference (8-12 May 2000) agreed to request the Permanent Bureau to: "prepare by the Nineteenth Diplomatic Session of the Hague Conference a report on the desirability and potential usefulness of a protocol to the 1980 Hague Convention ... that would provide in a more satisfactory and detailed manner than Article 21 of that Convention for the effective exercise of access / contact between children and their custodial and non-custodial parents in the context of international child abductions and parent re-locations, and as an alternative to return requests", "Conclusions of the Special Commission of May 2000 on General Affairs and Policy of the Conference", Prel. Doc. No 10 of June 2002 for the attention of the Nineteenth Session, available on the Hague Conference website at < www.hcch.net > under "Work in Progress" then "General Affairs", p. 34.

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

decided that it would be premature to begin work on a protocol, but stated that work should continue on the development of a guide to good practice on the issue of transfrontier contact / access in the context of the 1980 Convention.⁶

At the 2006 Special Commission on the 1980 and 1996 Hague Conventions,⁷ Switzerland put forward a more general proposal for a protocol. This proposal suggested that a protocol might contain provisions:

- requiring attempts at mediation or conciliation to secure the voluntary return of the child within the meaning of Article 10 (in association with Art. 7 c));
- providing for the child and parents to have an opportunity to be heard;
- formulating in detail the procedure and measures to secure the safe return of the child (as per Art. 7 h)) and the arrangements for securing rights of access (Art. 21);
- creating supplementary rules allowing the authorities of the requested State to obtain information on custody rights, on the relationship between the child and its parents and on the well being of the child once returned to his country of habitual residence;
- reducing the period of one year set out in Article 12; and
- amending Article 13(1) b) so as to clarify the relationship between the principle of returning the abducted child and the interests of the child.⁸

Experts present at the Special Commission meeting were divided on the proposal, and whilst the potential value of a protocol was recognised by the Special Commission, it was determined not to be an immediate priority.⁹

Switzerland's proposal to begin work on a protocol had been first presented in 2005 to the Special Commission on General Affairs and Policy of the Conference.¹⁰ The proposal

⁶ "Report and Conclusions of the Special Commission concerning the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (27 September – 1 October 2002)", drawn up by the Permanent Bureau, Prel. Doc. No 5 of March 2003 – see Conclusion No 2, p. 42. Available on the Hague Conference website *ibid*.

⁷ Fifth Meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* and the practical implementation of the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* (30 October – 9 November 2006).

⁸ See paras 251 *et seq*, of the "Report of the Fifth Meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* and the practical implementation of the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* (30 October – 9 November 2006)".

⁹ See "Conclusions and Recommendations of the Fifth Meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* and the practical implementation of the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* (30 October – 9 November 2006)", Recommendations Nos 1.7.3 and 1.8.3. The Swiss proposal was reiterated in the Hague Conference's Council on General Affairs and Policy in 2006, 2007, 2008 and 2009.

¹⁰ See "Report of the Special Commission on General Affairs and Policy of the Conference of 31 March – 1 April 2005", Prel. Doc. No 32 A of May 2005, at p. 34, available on the Hague Conference website at < www.hcch.net > under "Work in Progress" then "General Affairs".

was raised again at meetings of the Special Commission on General Affairs and Policy¹¹ in 2006, 2007 and a draft additional protocol was submitted by Switzerland in 2008.¹² In 2008, the Council had reserved for future consideration the feasibility of a protocol containing auxiliary rules designed to improve the operation of the Convention.¹³ Switzerland also presented to the 2010 Council on General Affairs and Policy a list of matters to be considered in view of a supplementary instrument to the 1980 Convention.¹⁴

III. THE CONSULTATIONS

(a) States Parties and Members of the Hague Conference

The consultation process focused primarily on the States Parties to the 1980 Convention, as well as Members of the Hague Conference. In December 2010, the Permanent Bureau circulated to States Parties and Members a Questionnaire on the desirability and feasibility of a protocol to the 1980 Convention,¹⁵ seeking general views as well as views in relation to specific elements which might form part of a protocol, according to the mandate given by the Council on General Affairs and Policy. It was not the objective to gather opinions on the precise rules or language that should appear in a protocol, but rather on the broad elements which might be covered by a protocol, as well as the feasibility of achieving consensus on these matters.

As of 1 May 2011, responses to the Questionnaire have been received from 16 States Parties and Members.¹⁶ This includes a response from the European Union all of whose 27 Member States are States Parties to the 1980 Convention. It seems likely that more responses to the Questionnaire will be returned in the forthcoming weeks. Also, at this point the European Union has not commented on the specific elements that might form part of a protocol or on the priority that should be attributed to them. The responses to date are summarised in Part V of this preliminary Report.

(b) Judges and academics

In the course of 2009, the Permanent Bureau conducted a review of publications in which proposals had been made for a protocol to or amendments of the 1980 Convention. The Permanent Bureau also sought the opinions of a number of academics and researchers known to have a specialist interest in the Convention.¹⁷ Members of the International Hague Network of Judges were also canvassed for their opinions.¹⁸ In all cases opinions were sought on the desirability and feasibility of a protocol containing auxiliary rules to improve the operation of the 1980 Convention.

¹¹ In 2007 the work undertaken by the Special Commission on General Affairs and Policy of the Hague Conference was taken over by the Council on General Affairs and Policy of the Hague Conference (see the Statute of the Hague Conference on Private International Law).

¹² Draft Additional Protocol to the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (submitted by the Swiss delegation), available on the Hague Conference website at < www.hcch.net > under "Work in Progress" then "General Affairs".

¹³ *Op. cit.* note 1, p. 2.

¹⁴ Work. Doc. No 2 of 7 April 2010.

¹⁵ "Questionnaire on the desirability and feasibility of a protocol to the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*", Prel. Doc. No 2 of December 2010 for the attention of the Special Commission of June 2011 on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention, available on the Hague Conference website at < www.hcch.net > under "Work in Progress" then "Child Abduction", also annexed to this document.

¹⁶ Australia, Bahamas, Burkina Faso, Chile, China (Mainland, Hong Kong SAR), Colombia, Dominican Republic, El Salvador, European Union, Mexico, Montenegro, New Zealand, Norway, Switzerland, Ukraine and Zimbabwe.

¹⁷ Twenty-five academics and researchers were contacted from Argentina, Brazil, Canada, France, Germany, Japan, New Zealand, Spain, Switzerland, the United Kingdom and the United States of America.

¹⁸ A list of the current members of the International Hague Network of Judges is available on the Hague Conference website at < www.hcch.net > under "Child Abduction Section" then "The International Hague Network of Judges".

Nine responses were received from academics and researchers¹⁹ and nine from Network Judges.²⁰ The views expressed are set out in Part VI of this preliminary Report on a non-attributable basis, together with views gleaned from the academic and other literature surveyed.

IV. PURPOSE OF THE PRELIMINARY REPORT

The detailed discussion of the desirability and feasibility of a protocol to the 1980 Convention is to take place during the second part of the Special Commission meeting, which is due to take place (tentatively) from 24 January to 1 February 2012.

The Permanent Bureau had decided to prepare this preliminary Report in order to make available as much background information as possible for the first part of the Special Commission meeting (1-10 June 2011). The final Report will be prepared for the second part of the meeting.

The purpose of the Report is to present an overview of opinions, especially of States Parties to the 1980 Convention, concerning the desirability and feasibility of a protocol to the Convention, including opinions concerning the possible elements within such a protocol. The Report is written to assist States Parties and Members of the Hague Conference in forming a judgment on whether the Hague Conference should embark on formal negotiations on a protocol. The final decision on whether the formal process should begin lies with the Council on General Affairs and Policy of the Hague Conference.

V. VIEWS OF SOME STATES PARTIES AND MEMBERS

A. Possible components of a protocol

(It should be noted that, in the absence of comments by the European Union on possible specific components of a protocol, this section summarises the views of 16 States Parties to the Convention or Members of the Hague Conference.)

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

1.1 Expressly authorising the use of mediation / conciliation / other means to promote the amicable resolution of cases under the Convention²¹

Several responses expressed the view that expressly authorising the use of mediation, conciliation or other means to promote the amicable resolution of cases under the Convention could serve a useful purpose²² and should cover amicable solutions in a broad sense, including other forms of alternative dispute resolution in addition to mediation or conciliation.²³ Compared to judicial resolution of cases, mediation, conciliation and other means of alternative dispute resolution have been described as a less traumatising process for the child²⁴ as well as facilitating in some instances a prompt return of the child.²⁵ However, on this last aspect, several responses expressed the need for careful

¹⁹ Carol Bruch, Andreas Bucher, Cristina Gonzalez-Beilfuss, Ann Laquer Estin, Marilyn Freeman, Estelle Gallant, Nigel Lowe, María Susana Najurieta, Nicola Taylor and Pauline Tapp.

²⁰ Justices Victoria Bennett (Australia), Peter Boshier (New Zealand), Robine de Lange-Tegelaar (Netherlands), Javier Forcada (Spain), Ricardo Pérez Manrique (Uruguay), Marjatta Möller (Finland), George Serghides (Cyprus), Graciela Tagle (Argentina) and Mathew Thorpe (United Kingdom).

²¹ The following entities have not responded to or expressed views on this particular question: China, European Union, Norway.

²² Australia, Bahamas, Burkina Faso, Chile, China (Hong Kong SAR), Colombia, El Salvador, Montenegro, Switzerland, Ukraine, Zimbabwe.

²³ El Salvador.

²⁴ Switzerland, Zimbabwe.

²⁵ Colombia, Dominican Republic, Montenegro.

consideration to ensure that mediation or other processes to bring about amicable solutions do not result in an undue delay in the return procedure.²⁶

One response (New Zealand) expressed the view that such provision would not be appropriate in a protocol, arguing that Article 7 of the 1980 Convention appeared to be sufficient. New Zealand noted that, considering the broad substantive issues involved in mediation, introducing a protocol on the area may create jurisdictional issues. Finally, it expressed concerns about the promotion of mediation to such a point that it became automatic in return proceedings, as this could reduce the incentive of the taking parent to act lawfully prior to the return.²⁷

While a number of responses have not settled priorities on this issue,²⁸ a majority gave high priority to this issue²⁹ while one gave low priority.³⁰

1.2 Addressing issues of substance and procedure surrounding the use of such means (e.g., concerning matters such as confidentiality, the interrelationship between the mediation process and return proceedings, or the recognition and enforcement of agreements resulting from mediation)³¹

Several responses³² expressed the view that it would be appropriate to address issues of substance and procedure surrounding the use of such means (e.g., concerning matters such as confidentiality, the interrelationship between the mediation process and return proceedings, or the recognition and enforcement of agreements resulting from mediation). According to these views, possible provisions should describe general rules on which such methods should be based³³ and could be imported from the principles being developed by the Working Party on Mediation in the context of the Malta Process.³⁴

In addition, it has been suggested that the following specific issues be addressed in a possible protocol:

- the relationship between the mediation procedure and the return procedure;³⁵
- the timeframe of the mediation process;³⁶
- the practical issues arising from a mediation process when one parent is abroad;³⁷
- admissibility of mediation;³⁸
- the procedures concerning the appointment of a mediator;³⁹

²⁶ Bahamas, Dominican Republic, Switzerland.

²⁷ New Zealand.

²⁸ The following entities have not mentioned any priorities in responding to this question: Chile, Mexico, Montenegro, New Zealand, Ukraine, Zimbabwe.

²⁹ Australia, Burkina Faso, China (Hong Kong SAR), Colombia, Dominican Republic, El Salvador, Montenegro, Switzerland.

³⁰ Bahamas.

³¹ The following entities have not responded to or expressed views on this particular question: China, European Union, Norway.

³² Australia, Burkina Faso, Chile, China (Hong Kong SAR), El Salvador, Ukraine.

³³ Switzerland, Ukraine (response to Question 1.1).

³⁴ Australia. See "The 'Principles for the establishment of mediation structures in the context of the Malta Process' and the Explanatory Memorandum", Prel. Doc. No 6 of May 2011 for the attention of the Special Commission of June 2011 on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention, available on the Hague Conference website at < www.hcch.net > under "Work in Progress" then "Child Abduction".

³⁵ Chile, Switzerland.

³⁶ Bahamas, Chile.

³⁷ Chile.

³⁸ Australia.

³⁹ Bahamas (response to Question 1.1).

- the confidentiality of the mediation process;⁴⁰
- the person and / or entities that should bear the cost of such process;⁴¹
- the guarantee of recognition and enforcement of a settlement agreement reached as a result of mediation proceedings conducted in another State,⁴² for example a standard application form for recognition and enforcement of such an agreement abroad.⁴³

The issues of timeframe, procedures for appointment of a mediator and the enforceability of the decision were seen as important in relation to the necessity of ensuring the prompt return of the child.⁴⁴

However, concerns were expressed regarding the feasibility of an instrument addressing the above issues, especially in relation to who should bear the costs of such services,⁴⁵ considering the diversity of legislation and methods among the States Parties,⁴⁶ and the potential practical difficulties arising from the co-ordination of the authorities involved internally in the mediation process (Central Authorities, mediation agencies, mediators, judicial authorities).⁴⁷

Several other responses did not think it appropriate to address issues of substance and procedure surrounding the use of means of amicable resolution.⁴⁸ Article 7 c) and Article 10 of the 1980 Convention appeared to some broad enough to permit the use of the most appropriate methods of amicable resolution disputes available in each State concerned.⁴⁹ In addition, it was noted that the substantive issues fell outside the scope of the 1980 Convention and were matters for the domestic law of the competent authorities having jurisdiction, while the 1996 Convention dealt clearly with rules on jurisdiction, recognition and enforcement.⁵⁰

A majority of responses did not designate any priority⁵¹ or expressed it as low,⁵² while several would give high priority to this work.⁵³

Note by the Permanent Bureau

Role of the 1996 Convention in the area of mediation and other means to bring about amicable resolution of cases under the 1980 Convention

Similarly to the 1980 Convention,⁵⁴ the 1996 Convention promotes mediation and other means to bring about amicable resolution of cases. The Central Authority designated under the 1996 Convention must take all appropriate steps to facilitate, by mediation, conciliation or similar means, agreed solutions for the protection of the person or property of the child in situations to which the Convention applies.⁵⁵ Such role of the Central Authority would be particularly

⁴⁰ Australia, Chile, Ukraine.

⁴¹ Zimbabwe.

⁴² Australia, Bahamas (response to Question 1.1), Chile, Poland, Switzerland, Ukraine.

⁴³ Ukraine.

⁴⁴ Bahamas (response to Question 1.1).

⁴⁵ Zimbabwe.

⁴⁶ Bahamas.

⁴⁷ Ukraine, Zimbabwe.

⁴⁸ Bahamas, Dominican Republic, Mexico, Montenegro, New Zealand.

⁴⁹ Bahamas, Mexico.

⁵⁰ New Zealand.

⁵¹ The following entities have not mentioned any priorities in responding to this question: Chile, Colombia, Dominican Republic, Mexico, New Zealand, Ukraine, Zimbabwe.

⁵² Bahamas, Montenegro.

⁵³ Australia, Burkina Faso, China (Hong Kong SAR), El Salvador, Switzerland.

⁵⁴ Art. 7 c).

⁵⁵ Art. 31 b).

relevant in relation to the exercise of visitation rights in the context of Article 35 of the 1996 Convention, which supplements Article 21 of the 1980 Convention.

In the context of child abduction proceedings under the 1980 Convention, and as mentioned in some responses to the Questionnaire, one of the main issues raised by the use of mediation in the context of abduction proceedings is the question of jurisdiction of the authorities where the mediation takes place. In most cases, this is the State to which the child has been abducted. In many legal systems, the mediated agreement needs to be made part of a decision or registered with the court to have legal effect and / or be enforceable. In abduction cases, the competent authorities of the requested State often do not have jurisdiction to render the agreement binding or enforceable and even if they do, the recognition and enforcement of such a decision may be refused by the requesting State.

In contrast, Article 9 of the 1996 Convention provides for the possibility of the competent authority of the requested State, where the child is present, to request the competent authority of the State of the habitual residence of the child, directly or with the assistance of the Central Authority of that State, to be authorised to exercise jurisdiction to take the measures of protection which it considers to be necessary, including a decision to make a mediated agreement part of a court order, in so far as its contents come within the scope of the 1996 Convention.⁵⁶ For this purpose, the 1996 Convention expressly provides that the authorities concerned may proceed to an exchange of views. Once the competent authority of the State of habitual residence has accepted this request, the authority initiating the request may exercise jurisdiction in place of the competent authority of the State of the habitual residence of the child. Decisions taken under this transfer of jurisdiction are entitled under the Convention to the same regime for their recognition and enforcement as any other decision taken on the grounds provided by the Convention. They are therefore recognised by operation of law in all other Contracting States (Art. 23(1)) and must be declared enforceable upon the request of a party (Art. 26), subject to the limited grounds on which recognition may be refused under the Convention (Art. 23(2)).

The flexibility offered by the 1996 Convention may be a good mechanism to solve jurisdiction issues, in particular in relation to mediation.⁵⁷

2. Direct judicial communications

2.1 Providing a legal basis for use of direct cross-border judicial communications in respect of cases brought under the Convention⁵⁸

Several responses were favourable to providing a legal basis for the use of direct cross-border judicial communications in respect of cases brought under the Convention.⁵⁹

⁵⁶ This would not include, for example, agreements concerning child support (see Art. 4 e)).

⁵⁷ See the *Draft Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part V – Mediation*, Chapter 13, in particular para. 286 and the *Draft Practical Handbook on the operation of the 1996 Child Protection Convention*, Chapter 13, pp. 100-103.

⁵⁸ The following entities have not responded to or expressed views on this particular question: China, European Union, Norway.

⁵⁹ Australia, Bahamas, Chile, China (Hong Kong SAR), Colombia, El Salvador, Montenegro, Switzerland, Ukraine, Zimbabwe.

Several responses were supportive of the use of direct judicial communications to ensure the proper operation of the Convention,⁶⁰ especially in the context of safe return of the child⁶¹ and enforcement of return orders.⁶² Providing such legal bases for the use of direct judicial communications was seen as a means to encourage the use of direct judicial communications in States that have been sceptical so far, in particular due to their legal tradition and practice,⁶³ and as an opportunity to clarify the role of the Central Authority compared to the role of judicial authorities in their co-operation and communications, including the circumstances and procedures required of Central Authorities to seek assistance through the judicial network in respect of particular cases.⁶⁴

By contrast, one response (New Zealand) expressed the view that, despite the usefulness of direct judicial communications, it would not be appropriate to deal with this issue in a protocol since these issues are governed by the law of the State of the judicial authorities which are seised of the matter. In contrast, soft law, such as the current Draft General Principles on Direct Judicial Communications⁶⁵ should be promoted.⁶⁶

Several responses did not have settled priorities on this issue⁶⁷ or set it low⁶⁸ while approximately a third considered it as high priority.⁶⁹

2.2 Defining the scope of such direct communications and setting out procedural safeguards for their use⁷⁰

Several responses found it necessary to define the scope of such direct communications and to set out procedural safeguards for the use of direct judicial communications.⁷¹ In particular, it was viewed as necessary to provide clear rules on the role of the authorities involved, including Central Authorities, in the context of such communications.⁷² One response also highlighted the need for clear rules applicable to situations where a procedure on the merits takes place before the courts of the State of the child's habitual residence.⁷³

On the contrary, two responses did not see binding provisions as appropriate in this area and would rather pursue the establishment of non-binding rules or guidance.⁷⁴

⁶⁰ Chile, Montenegro, Switzerland.

⁶¹ Chile, Switzerland.

⁶² Chile.

⁶³ Chile, Ukraine.

⁶⁴ Australia, Switzerland, Zimbabwe.

⁶⁵ "Emerging rules regarding the development of the International Hague Network of Judges and draft general principles for judicial communications, including commonly accepted safeguards for direct judicial communications in specific cases, within the context of the International Hague Network of Judges", Prel. Doc. No 3 A of March 2011, for the attention of the Special Commission of June 2011 on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention, available on the Hague Conference website at < www.hcch.net > under "Work in Progress" then "Child Abduction".

⁶⁶ New Zealand.

⁶⁷ The following entities have not mentioned any priorities in responding to this question: Australia, Burkina Faso, Colombia, Mexico, Ukraine, Zimbabwe.

⁶⁸ China (Hong Kong SAR), Montenegro, New Zealand.

⁶⁹ Bahamas, Chile, Dominican Republic, El Salvador, Switzerland.

⁷⁰ The following entities have not responded to or expressed views on this particular question: China, European Union, Mexico, Norway, Zimbabwe.

⁷¹ Australia, Bahamas, Chile, China (Hong Kong SAR), Dominican Republic, El Salvador, Montenegro, Switzerland.

⁷² El Salvador, Switzerland.

⁷³ Switzerland.

⁷⁴ New Zealand, Ukraine.

Several responses did not have settled priorities on this issue⁷⁵ or set it as low⁷⁶ while approximately a third considered it as high.⁷⁷

2.3 Providing an explicit basis for the International Hague Network of Judges⁷⁸

Providing an explicit basis for the International Hague Network of Judges was considered as useful by a majority of responses.⁷⁹ It was seen as an opportunity to clarify the role and the use of the International Hague Network, by contrast with the role of the Central Authority.⁸⁰

One response (New Zealand) did not consider an explicit basis for the International Hague Network of Judges as necessary or as an area where consensus is likely to be achieved. That response highlighted the differences in domestic legislation in this regard, in addition to the fact that governmental authorities and judicial authorities might have different perspectives on the issue.

The majority of responses did not have settled priorities on this issue⁸¹ or set it as low⁸² while two responses considered it as high.⁸³

Note by the Permanent Bureau

Role of the 1996 Convention to promote direct judicial communications in respect of cases brought under the 1980 Convention

While the 1996 Convention does not expressly promote direct judicial communications, it provides a legal basis for its use in some specific contexts.

By way of exception, the competent authority of the State of habitual residence of the child⁸⁴ may request directly that the authority of another State⁸⁵ assume jurisdiction to take measures of protection, if it considers that the other authority would be better placed in the particular case to assess the best interests of the child.⁸⁶ For such a purpose, the authorities concerned may proceed to an exchange of views.⁸⁷ Such direct judicial communications may also operate where the transfer of jurisdiction is requested by the other authority.⁸⁸

Apart from situations where a transfer of jurisdiction is relevant, the 1996 Convention provides a legal framework for direct judicial communications in some other scenarios where co-operation between judicial authorities may be

⁷⁵ The following entities have not mentioned any priorities in responding to this question: Australia, Burkina Faso, Colombia, Mexico, Ukraine, Zimbabwe.

⁷⁶ China (Hong Kong SAR), Montenegro, New Zealand.

⁷⁷ Bahamas, Chile, Dominican Republic, El Salvador, Switzerland.

⁷⁸ The following entities have not responded to or expressed views on this particular question: China, European Union, Mexico, Norway.

⁷⁹ Australia, Bahamas, Chile, China (Hong Kong SAR), Colombia, El Salvador, Montenegro, Switzerland, Ukraine, Zimbabwe.

⁸⁰ Australia, Switzerland.

⁸¹ The following entities have not mentioned any priorities in responding to this question: Australia, Burkina Faso, Chile, Colombia, El Salvador, Mexico, Ukraine, Zimbabwe.

⁸² Bahamas, China (Hong Kong SAR), Montenegro, New Zealand.

⁸³ Dominican Republic, Switzerland.

⁸⁴ As well as the competent authorities of the State of presence of child having jurisdiction under Art. 6.

⁸⁵ Art. 8(2) states that the Contracting States whose authorities may be addressed are (1) a State of which the child is a national, (2) a State in which property of the child is located, (3) a State whose authorities are seised of an application for divorce or legal separation of the child's parents, or for annulment of their marriage or (4) a State with which the child has a substantial connection.

⁸⁶ Art. 8(1).

⁸⁷ Art. 8(3).

⁸⁸ The same authorities mentioned by Art. 8(2), see note 85. See Art. 9.

necessary. In particular, in the context of the safe return of a child, the court of State A, where the child is habitual resident, contemplating a measure of protection to ensure the safe return of the child, may, under Article 34, request the court of State B, where the child is present, to communicate information to it relevant to the protection of the child. Conversely, the court of State B would not be able to submit such a request under the 1996 Convention, except in the case of urgency.⁸⁹ Direct judicial communications may also take place under Article 35(1) with a view to requesting assistance in the implementation of measures taken under the 1996 Convention, especially in securing the effective exercise of rights of access as well as of the right to maintain direct contacts on a regular basis.

In relation to safeguards for the use of such communications, the 1996 Convention provides for some in relation to the use of personal data⁹⁰ and confidentiality,⁹¹ as well as prohibiting requests for and transmission of information in situations of possible danger to the child's person or property, or serious threat to the liberty or life of a member of the child's family.⁹² However, the 1996 Convention does not address safeguards relating to due process, such as those addressed in the current Draft General Principles on Direct Judicial Communications.⁹³

3. Expeditious procedures

3.1 More explicit or stricter provisions to ensure that return applications are processed rapidly at first instance, on appeal and at the enforcement stage⁹⁴

Several responses thought that more explicit or stricter provisions to ensure that return applications are processed rapidly at first instance, on appeal and at the enforcement stage could serve a useful purpose⁹⁵ despite concerns expressed on the possibility of achieving consensus on this issue.⁹⁶ Some noted that Article 11 of the Convention does not appear to be sufficient, with significant delay encountered in child abduction cases,⁹⁷ including by Central Authorities which may hold up the filing of return applications before judicial authorities or delay notification of decisions.⁹⁸ Other responses suggested that the inclusion of more explicit or stricter provisions be made in conjunction with greater clarity as to the limited range of matters that should be considered by the courts in determining an application under the Convention, especially in view of the growing trend to consider a wide range of issues related to the "best interest of the child" rather than limiting matters for consideration.⁹⁹

⁸⁹ Art. 34(1). However, a Contracting State may declare under Art. 34(2) that such a request can only be communicated through its Central Authority. As of 10 May 2011, such a declaration has been made by a majority of Contracting States, namely Albania, Armenia, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, France, Hungary, Ireland, Latvia, Lithuania, Malta, Poland, Romania, Slovakia, Spain, Ukraine.

⁹⁰ Art. 41.

⁹¹ Art. 42.

⁹² Art. 37.

⁹³ *Op. cit.* note 65.

⁹⁴ The following entities have not responded to or expressed views on this particular question: China, European Union, Zimbabwe.

⁹⁵ Australia, Burkina Faso, Chile, China (Hong Kong SAR), Colombia, Dominican Republic, El Salvador, Norway, Switzerland.

⁹⁶ Norway.

⁹⁷ Chile, Switzerland.

⁹⁸ Chile, Mexico.

⁹⁹ Australia, Mexico.

Several responses expressed the view that such stricter provisions would not be appropriate.¹⁰⁰ Articles 2 and 11 were seen as clear enough; rather, it was felt that priority should be given to emphasising the practical implementation of such obligations and regular review of State practice.¹⁰¹ Stricter provisions would not ensure quicker procedures in practice, since delays were caused by lack of compliance of the Contracting States with the current provisions of the Convention, not by the terms themselves.¹⁰² In particular, it was highlighted that a stricter timeframe could jeopardise the quality of the proceedings and thus endanger the child's best interests.¹⁰³

While the majority of responses did not express a specific priority to be given to this issue,¹⁰⁴ or considered it as low,¹⁰⁵ some considered that the issue was of high priority,¹⁰⁶ also in relation to access applications.¹⁰⁷

4. The safe return of the child

4.1 Specifying measures (e.g., interim protective orders) which may be taken by either of the States involved to help ensure the safe return of the child and, where appropriate, an accompanying parent¹⁰⁸

Specifying measures (e.g., interim protective orders) which may be taken by either of the States involved to help ensure the safe return of the child and, where appropriate, an accompanying parent was seen as useful in a number of responses.¹⁰⁹ However, contradictory views have been expressed in relation to the measures to be specified. While at least two responses suggested that the responsibilities of the Central Authority of the requesting State to ensure the safe return of the child and accompanying parent be specified, as well as the responsibilities of other authorities involved such as Embassies,¹¹⁰ another emphasised the role of the parents in the matter and suggested that the completion of specific actions by the requesting parent be facilitated.¹¹¹ While it was also seen as appropriate to specify the protective measures to be taken in both States involved,¹¹² another response was not supportive of specific requirements for the Central Authority itself to seek orders in these matters.¹¹³ Two responses highlighted that the list of specified measures should be non-exclusive.¹¹⁴

Two States considered that such provisions did not appear to be appropriate or needed.¹¹⁵ In particular, considering that the current flexibility of the Convention was appropriate, it must stay as broad as possible so as not to restrain the measures that the Central Authority could take to ensure a safe return.¹¹⁶ According to these views, such specific measures should therefore be left to domestic law.¹¹⁷ It was also emphasised

¹⁰⁰ Bahamas, Montenegro, New Zealand, Ukraine.

¹⁰¹ New Zealand.

¹⁰² Ukraine.

¹⁰³ Montenegro.

¹⁰⁴ The following entities have not mentioned any priorities in responding to this question: Burkina Faso, Colombia, Mexico, Montenegro, New Zealand, Ukraine, Zimbabwe.

¹⁰⁵ Bahamas, China (Hong Kong SAR).

¹⁰⁶ Australia, Chile, Dominican Republic, El Salvador, Switzerland.

¹⁰⁷ Chile.

¹⁰⁸ The following entities have not responded to or expressed views on this particular question: China, European Union.

¹⁰⁹ Australia, Burkina Faso, Chile, China (Hong Kong SAR), Dominican Republic, El Salvador, Mexico, Montenegro, Norway, Switzerland, Ukraine.

¹¹⁰ Mexico, Switzerland.

¹¹¹ Australia.

¹¹² El Salvador, Switzerland.

¹¹³ Australia.

¹¹⁴ Chile, Ukraine.

¹¹⁵ Bahamas, New Zealand.

¹¹⁶ Bahamas, Chile.

¹¹⁷ Ukraine.

that the main issue in the area of safe return related to the recognition and enforcement of the measures taken. This was already dealt with by the 1996 Convention and its ratification should therefore be supported.¹¹⁸

This was a high-priority issue for seven of the responses,¹¹⁹ with slightly more responses not mentioning any priority¹²⁰ or giving the issue a low priority.

4.2 Providing for co-operation between courts or between Central Authorities in securing the safe return of the child and removing obstacles to return¹²¹

Almost all of the responses considered that it would be useful to provide for co-operation between courts or between Central Authorities in securing the safe return of the child and removing obstacles to return.¹²² Such provisions were considered by States as needed in relation to co-operation between courts in particular,¹²³ as well as between immigration authorities¹²⁴ with a view to expediting proceedings.¹²⁵ At least one State suggested that such provisions should also apply to the safe return of the accompanying parent.¹²⁶

Two States were of the view that such provisions were not needed,¹²⁷ since Article 7 of the 1980 Convention already provided for co-operation between Central Authorities and competent authorities to secure the safe return of the child.¹²⁸

Most of the responses considered this to be a high priority issue,¹²⁹ although a small number of responses expressed no priority¹³⁰ or a low priority.¹³¹

4.3 Providing for an exchange of information following the return of the child¹³²

The idea of providing for an exchange of information following the return of the child was broadly supported.¹³³ Addressing the issue of the follow-up of the child's situation after the return more generally was seen as a way to strengthen trust between States.¹³⁴ In particular, such information was seen as helpful in ensuring that the child arrived safely, in considering psychological follow-up for the child,¹³⁵ as well as in verifying compliance with the measures taken for the safe return of the child by the courts of the State to which the child has been removed or with any extrajudicial agreements.¹³⁶ According to

¹¹⁸ New Zealand.

¹¹⁹ Australia, China (Hong Kong SAR), Dominican Republic, El Salvador, Montenegro, Norway, Switzerland.

¹²⁰ The following entities have not mentioned any priorities in responding to this question: Australia, Burkina Faso, Chile, Colombia, Mexico, Ukraine, Zimbabwe.

¹²¹ The following entities have not responded to or expressed views on this particular question: China, European Union.

¹²² Australia, Burkina Faso, Chile, China (Hong Kong SAR), Dominican Republic, El Salvador, Mexico, Montenegro, Norway, Switzerland, Ukraine, Zimbabwe.

¹²³ Chile.

¹²⁴ Mexico.

¹²⁵ Mexico, Zimbabwe.

¹²⁶ Chile.

¹²⁷ Bahamas, New Zealand.

¹²⁸ New Zealand.

¹²⁹ Chile, China (Hong Kong SAR), El Salvador, Montenegro, Norway, Switzerland.

¹³⁰ The following entities have not mentioned any priorities in responding to this question: Burkina Faso, Colombia, Dominican Republic, New Zealand, Ukraine, Zimbabwe.

¹³¹ Bahamas.

¹³² The following entities have not responded to or expressed views on this particular question: China, European Union, Norway, Zimbabwe.

¹³³ Burkina Faso, Chile, China (Hong Kong SAR), Dominican Republic, El Salvador, Montenegro, Switzerland, Ukraine.

¹³⁴ Switzerland.

¹³⁵ Burkina Faso.

¹³⁶ Australia, Chile.

two States, such feedback could permit the court ordering the return of the child to develop more efficient practices for the safe return of the child and better co-operation with the authorities of the State of the child's habitual residence.¹³⁷ In this regard, it has been suggested that there is a crucial need for the prompt taking of a decision on the merits by the courts of the State of the child's habitual residence after the return.¹³⁸

Switzerland is of the view that addressing more generally the issue of the follow-up of the child after the return is seen as a way to strengthen trust between States. In its response to Preliminary Document No 1 of November 2010, "Questionnaire concerning the practical operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* and the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children*" (hereinafter "the General Questionnaire"), Switzerland mentioned also that ensuring co-operation between Central Authorities is important after the return and that, for this purpose, recommendations are not enough and binding rules are necessary.¹³⁹

For three States, such provisions were not appropriate,¹⁴⁰ while one was undecided on this suggestion.¹⁴¹ As a matter of respect for the legal system of the State of habitual residence, it should be accepted that that State has the ability to protect the child on return.¹⁴² In addition, it was noted that such provisions would impose an unnecessary burden on the individual States.¹⁴³

Some of the responses gave the issue a high priority,¹⁴⁴ while the remainder gave it a medium priority,¹⁴⁵ low priority¹⁴⁶ or did not mention any.¹⁴⁷

It is worth recalling here that during the Special Commission in 2006, "[p]ositive consideration was given to the possibility of a Protocol to the 1980 Convention which would provide a clear legal framework for the taking of protective measures to secure the safe return of the child (and where necessary the accompanying parent). The potential value of a Protocol was recognised though not as an immediate priority."¹⁴⁸

Note by the Permanent Bureau

Role of the 1996 Convention in respect of the safe return of the child

As highlighted by some responses, the 1996 Convention can play an important role in ensuring the safe return of the child, in particular through the use of Article 11, which provides for a ground of jurisdiction for cases of urgency,¹⁴⁹ including in the context of return proceedings under the 1980 Convention.¹⁵⁰ The authorities that are seised with a return application may order under this ground measures of

¹³⁷ Australia, Switzerland.

¹³⁸ Switzerland.

¹³⁹ See the response from Switzerland to Question 6.8 of the General Questionnaire.

¹⁴⁰ Bahamas, Mexico, New Zealand.

¹⁴¹ Australia.

¹⁴² New Zealand.

¹⁴³ Australia, New Zealand.

¹⁴⁴ China (Hong Kong SAR), El Salvador, Montenegro.

¹⁴⁵ Switzerland.

¹⁴⁶ Bahamas, Mexico.

¹⁴⁷ The following entities have not mentioned any priorities in responding to this question: Australia, Burkina Faso, Chile, Colombia, Dominican Republic, New Zealand, Ukraine, Zimbabwe.

¹⁴⁸ See *op. cit.* note 9, Recommendation No 1.8.3.

¹⁴⁹ See the *Draft Practical Handbook on the operation of the 1996 Child Protection Convention*, Chapter 6, pp. 41-46.

¹⁵⁰ See *ibid.*, Chapter 13, pp. 87-92.

protection to help ensure the safe return of a child. The measures will lapse when the authorities of the requesting State take the measures that are required by the situation.¹⁵¹ Such measures taken in cases of urgency are entitled under the Convention to be recognised by operation of law and enforced in the State to which the child is to be returned. However, only measures of protection for the benefit of a child fall within the scope of the 1996 Convention; an order made to protect an accompanying parent, unless made also for the child's protection, would not come within the scope of the Convention.

Article 24 of the Convention, which allows for advance recognition of the urgent measures, may also be of use in the context of safe return in order to have an assurance that the urgent protective measure in relation to the child will be respected in the country of habitual residence.¹⁵²

The 1996 Convention may also permit to a certain extent an exchange of information following the return of the child through the use of Article 32. In cases where a child may be considered as having a substantial connection with the former requested State under the 1980 Convention return proceedings, the Central Authority of that State may request, with supporting reasons, the Central Authority of the State of habitual residence of the child to provide a report on the situation of the child following the return, or request a competent authority to consider the need for measures of protection.

5. Allegations of domestic violence

5.1 Providing guidance on the manner in which allegations of domestic violence should be handled in the context of proceedings for the return of a child¹⁵³

All the responses considered that providing guidance on the manner in which allegations of domestic violence should be handled in the context of proceedings for the return of a child would be useful.¹⁵⁴ One State was of the view that work on such possible provisions should involve specialists in the field of domestic violence.¹⁵⁵ Two other States considered as potentially beneficial that, where it is anticipated that the respondent may raise an allegation of domestic violence, the requesting State should provide information about any alleged domestic violence and about the laws and services available to protect and support the child and respondent were a return order to be made.¹⁵⁶ In particular, return should be ordered where the requesting State provides assurance of addressing those issues upon the child's return.¹⁵⁷ Others mentioned that it would be useful to promote a consistent and uniform approach on the issue,¹⁵⁸ especially regarding the construction of the exception to the return under Article 13 *b*) of the Convention (grave risk).¹⁵⁹ Consideration should also be given to the living conditions of the child after the return, which relate closely to the Article 13 *b*) exception.¹⁶⁰

¹⁵¹ Art. 11(2).

¹⁵² See *Draft Practical Handbook on the operation of the 1996 Child Protection Convention*, paras 10.7-10.11.

¹⁵³ The following entities have not responded to or expressed views on this particular question: China, European Union, Norway.

¹⁵⁴ Australia, Burkina Faso, Chile, China (Hong Kong SAR), Dominican Republic, El Salvador, Mexico, Montenegro, New Zealand, Ukraine, Zimbabwe.

¹⁵⁵ El Salvador.

¹⁵⁶ Australia, Mexico.

¹⁵⁷ Mexico (response to Question 9.3).

¹⁵⁸ Bahamas, Chile, Dominican Republic, Mexico, New Zealand.

¹⁵⁹ Chile, Dominican Republic, Mexico, New Zealand.

¹⁶⁰ Switzerland.

It was noted that the 1996 Convention could be of use to a certain extent,¹⁶¹ although it was also observed that there is no provision for jurisdiction to take protective measures in this context unless the measures are urgent.¹⁶² As a result, two States suggested that such provisions should also deal with the issue of the jurisdiction and powers of the authorities seised of a return application to take protective measures.¹⁶³

However, one State warned that careful consideration should be given to ensuring that such guidelines would not restrict the discretion of the judicial authorities.¹⁶⁴

Views on the priority of this issue¹⁶⁵ were evenly divided between those giving it low,¹⁶⁶ medium¹⁶⁷ and high priority.¹⁶⁸

Note by the Permanent Bureau

Role of the 1996 Convention in respect of allegations of domestic violence in the context of return proceedings under the 1980 Convention

The Permanent Bureau refers to Preliminary Document No 9 published for the attention of the Special Commission of June 2011 on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention. That document deals more closely with the issue of domestic and family violence and the Article 13(1) *b*) "grave risk" exception, including the interaction between the 1980 Convention and the 1996 Convention and domestic violence issues.¹⁶⁹

6. The views of the child

6.1 Further provisions concerning the right of the child to be heard and to have his or her views taken into account in the course of return proceedings¹⁷⁰

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

A majority¹⁷¹ considered that such provision may be of use to ensure that the child is heard in return proceedings, since this is not provided for in the Convention. In particular, it was suggested that the conditions for such hearing be addressed.¹⁷²

¹⁶¹ New Zealand.

¹⁶² Switzerland.

¹⁶³ Switzerland, Ukraine.

¹⁶⁴ Bahamas.

¹⁶⁵ The following entities have not mentioned any priorities in responding to this question: Australia, Burkina Faso, Chile, Colombia, Dominican Republic, Mexico, Ukraine, Zimbabwe.

¹⁶⁶ Bahamas, New Zealand.

¹⁶⁷ Montenegro, Switzerland.

¹⁶⁸ China (Hong Kong SAR), El Salvador.

¹⁶⁹ See "Domestic and Family Violence and the Article 13 'Grave Risk' Exception in the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*: A Reflection Paper", Prel. Doc. No 9 of May 2011, paras 128-132.

¹⁷⁰ The following entities have not responded to or expressed views on this particular question: China, European Union, Norway.

¹⁷¹ Burkina Faso, China (Hong Kong SAR), Dominican Republic, El Salvador, Mexico, Switzerland, Ukraine.

¹⁷² Burkina Faso, Ukraine.

In contrast, the remaining responses were more sceptical and would consider such provisions as unnecessary or redundant,¹⁷³ taking into account the relevant provisions of the *United Nations Convention on the Rights of the Child*¹⁷⁴ as well as of other regional instruments.¹⁷⁵ According to these views, better implementation of the *Convention on the Rights of the Child* should therefore be promoted first, as well as greater standardisation of practices.¹⁷⁶ This issue was also seen as a matter for each State to determine according to its own laws and procedures,¹⁷⁷ with two States noting that many States already had such provisions in place in their domestic legislation.¹⁷⁸

One State took the view that instead of dealing with the question of the hearing of the child, a possible protocol should address the issue of the representation of the child in return and access proceedings, especially by the use of a guardian *ad-litem* or similar institution.¹⁷⁹

The priorities expressed on this topic¹⁸⁰ reflected the views as to its usefulness, with one State expressing a medium priority¹⁸¹ and the remaining States balanced between low¹⁸² and high priority.¹⁸³

7. Enforcement of return orders

7.1 Explicit provisions concerning enforcement procedures (e.g., limiting legal challenges, promoting voluntary compliance)¹⁸⁴

For several responses, explicit provisions concerning enforcement procedures (e.g., limiting legal challenges, promoting voluntary compliance) could be of use,¹⁸⁵ especially regarding the limitation of challenges. Challenges were considered as one important obstacle to the enforcement of return orders, creating delays that could even in some cases lead to a change of decision concerning the return of the child considering the time that had elapsed and the adaptation of the child to a new environment.¹⁸⁶ One State considered that voluntary compliance may increase the risk of abductions and further litigation and therefore should not be promoted.¹⁸⁷

¹⁷³ Australia, Chile, Colombia, Montenegro, New Zealand, Zimbabwe.

¹⁷⁴ Art. 12: "1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

¹⁷⁵ Chile, Colombia, New Zealand.

¹⁷⁶ Australia, Ukraine.

¹⁷⁷ New Zealand.

¹⁷⁸ Australia, Bahamas.

¹⁷⁹ Chile.

¹⁸⁰ The following entities have not mentioned any priorities in responding to this question: Australia, Burkina Faso, Chile, Colombia, Mexico, Ukraine, Zimbabwe.

¹⁸¹ Dominican Republic.

¹⁸² Bahamas, Montenegro, New Zealand.

¹⁸³ China (Hong Kong SAR), El Salvador, Switzerland.

¹⁸⁴ The following entities have not responded to or expressed views on this particular question: China, European Union.

¹⁸⁵ Bahamas, Burkina Faso, Chile, China (Hong Kong SAR), Colombia, El Salvador, Mexico, Montenegro, Norway, Switzerland.

¹⁸⁶ Chile, Colombia, Mexico.

¹⁸⁷ Mexico.

For some States, such provisions were not considered necessary¹⁸⁸ and should be left to national procedure.¹⁸⁹ However, recommendations or Guides to Good Practice¹⁹⁰ were seen as particularly appropriate.¹⁹¹

A number of responses did not express views on priorities¹⁹² or considered it as low,¹⁹³ while the remainder considered such provisions of medium¹⁹⁴ or high priority.¹⁹⁵

8. Access / contact

8.1 Clarifying obligations under Article 21 of the Convention (e.g., the responsibilities of Central Authorities)¹⁹⁶

Several responses¹⁹⁷ expressed the need for clarifying obligations under Article 21 of the Convention (e.g., the responsibilities of Central Authorities) and to avoid delay in the treatment of access applications.¹⁹⁸ A number of responses highlighted that the provisions of the Convention were not clear enough and led to very different interpretations among Contracting States.¹⁹⁹ The difficulty to manage access proceedings was also highlighted, in particular due to the age limit of 16 years provided by the Convention, the recurring breach of orders and the significant legal costs with little benefit for the requesting parents or child.²⁰⁰ One suggestion for clarification was that a list of obligations under Article 21 be drafted.²⁰¹

At least for one State (New Zealand), such provisions were not considered as necessary, since Article 21 combined with Article 7 provided clear obligations. In this regard, it was observed that the Guide to Good Practice on Transfrontier Contact and the Country Profiles were very helpful tools in the implementation of Article 21.

All of the States that expressed a priority on this issue considered it medium²⁰² or high.²⁰³

¹⁸⁸ Australia, Dominican Republic, New Zealand, Ukraine.

¹⁸⁹ Ukraine.

¹⁹⁰ *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part I – Central Authority Practice* (Jordan Publishing, 2003), hereinafter, "Guide to Good Practice on Central Authority Practice"; *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part II – Implementing Measures* (Jordan Publishing, 2003); *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part III – Preventive Measures* (Jordan Publishing, 2003), hereinafter, "Guide to Good Practice on Preventive Measures"; *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part IV – Enforcement* (Jordan Publishing, 2010), hereinafter, "Guide to Good Practice on Enforcement". The Guides to Good Practice are available on the Hague Conference website at < www.hcch.net > under "Child Abduction Section" then "Guides to Good Practice".

¹⁹¹ New Zealand.

¹⁹² The following entities have not mentioned any priorities in responding to this question: Australia, Burkina Faso, Chile, Colombia, Dominican Republic, Mexico, New Zealand, Ukraine, Zimbabwe.

¹⁹³ Bahamas.

¹⁹⁴ Switzerland.

¹⁹⁵ China (Hong Kong SAR), El Salvador, Montenegro, Norway.

¹⁹⁶ The following entities have not responded to or expressed views on this particular question: China, European Union.

¹⁹⁷ Australia, Bahamas, Burkina Faso, Chile, China (Hong Kong SAR), Colombia, Dominican Republic, El Salvador, Mexico, Montenegro, Norway, Switzerland, Ukraine, Zimbabwe.

¹⁹⁸ Burkina Faso.

¹⁹⁹ Australia, Chile, Dominican Republic, Mexico, Montenegro, Switzerland, Ukraine.

²⁰⁰ Australia.

²⁰¹ Ukraine.

²⁰² Bahamas.

²⁰³ Chile, China (Hong Kong SAR), Dominican Republic, El Salvador, Mexico, Montenegro, Norway, Switzerland.

Note by the Permanent Bureau

Role of the 1996 Convention in respect of access / contact

It is worth recalling that, as far back as May 2000, the Special Commission on General Affairs and Policy of the Conference invited the Permanent Bureau to draft a report on "the desirability and potential usefulness of a protocol to the [1980] Convention that would, in a more satisfactory and detailed manner than Article 21 of that Convention, provide for the effective exercise of access / contact between children and their custodial and noncustodial parents in the context of international child abductions and parent relocations, and as an alternative to return requests."²⁰⁴ This led to a final report published in 2002.²⁰⁵

The Special Commission concluded in October 2002 on the matter of transfrontier access / contact that it was premature to begin work on a protocol to the 1980 Convention and that work should continue on a Guide to Good Practice and the formulation of General Principles.²⁰⁶ The Special Commission in 2006 gave broad endorsement to the general principles and good practices set out in Preliminary Document No 4 of October 2006, "Transfrontier access / contact – General principles and good practice"²⁰⁷ and recognised "the strength of arguments in favour of a Protocol to the 1980 Convention which might in particular clarify the obligations of States Parties under Article 21 and make clearer the distinction between 'rights of custody' and 'access rights'. However, it [was] agreed that priority should at this time be given to the efforts in relation to the implementation of the 1996 Convention."²⁰⁸ The General Principles and Guide to Good Practice were therefore drafted by the Permanent Bureau with the assistance of experts and published by the Hague Conference in 2008.²⁰⁹ This document takes fully into account the 1996 Convention, which augments the 1980 Convention in several important respects.²¹⁰

There is no need to repeat here what is set out in the General Principles and Guide to Practice. It is enough to recall, by way of summary, that in addition to the special provisions concerning access / contact in Article 35, the 1996 Convention establishes a structured and uniform regime for the exercise of jurisdiction to make decisions concerning access / contact, and contains provisions for the enforcement of such decisions.

8.2 Facilitating contact between the child and the left-behind parent during the return procedure²¹¹

All of the responses were in favour of further provisions to facilitate contact between the child and the left-behind parent during the return procedure.²¹² States pointed to a

²⁰⁴ See *op. cit.* note 4, p. 34, summary of Recommendations, Recommendation D.

²⁰⁵ *Op. cit.* note 5.

²⁰⁶ See *op. cit.* note 6, No 2 a) and c).

²⁰⁷ See *op. cit.* note 9, Recommendation No 1.7.2.

²⁰⁸ See, *ibid*, Recommendation No 1.7.3.

²⁰⁹ "Transfrontier Contact Concerning Children – General Principles and Guide to Good Practice", HCCH, 2008, available on the Hague Conference website at < www.hcch.net > under "Publications" then "Guides to Good Practice".

²¹⁰ *Ibid*, see in particular sections 3.2, 4.3 and 8.5.

²¹¹ The following entities have not responded to or expressed views on this particular question: China, European Union, Norway.

²¹² Australia, Bahamas, Chile, China (Hong Kong SAR), Dominican Republic, El Salvador, Mexico, Montenegro, Switzerland, Ukraine, New Zealand.

number of benefits in facilitating contact between the child and the left-behind parent during the return procedure. Contact would avoid further prejudice to the child, such as parental alienation, and facilitate amicable resolution where possible.²¹³ The lack of contact during the return proceedings increased tension to a point where an amicable solution was difficult to find. As a result, the promotion of contact during the procedure was seen as a key aspect in facilitating an amicable solution and responding to the concerns of the left-behind parent.²¹⁴

In particular, some States expressed the need for an effective mechanism to execute rights of access, and for considering clarification on jurisdiction rules, on which the Convention was silent.²¹⁵ One State argued that priority should be given to the prompt return of the child and better implementation of Article 11, but that further provisions might be necessary to facilitate contact when there was a delay in the return proceedings.²¹⁶

Some responses²¹⁷ considered this issue to be a high priority,²¹⁸ with only two considering it low priority.²¹⁹

8.3 Other

One State suggested that the protocol should contain provisions requiring Central Authorities, in co-operation with judicial authorities, to keep all judgments on record, so as to facilitate enforcement of orders in case of non-compliance by the parties.²²⁰

9. Definitions or refined definitions

9.1 Rights of custody²²¹

Approximately two thirds of the responses considered that it would be useful to provide for a refined definition of rights of custody.²²² However, opposite views were expressed concerning the way such rights should be further defined. Some supported the extension of the concept of custody to the broadest extent,²²³ including *patria potestas*, *kafala*²²⁴ and situations where a non-custodial parent's consent was required to change the child's place of residence.²²⁵ On the other hand, one State wanted to address the issue of considering *ne exeat* orders as custody rights under the Convention, taking into account the fact that two thirds of taking parents were primary care-givers, many of whom did not see any future in the country of their habitual residence.²²⁶ Accordingly, doubts have been expressed on the likelihood of reaching a fruitful consensus on such a definition.²²⁷

The remaining responses did not consider that a further definition of rights of custody would be appropriate.²²⁸ These responses highlighted that a definition is already provided

²¹³ Chile.

²¹⁴ Switzerland.

²¹⁵ Switzerland (in relation to jurisdiction), Ukraine (an effective mechanism).

²¹⁶ New Zealand.

²¹⁷ The following entities have not mentioned any priorities in responding to this question: Australia, Burkina Faso, Colombia, Dominican Republic, Ukraine, Zimbabwe.

²¹⁸ Chile, China (Hong Kong SAR), El Salvador, Mexico, Montenegro, Switzerland.

²¹⁹ Bahamas, New Zealand.

²²⁰ Zimbabwe.

²²¹ The following entities have not responded to or expressed views on this particular question: China, European Union, Norway.

²²² Burkina Faso, Chile, Colombia, El Salvador, Mexico, Montenegro, Ukraine, Switzerland.

²²³ Ukraine.

²²⁴ Mexico.

²²⁵ Colombia.

²²⁶ Switzerland.

²²⁷ El Salvador, New Zealand.

²²⁸ Australia, Bahamas, China (Hong Kong SAR), Dominican Republic, New Zealand.

for in the Convention, as strengthened by case law,²²⁹ and that the open wording is a significant advantage to enable flexibility and its operation in a great variety of legal systems.²³⁰ By providing that these rights are to be defined under the law of the State of habitual residence, the Convention explicitly leaves this issue to domestic law.²³¹ Communication between competent authorities on their respective law and case law regarding this concept was therefore encouraged.²³²

It has also been highlighted that any work on the definition of rights of custody would impact on the definition of rights of access which therefore would also need to be addressed.²³³

Four States considered that refining the definition was of high priority,²³⁴ while the Bahamas considered that this was of low priority, and the remaining States did not attach a particular level of priority.²³⁵

9.2 Habitual residence²³⁶

A majority of responses saw it as necessary to define habitual residence,²³⁷ including in relation to newborns.²³⁸ One State mentioned in particular that it would be worth clarifying the distinction between habitual residence and the one year requirement provided by Article 12.²³⁹

A few States expressed the view that provisions defining habitual residence would not be appropriate,²⁴⁰ highlighting that it would be difficult to define a fact-dependent concept²⁴¹ and that sufficient case law defining the concept already exists.²⁴² It was also noted that, in practice, though this issue may often be raised, it has not been the deciding feature in the majority of cases.²⁴³

The responses²⁴⁴ were split between those considering this issue high priority²⁴⁵ and those considering it low.²⁴⁶

9.3 Others

One State suggested the need to define the terms “authentication”, “certification”, “legalisation” and “originals”.²⁴⁷ The suggestion was also made to define the concepts of “grave risk” and “intolerable situation”.²⁴⁸

²²⁹ China (Hong Kong SAR), New Zealand.

²³⁰ Australia, Chile.

²³¹ Australia, Bahamas.

²³² New Zealand.

²³³ Australia.

²³⁴ Burkina Faso, El Salvador, Montenegro, Switzerland.

²³⁵ Australia, Chile, China (Hong Kong SAR), Colombia, Dominican Republic, Mexico, New Zealand, Norway, Ukraine, Zimbabwe.

²³⁶ The following entities have not responded to or expressed views on this particular question: China, European Union, Norway.

²³⁷ Burkina Faso, Chile, Colombia, Dominican Republic, Mexico, Montenegro, Ukraine.

²³⁸ Dominican Republic.

²³⁹ Colombia.

²⁴⁰ Australia, Bahamas, New Zealand.

²⁴¹ Australia.

²⁴² Australia, Bahamas, New Zealand.

²⁴³ New Zealand.

²⁴⁴ The following entities have not mentioned any priorities in responding to this question: Australia, Chile, Colombia, El Salvador, New Zealand, Mexico, Ukraine, Zimbabwe.

²⁴⁵ Burkina Faso, Colombia, Dominican Republic, Montenegro.

²⁴⁶ Bahamas, China (Hong Kong SAR), Switzerland.

²⁴⁷ Mexico.

²⁴⁸ Mexico.

10. International relocation of a child

10.1 Addressing the circumstances in which one parent may lawfully remove a child to live in a new country²⁴⁹

Several responses expressed the value of addressing in a possible protocol the circumstances in which one parent may lawfully remove a child to live in a new country,²⁵⁰ especially as a matter of preventing abduction.²⁵¹ In particular, it was suggested that any document granting relocation should include the destination and the length of the relocation.²⁵² In its response to the General Questionnaire, Switzerland also suggested that the principles adopted in the Declaration of Washington on International Family Relocation²⁵³ be dealt with by a protocol.²⁵⁴

However, several States emphasised the role of domestic law in determining the lawfulness of the relocation of the child²⁵⁵ and that a cautious approach should be given to the issue to avoid abuse of the provision to justify abduction.²⁵⁶

One State was undecided²⁵⁷ while approximately a third of the responses saw this matter as inappropriate for a protocol to the 1980 Convention.²⁵⁸ According to at least one State, this issue fell outside the scope of the 1980 Convention and should rather be dealt with under the 1996 Convention.²⁵⁹ Another State considered that such provisions would not be necessary if the concept of "rights of custody" was clear.²⁶⁰

Only five responses provided comments on the priority of the issue, with two responses considering it a high priority,²⁶¹ and three considering it a low priority.²⁶²

10.2 Promoting agreement between parents in respect of relocation²⁶³

Approximately two thirds of the responses agreed that it would be appropriate for a possible protocol to promote agreement between parents in respect of relocation.²⁶⁴ Agreement between parents was indeed supported by the Special Commission in 2006²⁶⁵ and would be faster, easier and more child friendly than judicial proceedings or other mechanisms.²⁶⁶ In this context, mediation has a significant preventive role to play.²⁶⁷

²⁴⁹ The following entities have not responded to or expressed views on this particular question: China, European Union.

²⁵⁰ Burkina Faso, China (Hong Kong SAR), Colombia, El Salvador, Montenegro, Zimbabwe.

²⁵¹ Chile.

²⁵² El Salvador.

²⁵³ Declaration adopted by the judges and experts participating in the International Judicial Conference on Cross-border Family Relocation that took place in Washington, DC from 23 to 25 March 2010, available on the Hague Conference website at < www.hcch.net > under "News and Events" then "2010".

²⁵⁴ See response from Switzerland to Question 19.4 of the General Questionnaire.

²⁵⁵ Bahamas, Norway, Ukraine.

²⁵⁶ Chile.

²⁵⁷ Bahamas.

²⁵⁸ Australia, Dominican Republic, Mexico, New Zealand, Norway, Ukraine.

²⁵⁹ New Zealand.

²⁶⁰ Switzerland.

²⁶¹ El Salvador, Montenegro.

²⁶² Bahamas, China (Hong Kong SAR), Norway.

²⁶³ The following entities have not responded to or expressed views on this particular question: China, El Salvador, European Union, Norway.

²⁶⁴ Australia, Burkina Faso, Chile, China (Hong Kong SAR), El Salvador, Montenegro, Switzerland.

²⁶⁵ Australia. See *op. cit.* note 9, Recommendation No 1.7.4.

²⁶⁶ Chile.

²⁶⁷ Australia.

One State was undecided, and emphasised the role of domestic law in promoting such agreement.²⁶⁸ Approximately a third of the responses saw such promotion inappropriate in a protocol to the 1980 Convention.²⁶⁹ Despite the desire to promote amicable solutions, it was considered that such a provision would go beyond the scope of the Convention²⁷⁰ and that it could be dealt with under the 1996 Convention.²⁷¹

This matter was assigned high priority in only one response,²⁷² with one further response giving it a medium priority²⁷³ and three others low.²⁷⁴

Note by the Permanent Bureau

Role of the 1996 Convention in respect of international relocation of children

As mentioned by some responses, the role of the 1996 Convention is relevant in the area of relocation in so far as it relates to jurisdiction, applicable law, and recognition and enforcement of foreign decisions, although it does not address the circumstances in which one parent may lawfully remove a child to live in a new State. First of all, under the 1996 Convention, general jurisdiction to make relocation orders belongs to the courts of the State in which the child is habitually resident²⁷⁵ and the law applicable under the Convention is, as a general principle,²⁷⁶ the law of that State, *i.e.* the law of the forum.

Except in cases of wrongful removal or retention, jurisdiction changes as the child's habitual residence changes.²⁷⁷ However, this does not mean that any order that has been made by the authorities of the State of origin granting relocation would lose any effect following the change in residence of the child. First of all, the measures that are taken in the State of origin, which at the time was the State of habitual residence of the child, will be recognised by operation of law in all other Contracting States,²⁷⁸ including the State of destination, if it is also a Contracting State to the 1996 Convention. The measures, including the provisions concerning relocation, will remain in force even if habitual residence changes, and will remain enforceable²⁷⁹ until modified, replaced or terminated by an authority in the child's new habitual residence. Thus in the absence of a further application to the court by the relocating parent, those original conditions of relocation remain in force. The measures which are declared enforceable in the State of destination are to be enforced as if they have been taken by the authorities in that State.²⁸⁰ In the case of relocation, this means that under the Convention the order made in the State of origin is entitled to be treated as if it were an order made in the State of destination.

²⁶⁸ Bahamas.

²⁶⁹ Dominican Republic, Mexico, New Zealand, Ukraine.

²⁷⁰ New Zealand.

²⁷¹ New Zealand.

²⁷² El Salvador.

²⁷³ Montenegro.

²⁷⁴ Bahamas, China (Hong Kong SAR), Mexico.

²⁷⁵ The Convention provides however for some flexibility in this regard. See Arts 15 and 16.

²⁷⁶ See also Art. 10 which gives temporary jurisdiction, subject *inter alia* to the parents' agreement, to a court exercising jurisdiction in divorce or similar proceedings.

²⁷⁷ Art. 5(2).

²⁷⁸ Art. 23(1).

²⁷⁹ Art. 26.

²⁸⁰ Art. 28.

In addition, Article 24 of the Convention allows for advance recognition of the relocation order and its contact conditions, which may be of use before relocation occurs to have assurance that the relocation order and its conditions will be respected in the country of destination.²⁸¹ Article 8, which deals with a possible transfer of jurisdiction, might also be of use in some situations.²⁸²

In case of issues surrounding “the effective exercise of rights of access”, Article 35 also provides a further basis for co-operation, and possibly direct communications, between judges in the two jurisdictions concerned in a relocation case.

Again, attention is drawn to the General Principles and Guide to Good Practice on Transfrontier Contact Concerning Children, which contains a more detailed explanation of the operation of the 1996 Convention in the context of relocation.²⁸³

11. Review of the operation of the 1980 Convention

11.1 Providing an explicit legal basis for convening the Special Commission to review the practical operation of the Convention and to encourage the development of good practices under the Convention²⁸⁴

Several responses were in favour of providing in a possible protocol an explicit legal basis for convening the Special Commission to review the practical operation of the Convention and to encourage the development of good practices under the Convention and participate to better implementation of the Convention.²⁸⁵ One State supported the strengthening of the mandate and the powers of the Special Commission.²⁸⁶

While one State was undecided on the issue,²⁸⁷ such provision was not seen as appropriate by two other States.²⁸⁸ While Special Commission meetings were viewed as very useful for promoting co-operation and consistent approaches,²⁸⁹ the existing legal basis for convening Special Commissions under Article 8 of the Statute of the Hague Conference was seen as sufficient.²⁹⁰ It was also pointed out that providing a different legal basis for Special Commissions on the 1980 Convention could call into question the standing of the recommendations from other Special Commissions.²⁹¹

The responses giving this issue a high priority²⁹² outnumbered those responses giving it a low priority.²⁹³

²⁸¹ See *Draft Practical Handbook on the operation of the 1996 Child Protection Convention*, paras 10.7-10.11.

²⁸² See *ibid*, Chapter 33, pp. 33-40.

²⁸³ *Op. cit.* note 209, Chapter 8, and in *ibid*, sections 13.22-13.26.

²⁸⁴ The following entities have not responded to or expressed views on this particular question: European Union, Norway, Zimbabwe.

²⁸⁵ Australia, Burkina Faso, Chile, China (Hong Kong SAR), Colombia, Dominican Republic, Mexico, Switzerland, Ukraine.

²⁸⁶ Ukraine.

²⁸⁷ Bahamas.

²⁸⁸ China, New Zealand.

²⁸⁹ New Zealand.

²⁹⁰ China, New Zealand.

²⁹¹ New Zealand.

²⁹² Chile, China (Hong Kong SAR), Dominican Republic, Mexico, Switzerland. The following entities have not mentioned any priorities in responding to this question: Australia, Bahamas, Burkina Faso, Chile, Colombia, El Salvador, New Zealand, Ukraine, Zimbabwe.

²⁹³ Montenegro.

11.2 Requiring the co-operation of Contracting States in gathering statistics and case law under the Convention and in completing country profiles²⁹⁴

Half of the responses considered that it would be useful to require through a protocol the co-operation of Contracting States in gathering statistics and case law under the Convention and in completing country profiles.²⁹⁵ Among those responses, it was noted however that this collection should be requested in a reasonable way and not create a burdensome task for Central Authorities²⁹⁶ and that clarifications would be needed on how and for what purpose the statistics are to be used and collected.²⁹⁷

The other half of the responses did not see a need for such provision²⁹⁸ while one State was undecided.²⁹⁹ In particular, the co-ordination between international and national tools for implementation of the Convention would need in-depth consideration.³⁰⁰ Nevertheless, and despite limited resources that could hinder the gathering of data, this practice was considered as necessary and one that should be supported.³⁰¹

There was a mix of views on the priority of the issue, with three responses giving it high priority,³⁰² one giving it medium priority,³⁰³ and one giving it low priority.³⁰⁴

11.3 Establishing a body competent to review States Parties' compliance with Convention obligations³⁰⁵

Several responses expressed the view that establishing a body competent to review States Parties' compliance with Convention obligations could serve a useful purpose,³⁰⁶ since there is currently no way of enforcing a State's compliance with the Convention.³⁰⁷ In particular, the committee established under the *Convention on the Rights of the Child* was suggested as a model for such a body.³⁰⁸ It was pointed out however that, in considering the establishment of such a body, careful consideration should be given to the impact on the budget of the Conference and on other Hague Conventions.³⁰⁹

A few States took the opposite approach, taking the view that the establishment of such a body would not be appropriate.³¹⁰ Such a proposal would require in-depth analysis,³¹¹ since it would give rise to many questions such as how the assessment would be carried out, whether the body would have enforcement capacity, and what the effect of an adverse review would be.³¹² It was also argued that the level of non-compliance with the

²⁹⁴ The following entities have not responded to or expressed views on this particular question: China, Colombia, El Salvador, European Union, Zimbabwe.

²⁹⁵ Burkina Faso, Chile, China (Hong Kong SAR), Mexico.

²⁹⁶ Australia.

²⁹⁷ Australia, Switzerland.

²⁹⁸ Dominican Republic, New Zealand, Ukraine.

²⁹⁹ Bahamas.

³⁰⁰ Ukraine.

³⁰¹ New Zealand.

³⁰² Chile, China (Hong Kong SAR), Mexico. The following entities have not mentioned any priorities in responding to this question: Australia, Burkina Faso, Colombia, Dominican Republic, El Salvador, Mexico, New Zealand, Ukraine, Zimbabwe.

³⁰³ Switzerland.

³⁰⁴ Montenegro.

³⁰⁵ The following entities have not responded to or expressed views on this particular question: El Salvador, European Union, Norway.

³⁰⁶ Burkina Faso, Chile, China (Hong Kong SAR), Dominican Republic, Mexico, Switzerland, Zimbabwe.

³⁰⁷ Chile, Switzerland.

³⁰⁸ Switzerland.

³⁰⁹ China.

³¹⁰ Bahamas, New Zealand.

³¹¹ China, Mexico.

³¹² Bahamas, Ukraine (undetermined).

Convention was not such as to necessitate establishing a review body.³¹³ According to these views, co-operation and communication between Central Authorities should instead be supported as well as the current activities of the Hague Conference (e.g., the judicial network, national and international meetings).³¹⁴

Those responses supporting the creation of such a body gave this issue a high priority.³¹⁵ A few responses gave this issue a low priority.³¹⁶

12. Others

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

Cost of procedures and funding of the return

The issue of reducing the cost of return and access proceedings under the Convention was suggested as a topic to be addressed in any discussions on a possible protocol.³¹⁷ It was observed in particular that in some States that had made a reservation to Article 26, the high cost of legal proceedings made it virtually impossible for applicants to start or pursue return procedures.³¹⁸

More specifically, it has been suggested that there is a need to include rules to cover the situation where applicants are impecunious and have no financial resources to fund the return of the child(ren).³¹⁹

Immigration issues

One State suggested that a protocol should contain provisions facilitating the granting of travel documents for children and parents, for the return itself as well as during the return proceedings and for the exercise of access rights.³²⁰

Another State considered it desirable to have provisions related to child's relocation in case of the deportation of a parent considering that there is no actual intent to abandon the place of habitual residence.³²¹

Burden of proof

One State suggested that a protocol should contain provisions clearly placing on the taking parent the burden of proving possible exceptions to the return.³²²

Role of requesting Central Authorities before sending out applications

One State suggested that provisions be envisaged to the effect that requesting Central

³¹³ New Zealand.

³¹⁴ New Zealand.

³¹⁵ Chile, China (Hong Kong SAR), Dominican Republic, Switzerland. The following entities have not mentioned any priorities in responding to this question: Australia, Burkina Faso, Colombia, El Salvador, Ukraine, Zimbabwe.

³¹⁶ Bahamas, Mexico, Montenegro, New Zealand.

³¹⁷ Colombia, Switzerland.

³¹⁸ Switzerland.

³¹⁹ Australia.

³²⁰ Switzerland.

³²¹ Mexico.

³²² Mexico.

Authorities verify that applications contain all factual and legal bases before transmission, in order for the requested Central Authorities to be in a position to act swiftly.³²³

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

The European Union reserved its position on this question. Of those responses that expressed a view, a majority expressed themselves to be in favour of embarking on the formal process of developing a protocol to the 1980 Convention.³²⁴

Responses that were undecided³²⁵ raised a number of points to be taken into account in taking such a decision. Firstly, it was noted that some perceived shortcomings of the 1980 Convention find their remedies in the 1996 Convention.³²⁶ However, there has not yet been sufficient experience with the 1996 Convention to evaluate its practical operation and its interplay with the 1980 Convention to decide whether any additional rules need to be set out in a protocol.³²⁷

In addition, and according to this view, it should be considered carefully whether the objectives of a possible protocol could be achieved equally by the use of "soft law" such as Special Commission recommendations and assistance from the Permanent Bureau. The practical impact of such soft law should therefore be evaluated when considering any additional rules.³²⁸

A concern was expressed that any future negotiations on a protocol to the 1980 Convention must not substantially alter the interpretation of existing key Convention articles, as that would risk undermining the carefully balanced consensus among the Contracting States in the area of parental child abduction that also forms the basis of some regional instruments.³²⁹

Two States (New Zealand and Norway) expressed opposition to starting such an exercise and reservations about the need and benefits of developing a protocol and the likelihood of success. It was suggested that most of the difficulties experienced in the operation of the 1980 Convention relate to the fact the already existing provisions are not being fulfilled, such as provisions on expeditious procedures.³³⁰ With a view to promoting common understanding of the Convention's objectives and provisions, it was felt that support for training of Central Authorities and judges as well as in drafting implementing legislation should be given priority over developing a protocol to the Convention.³³¹ Another main concern was that, as raised by the undecided responses, some topics suggested in the Questionnaire were dealt with by the 1996 Convention, which provides the legal framework for better protection of children.³³² It was therefore felt that support for ratification of the 1996 Convention should be pursued and promotion of international awareness should be strengthened.³³³ International relocation was one issue that, while seen as important, fell under the scope of the 1996 Convention.³³⁴

Some specific topics – mediation, expeditious procedures and enforcement of return orders – were seen as matters of domestic law, with support expressed for encouraging

³²³ Mexico.

³²⁴ Australia, Burkina Faso, Chile, China (Hong Kong SAR), Colombia, Dominican Republic, Mexico, Montenegro, Switzerland, Ukraine, Zimbabwe

³²⁵ Bahamas, European Union.

³²⁶ European Union.

³²⁷ European Union.

³²⁸ European Union.

³²⁹ European Union.

³³⁰ Norway.

³³¹ Norway.

³³² New Zealand.

³³³ New Zealand.

³³⁴ New Zealand.

States to review their domestic law and implementing measures to meet the objects of the Convention.³³⁵ However, there was support for the current work of the Permanent Bureau in providing further guidance on mediation and judicial communications.³³⁶

Concerns were raised that possible work on certain areas referred to in the Questionnaire would consist in harmonising substantive law, which departs from the Hague Conference's general approach of working for harmonisation of private international law.³³⁷

Regarding the level of priority³³⁸ that should be attached to this exercise, a number of responses expressed the view that a high priority should be given to this exercise³³⁹ while one considered it as low.³⁴⁰ Some responses also noted however that, as stated by the Council on General Affairs and Policy of the Hague Conference in 2009 and 2010,³⁴¹ the decision for the Hague Conference on Private International Law to embark on the formal process of developing a protocol to the 1980 Convention can ultimately only be taken by the Council.³⁴²

VI. VIEWS OF SOME INTERNATIONAL HAGUE NETWORK JUDGES AND ACADEMICS

A. General views on a protocol

Most respondents suggested a number of possible areas in which a protocol could be useful, and these are described further in this Chapter. However, two respondents expressed concern with the idea of developing a protocol and observed that the field of international family law was already complicated, with various international instruments as well as European regional instruments. According to their views, a protocol would further complicate matters, particularly if only adopted by some of the Parties to the Convention. With limited funding, staff and resources in national bodies, a better approach might be to focus resources on promoting better understanding and implementation of the Convention, and to await the development of the 1996 Convention, which would improve some problem areas such as access and safe return. Similarly, it was also suggested that issues such as the hearing of the child, the definition of rights of access and custody, the adoption of preventive measures and of measures to assure the safe return of the child should be the object of Guides to Guide Practice rather than of a protocol to the Convention.

From the literature surveyed, several authors considered that a protocol is needed and the suggested approaches are described further in this Chapter. Their general view is that a protocol would be beneficial to the operation of the Convention and so should be prioritised as far as concerns protective measures and cross-frontier access rights. Though the 1996 Convention contains rules on those issues, a protocol to the 1980 Convention could introduce more effective and specific mechanisms to deal with child abduction cases, facilitating the return of the child.

³³⁵ New Zealand.

³³⁶ New Zealand.

³³⁷ New Zealand.

³³⁸ See question 2, Part II of Prel. Doc. No 2, annexed to this Report.

³³⁹ Australia, Chile, China (Hong Kong SAR), Colombia, Dominican Republic, Mexico, Montenegro, Switzerland, Zimbabwe.

³⁴⁰ New Zealand.

³⁴¹ See *op. cit.* note 1, p. 2; *op. cit.* note 2, p. 2.

³⁴² European Union, Ukraine.

B. Components of a protocol

The following were identified in the responses from experts as areas in which the development of a protocol could be useful.

Preventing abductions

The view was expressed that more work needs to be done on preventing abductions, taking into consideration the profile of abductors and the reasons for abductions.

Jurisdiction

One response identified some provisions of the Convention that could be further clarified in a protocol. Under Article 12(3) of the Convention, the judicial or administrative authority can stay proceedings or dismiss the application for the return of the child if it has reason to believe that the child has been taken to another State. The response noted that no guidance was given on how an authority could come to such a belief, and suggested that a protocol could elaborate on this point.

It was also highlighted that, under Article 29 of the Convention, a person, institution or body claiming that there has been a breach of custody or access rights is not precluded from applying directly to the judicial or administrative authorities of a Contracting State. While the Explanatory Report to the Convention explains that this is intended to refer to the authorities of the State in which the child is located, the text of the provision contains no such limitation. Thus the response suggested that a protocol could clarify whether the courts of the State to which the child has been removed are intended to have exclusive jurisdiction.

Two responses also commented on the *status quo ante* principle of jurisdiction underlying the Convention. One response considered that Article 7 of the 1996 Convention was not sufficiently clear to clarify jurisdiction in abduction cases. On the other hand, another response criticised the *status quo ante* principle, arguing that the authorities in the requested and requesting States should co-operate more during return proceedings instead of staying any merits proceedings in the requested State.

Definition of rights of custody

Various responses suggested that a future protocol should clarify the definition of "rights of custody" (Art. 3). Two responses argued that the intention underlying the Convention when it was drafted was that the child's best interest was served by remaining in, or being restored to, the care of the primary care-giver. At present, however, the Convention was being used by non-custodial parents to seek the return of the child following abduction by the primary care-giver. The original intention of the Convention should be restored – parents with only access or visitation rights should not be treated as having rights of custody, such that only removal from a primary care-giver, or someone who spent equal time caring for the child, could give rise to return. Another response also pointed to a study showing that children abducted by their primary care-giver did not experience the care-giver as an "abducting parent", with distress being caused as much by the process for return as by the abduction.

Another response also considered that problems with the definition of access and custody rights were a key issue, particularly in civil law systems and in relation to *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 ("Brussels II a Regulation"). Another response remarked that while the varying interpretation of the concepts of access and custody in different jurisdictions was an obstacle for the uniform application of the Convention, a protocol was not the right tool to deal with the issue and a Guide to Good Practice would be preferable.

The debate on whether *ne exeat* rights should qualify as rights of custody under the Convention is also reflected in legal literature.³⁴³ Pointing out the need for a more uniform interpretation, one commentator suggested that the Permanent Bureau should deliver a statement to clarify that a parent who is entitled to give or deny consent to the child's removal from a country holds rights of custody under the Convention. This may be accomplished either through a protocol or a recommendation.³⁴⁴

Hearing the child's views

There was support for developing procedures for hearing the child's views, taking into account, in particular, the requirements of the *Convention on the Rights of the Child* (Art. 12). It was suggested that paragraph 2 of the Appendix to the Conclusions and Recommendations of the Fifth Meeting of the Special Commission could provide the basis for a specific provision.³⁴⁵ One response recommended in particular that a lawyer should be appointed to represent the child at every return hearing, and that an expert's report should be required whenever the abducting parent relied on Article 12 (child settled in its new environment) or Article 13 (grave risk to the child, or child objects to return) to oppose return. Another response suggested that this issue could be dealt with in a Guide to Good Practice.

A tendency to a broader interpretation of the need to hear the voice of the child of an appropriate age and maturity in return proceedings under the Convention can be observed, especially among States that are bound by the Brussels II a Regulation.

Domestic violence and safe return

A few responses identified the issue of ensuring safe return, particularly in cases of domestic violence, as a problem area. One submission noted that the typical situation involved abduction by a primary care-giver fleeing from an emotionally or physically desperate situation, and that the provision of better information and support services for parents in those situations could lead to a reduction in abductions.

There were, however, different approaches on ensuring safe return. One response proposed that a protocol should emphasise that the return of the child was to the State in which the child had been habitually resident, and not necessarily to the left-behind parent. Some responses suggested the need for enforceable protection measures in the State of return and support from social services, or a requirement for return orders to be discussed with the requesting State. Another, however, suggested that there should be explicit provisions to protect care-givers. Return orders that resulted in care-givers being

³⁴³ See for example E. Lynch, "Villegas Duran v. Arribada Beaumont: The Second Circuit Court's Interpretation of Custody Rights undermines the Purpose of The Hague Convention on the Civil Aspects of International Child Abduction", *Inter-American Law Review*, (2010) Vol. 41, No 2, pp. 221-245, and J. Jackson, "Interpreting Ne Exeat Rights as Rights of Custody: The United States Supreme Court's Change to Advance the Purposes of The Hague Convention on International Child Abduction", *Tulane Law Review*, (2009) Vol. 84, Issue 1, pp. 195-217.

³⁴⁴ See J. Jackson, *ibid.* p. 215.

³⁴⁵ The Appendix provides that the provisions of the 1980 Convention support measures to be taken to "provide an opportunity for the child to be heard, unless this appears inappropriate having regard to the child's age or degree of maturity", *op. cit.* note 9.

endangered or living in poverty or children being placed in foster care should be expressly prohibited. The latter response also suggested that undertakings should be expressly prohibited, as they resulted in the judge avoiding having to evaluate fully the circumstances to which the child and taking parent would be returning.

One response suggested that the provisions of a protocol could be based on relevant paragraphs in the Appendix to the Conclusions and Recommendations of the Fifth Meeting of the Special Commission.³⁴⁶ However a further response noted that these matters were dealt with under the 1996 Convention, and could also be covered in a Guide to Good Practice.

In legal literature, some commentators pointed to the lack of support, follow-up and post-return monitoring after the return of the child as a weak point in the system of implementation of the Convention.³⁴⁷

Some respondents shared the opinion that the safe return of the child could be assured by the use of protective and safety measures. In particular, a commentator argued that the protocol should include a provision formally acknowledging the validity of protective measures. The provision would be similar to Article 11(1) of the 1996 Convention but specifically tailored to fit the requirements of child abduction cases. Thus, in cases where the safety of the child or the accompanying parent raises concerns, the protocol should provide any court returning a child with the authority to attach protective measures to the return order.³⁴⁸ The introduction of a protocol dealing with protective measures is also encouraged by other commentators.³⁴⁹

As regards domestic violence, some authors argued that the current application of the Convention does not meet the needs of protection for domestic violence victims and their children fleeing to another country for their safety.³⁵⁰ In their views, the narrow interpretation of the grave risk defence under Article 13 *b*) impedes the use of this defence by domestic violence victims. As a solution, some commentators have suggested that a specific domestic violence defence should be added to the Convention.³⁵¹ Other scholars, more sceptical as regards the possibility of amending the Convention, recommended specific training for judges and legal practitioners in order to develop a broader interpretation of Article 13 *b*) which considers exposure to adult domestic

³⁴⁶ *Op. cit.* note 9.

³⁴⁷ See M. Freeman, "International Child Abduction: is it all Back to Normal Once the Child Returns Home?", *International Family Law*, (March 2011) pp. 39-51.

³⁴⁸ P. Ripley, "A Defense of the Established Approach to the Grave Risk Exception in The Hague Child Abduction Convention", *Journal of Private International Law*, (2008) Vol. 4, No 3, pp. 443-477, at p. 465.

³⁴⁹ See J. Moylan, "The Strengths and Weakness of the Hague Abduction Convention: a 'Child-Centric' view from an English Judge", *International Family Law*, (March 2010) pp. 78-85, at p. 84.

³⁵⁰ See for example C. Bruch, "The Unmet Needs of Domestic Violence Victims and Their Children in Hague Child Abduction Convention Cases", *Family Law Quarterly*, (2004) pp. 529-545; D.B. Finkley, "The Hague Convention on the Civil Aspects on International Childhood Abduction: Where are we, and Where Do We Go From Here?", *Hastings International and Comparative Law Review*, (2007) 30, pp. 505-519; M.H. Weiner, "Half-Truths, Mistakes, and Embarrassments: The United States Goes to the Fifth Meeting of the Special Commission to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction", *Utah Law Review*, (2008) 1, pp. 221-313. The question has been raised also in the study by J.L. Edleson, T. Lindhorst, G. Mehrotra, W. Vesneski, L. Lopez and S. Shetty, "Multiple perspectives on battered mothers and their children fleeing to the United States for safety: A study of Hague Convention cases (Final Report National Institute for Justice #2006-WG-BX-0006)", November 2010, available at < <http://www.haguedv.org/reports/finalreport.pdf> > (last consulted 10 May 2011).

³⁵¹ See M.H. Weiner, "International Child Abduction and the Escape from Domestic Violence", *Fordham Law Review*, (2000), pp. 593-698, and R. Hoegger, "What if She Leaves? Domestic Violence Cases under The Hague Convention and the Insufficiency of the Undertakings Remedy", *Berkeley Women's Law Journal*, (2003) pp. 181-212, who specified that, thanks to a domestic violence defence, "the abused victim would not have to return to the home country to litigate custody. First, the receiving country's court would assess whether there is credible evidence of domestic violence. If there is sufficient proof, the court could then adjudicate the custody matter, applying the applicable law of the receiving country".

violence as a form of “grave risk of harm” for the child.³⁵² Similarly, another commentator contended that, even in the absence of amendments to the Convention, national legislation and practice can “improve the Convention’s unintended adverse effects on victims of domestic violence”.³⁵³

Concerns about the harmful consequences of the rigid application of the mechanism provided by the Convention to mothers fleeing from domestic violence have also been expressed by an author of a non-State party, in relation to an eventual ratification of the Convention.³⁵⁴

Exceptions to the return of the child

One response suggested a better specification of the content of the exceptions to the return of the child, in order to narrow the margin of discretion for judges in the interpretation of the Convention. Another response took a different approach, arguing that the current exceptions were too rigid and that specific provision should be made allowing judges to consider more factors relating to the protection of the child.

Mediation and voluntary agreements³⁵⁵

A few responses suggested that a protocol should deal with issues relating to mediation. The numerous advantages of mediation were noted, including reducing the child’s distress and avoiding two potential relocations for the child, saving resources of States Parties, reducing delays, and empowering the parents. Mediations could be undertaken through video link or Skype to prevent both parents having to travel to one country.

An important issue related to mediation was which court(s) had jurisdiction to make orders confirming the parties’ settlement agreement. Two responses argued that the courts of the State to which the child had been abducted would have jurisdiction to make orders relating to the return, but not relating to general matters of parental responsibility; the parents would also need to turn to the courts of the State from which the child had been removed. A protocol could contain rules relating to jurisdiction to make orders for settlement agreements arising out of mediation.

In addition, one academic suggested that, in light of the emphasis on promoting agreement and voluntary return, the protocol should contain “additional rules to clarify the scope and enforceability of agreements reached by parents”. Where agreements are incorporated into a court order, they would be entitled to recognition under the 1996 Convention, if the relevant States were Parties to that Convention. Some agreements nevertheless continued to present difficulties, including agreements on the child’s habitual residence, agreements on the jurisdiction of courts, and more informal agreements made before a dispute arose such as those on travel with the child or relocation.

³⁵² S. Shetty, J. Edleson, “Adult Domestic Violence in Cases of International Parental Child Abduction”, *Violence Against Women*, Vol. 11, No 1, 2005, pp. 115-138, also available at < <http://www.haguedv.org> >.

³⁵³ D.B. Finkley, *op. cit.* 350, pp. 505-519.

³⁵⁴ M. Otani, “Child Abduction in Japan”, *International Family Law*, (2010), pp. 255-258.

³⁵⁵ Prel. Doc. No 5 of May 2011, “Draft Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. Part V – Mediation”, will be considered at the upcoming Special Commission in June, available on the Hague Conference website at < www.hcch.net > under “Work in Progress” then “Child Abduction”.

One response considered that, while important, rules relating to mediation should remain a matter of domestic legislation and should not be included in a protocol, although a Guide to Good Practice would be useful.

Liaison judges and judicial communications³⁵⁶

Several responses suggested that a protocol should provide a legal basis for the International Hague Network of Judges and the role of judicial communications and how and when they should be undertaken. One suggestion was that, for States Parties with comparable legal systems where abductions were common between the two countries, the hearing could be conducted via video link, with judges reaching a joint decision on the choice of forum and the substantive issue.

One response expressed concern that liaison judges should not violate certain procedural rights: that judges not assigned to the case should not take part in decision-making and that parties have the right to know and address any information given to the court in their case.

Article 15 of the Convention was also identified as an area in need of improvement. One response considered that Article 15 needed to be reconsidered, as it tended to delay rather than clarify the return process. Another response suggested that there was a need to improve uniformity in the operation of the provision, including to clarify who should issue the decision or determination (the Central Authority or judicial authorities), and what form the decision or determination should take. These issues could, however, be resolved by ensuring that States set out a procedure for issuing Article 15 decisions or determinations in their implementing legislation, rather than by a protocol.

In legal literature, it has also been suggested that better transnational procedures are needed to facilitate the use of Article 15 of the Convention.³⁵⁷

Amicus curiae

One response suggested that a protocol should provide rules for the intervention of Central Authorities in proceedings under the Convention, in particular to inform the court about the content of foreign laws and services available in the requesting State.

Facilitating travel for proceedings

The need for provisions facilitating travel for parents and the child during return proceedings, such as the grant of visas, was highlighted by one response.

Speed of proceedings

It has been suggested that provisions contained in the Brussels II a Regulation (e.g., Art. 11(3)) could provide a model for further provisions to provide more definitive timeframes to increase the speed of proceedings.

Cost of proceedings under the 1980 Convention

Some experts raised the issue of the lack of financial support to the applicants under the 1980 Convention in States that have made a reservation to Article 26. It is suggested

³⁵⁶ The Draft General Principles on Direct Judicial Communications, *op. cit.* note 65, will be considered at the Special Commission in June 2011.

³⁵⁷ See J. Moylan, *op. cit.* note 349, at p. 83.

that, in some of the States, left-behind parents cannot even consider starting return procedures or must abandon them to avoid ruinous costs.

It was also mentioned that while the Convention supports the principle of free, specialist legal representation for the applicant parent (Arts 7 g) and 26), the abducting parent must rely on legal aid or fund his / her own representation. It has been argued that the abducting parent should also be provided with financial support to ensure due process and to safeguard the abducting parent's right to a fair trial.

Access / Contact (Arts 7 f) and 21)

A few responses suggested that there should be clearer provisions relating to enforcement of access or contact. Two responses pointed to the need for specific rules to promote or ensure access during return proceedings. In particular, one response suggested that a protocol should provide for the obtaining of mirror orders relating to access rights. One response observed, however, that the main difficulties in this area were in the practical enforcement of access where the custodial parent blocked access, the child was persuaded not to want access, or the parents could not afford to travel. Furthermore, the 1996 Convention already contained rules on this.

In legal literature, Article 21 of the Convention, which deals with rights of access, has often been criticised as a weak provision. A commentator, considering that the 1996 Convention contains "much more potent Articles for the enforcement of access rights" but that the progress in ratifying that Convention is still slow, proposed extracting the provisions concerning access rights from the 1996 Convention and including them in a protocol to the 1980 Convention.³⁵⁸ On the contrary, another author suggested that if transfrontier contact is to be dealt with within a protocol, it should not be seeking to duplicate in a summary fashion the provisions of an existing larger instrument.³⁵⁹ Rather, the protocol should provide a procedural mechanism whereby the left-behind parent could renounce his or her rights to apply for the return of the child where an adequate assistance in securing and enforcing access rights in the State of refuge would be achieved.³⁶⁰

Reviewing the operation of the 1980 Convention

The Convention itself does not provide any mechanism for ensuring that Contracting States fulfil their obligations or for dealing with those States that fail to comply. One response pointed to the issue of non-compliance of the Contracting States as one of the main factors undermining the implementation of the Convention and suggested that there should be international rules relating to non-compliance.

An author similarly noted the problem of non-compliance with the Convention.³⁶¹ However, this led the author to support adoption of national initiatives aimed to impose punitive actions and sanctions on non-compliant countries.³⁶²

³⁵⁸ See P. Ripley, *op. cit.* note 348, at p. 468.

³⁵⁹ P. McEleavy "A protocol for the 1980 Hague Convention?", *International Family Law*, (March 2010), at p. 63.

³⁶⁰ *Ibid*, pp. 59-65, at p. 64.

³⁶¹ C. Bannon, "The Hague Convention on the Civil Aspects on international Child Abduction: the Need for Mechanisms to Address Noncompliance", *Boston College Third World Law Journal*, (2011), Vol. 31, pp. 129-162.

³⁶² In particular, the author referred to bills proposed to the United States Congress to address noncompliance of the States that, according to the annual report of the Department of State, are considered "non compliant" or demonstrating patterns of noncompliance". See C. Bannon, *ibid.*, pp. 150-162.

Relocation

Relocation was identified as another potential area for development by a protocol. Two responses noted that agreement on guidelines to be used in relocation might assist in preventing abductions. An approach suggested by one response was that a protocol could contain a judicial procedure combined with co-operation of authorities to make sure that authorisation to relocate is combined with satisfactory access granted to the left-behind parent. It was acknowledged, however, that there may be difficulties in reaching a global consensus on this issue.

One of the experts suggested that a protocol dealing with the issue of relocation should be autonomous and independent from the text of the Convention. States that were not Parties to the Convention should be given the possibility to ratify the protocol.

In legal debate, international family relocation is increasingly perceived as a focus of concern.³⁶³ Many authors, acknowledging the significantly divergent approaches adopted by the courts dealing with cross-border relocation cases in different jurisdictions,³⁶⁴ expressed the need for an international response to "standardise" the factors to be taken into account in granting an application for lawful removal.³⁶⁵

One commentator, in particular, considered that "highly restrictive approaches to relocation can adversely affect the operation of the Hague Child Abduction Convention", and suggested the adoption of an international common standard by a protocol available for ratification by States Party to the Convention.³⁶⁶

On the contrary, some other scholars considered the argument that international child abduction and relocation are strictly connected in this way as an overly simplistic analysis.³⁶⁷

VII. SOME GENERAL CONSIDERATIONS

A. The 1996 Convention

The mandate given by the Council on General Affairs and Policy of the Hague Conference in 2009 requires that this Report should "take into account the extent to which the

³⁶³ See *The Judges' Newsletter on International Child Protection*, "International Judicial Conference on Cross-Border Family Relocation, 23-25 March 2010, Washington, D.C." – Special Edition No 1, 2010, available on the Hague Conference website at < www.hcch.com > under "Publications" then "Judges' Newsletter".

³⁶⁴ See P. Boshier, "Have Judges Been Missing the Point and Allowing Relocation Too Readily?", in *International Family Law*, (November 2010), pp. 311-318; M. Thorpe, "Relocation: The Search for Common Principles", *International Family Law*, (September 2010) pp. 241-246; M. Freeman, "Relocation and the Child's Best Interests", *International Family Law*, (September 2010) pp. 247-254; M. Freeman, "International Child Abduction: is it all Back to Normal Once the Child Returns Home?", *op. cit.* note 347. For example, analysing trends within jurisdictions of the common law, Boshier found out three main different approaches to the issue. In some countries (New Zealand and Australia), where there is no presumption in favour of the primary caregiver, the primary caregiver's application to relocate is declined if the relocation could affect negatively the child's relationship with the other parents. In other jurisdictions (England and Wales), it is assumed that the welfare of the child depends on the welfare of the primary caregiver, thus, normally, a reasonable proposal for relocation of the primary caregiver is not rejected by the courts. Finally, in some States of the United States, a presumption in favour of the move by the custodial parents is applied.

³⁶⁵ See M. Thorpe, *ibid*, p. 245.

³⁶⁶ See M. Thorpe, *ibid*, p. 245. For a similar perspective, see also P. Ripley, *op. cit.* note 348.

³⁶⁷ See M. Freeman, "International Child Abduction: is it all Back to Normal Once the Child Returns Home", *op. cit.* note 347, pp. 50-51. See also P. Boshier, *op. cit.* note 364, at p. 316, where the author refers to the outcomes of the empirical analysis conducted by M. Taylor and M. Freeman, "International Research Evidence in Relocation: Past, Present and the Future", presented to The International Judicial Conference on Cross-border Family Relocation, 23-25 March 2010.

provisions of the 1996 Hague Convention supplement those of the 1980 Hague Convention".³⁶⁸

Many of the responses to the Questionnaire have themselves drawn attention to the relevance of the 1996 Convention, and some notes on specific aspects of the 1996 Convention have been included in this Report by the Permanent Bureau. In addition to this, attention is drawn to the revised draft Practical Handbook on the 1996 Convention,³⁶⁹ which contains detailed comments on the inter-action between the 1980 and 1996 Conventions and the way in which the latter may be seen to supplement the provisions of the former.³⁷⁰

On the one hand, it is clear that the 1996 Convention strengthens the 1980 Convention in particular by confirming the primary jurisdiction of the authorities of the State of the child's habitual residence, by reinforcing the provisions on access / contact, and by providing judges with a basis for making, and having recognised and enforced, urgent protection measures with a view to securing the safe return of the child. The 1996 Convention also contributes to a legal environment which encourages the use of mediation and other similar mechanisms, including in the context of child abduction.

On the other hand, there are some matters on which the provisions of the 1996 Convention do not provide assistance. Its provisions which relate to direct judicial communications are limited, and they do not provide a general legal basis for such communications within the abduction context. The potential of the 1996 Convention in the context of securing safe return is limited by the fact that it does not provide a basis for measures protecting an accompanying parent, except to the extent that judges are prepared to regard such measures as also urgent and necessary for the protection of the child.

In short, the 1996 Convention contains many provisions which are "auxiliary" to the 1980 Convention but it does not cover all the matters in respect of which auxiliary provisions have been suggested in the course of the Permanent Bureau's consultations.

A separate but related matter concerning the 1996 Convention is relevant here. If it is decided that work should begin on a protocol to the 1980 Convention, the impact of that work on the 1996 Convention will have to be considered. Already there are a number of areas in which there may be a direct interplay between the provisions of the two Conventions. The provisions on access / contact are the obvious example. At the same time, the provisions of each Convention are able to stand alone, and the two Conventions have their own sets of States Parties which intersect but are by no means coterminous.

As a matter of practicality, means will need to be found to ensure that any benefits brought about by a protocol for Parties to the 1980 Convention may be enjoyed equally by the Parties to the 1996 Convention, where they also relate to the provisions of that Convention. One way of achieving this would be by allowing all States and Regional Economic Integration Organisations (REIOs), whether or not they are Parties to the 1980

³⁶⁸ *Op. cit.* note 1.

³⁶⁹ "Revised draft Practical Handbook on the operation of the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*", Prel. Doc. No 4 of April 2011 for the attention of the Special Commission of June 2011 on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention, available on the Hague Conference website at < www.hcch.net > under "Work in Progress" then "Child Abduction".

³⁷⁰ Pp. 87-93.

Convention, to ratify or accede to the protocol.³⁷¹ Another more radical approach would be to make the new instrument a “stand-alone” Convention, rather than a protocol to the 1980 Convention.

B. The procedure for negotiating a protocol to the 1980 Convention

A protocol to amend or supplement the 1980 Convention would involve participation in the negotiations of all the existing States Parties to the 1980 Convention, as well as other Members of the Hague Conference on Private International Law. Such negotiations would “to the furthest extent possible” proceed on the basis of consensus.³⁷² The prospect of achieving consensus is thus a major consideration in assessing the feasibility of the project.

C. The effects of ratification or accession

The protocol would not bind a Party to the 1980 Convention which does not become a Party to the protocol. As between one State Party to the 1980 Convention which becomes Party to the protocol and one which does not, the unamended Convention would continue to apply.

The position under a protocol of States Parties to the 1980 Convention, between whom, by virtue of Article 38 of that Convention, the Convention has not yet entered into force, would also need to be considered.

The process of adherence to a protocol by individual States Parties to the 1980 Convention could take several years.

VIII. PRELIMINARY CONCLUSIONS

It is not possible at this stage to draw definitive conclusions from the consultations among States Parties and Members. There are many States Parties to the 1980 Convention that have not yet responded to the Questionnaire. At the same time, some States, and in particular the Members of the European Union, have reserved their positions, making it difficult to gauge the prospects of consensus both in relation to the general questions of whether negotiations on a protocol should begin, and in relation to the specific elements that might be included in a protocol. It is to be hoped that further responses to the Questionnaire will be received by the Permanent Bureau in the near future, which will make possible a Final Report on the consultations with clearer conclusions concerning the desirability and feasibility of a protocol to the 1980 Convention.

Some preliminary observations may at this stage be ventured. There is a fair amount of agreement among States Parties about the areas of practice surrounding the Convention which might be strengthened and improved. There is, for example, substantial support for further encouraging and facilitating the use of mediation in the context of return proceedings. There is similar support for encouraging the use of direct judicial communications especially in removing obstacles to the return of a child. Related to this, there is a general concern about “safe return”, *i.e.*, the need to ensure that any risks surrounding the return of a child, and where appropriate the accompanying parent, can be minimised.

There is a widely held view that more guidance is needed on the manner in which allegations of domestic violence should be handled in the context of return proceedings. At the same time there continue to be concerns about delays in return proceedings. Moreover, there is still a view that, despite improvements made by the 1996 Convention,

³⁷¹ See, for example, the *Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations*.

³⁷² See the Statute of the Hague Conference on Private International Law, Art. 8(2).

obligations arising under Article 21 in respect of contact / access still need further clarification.

The degree of consensus on these and other issues is in itself encouraging and suggests much common ground for improving the operation of the 1980 Convention. However, there remains the question of the appropriate means to bring about the improvements. On this matter there is less consensus, with some States convinced that binding rules are needed in the form of a protocol, while others place greater reliance, at least for the moment, on improvements generated by the development of good practices ("soft law"), by training and other supports for improved cross-border co-operation.

It will be important in the forthcoming discussions on the question of a protocol for some flexibility to be shown with regard to the question of the means by which improvements are to be made. The need for some legal systems to have binding rules where for others "soft law" is sufficient is a factor which need not lead to division but may call rather for a certain accommodation between States with different legal cultures.

Finally, the consultations suggest that, while there is significant support for clarification of some of the Convention's central concepts ("rights of custody", "habitual residence", etc.), there remains a wish to avoid amendments which might undermine the carefully balanced consensus achieved by the drafters of the Convention.

Further comments at this stage would be unhelpful, but the Permanent Bureau looks forward to providing States Parties and Member States with a final report, which will be circulated in ample time for it to be studied before the second part of the meeting of the Special Commission tentatively scheduled to take place at the beginning of 2012.

ANNEXE

DOCUMENT PRÉLIMINAIRE NO 2 DE DÉCEMBRE 2010 –

**« QUESTIONNAIRE RELATIF À L'OPPORTUNITÉ ET A LA FAISABILITÉ D'UN
PROTOCOLE À LA CONVENTION DE LA HAYE DU 25 OCTOBRE 1980 SUR LES
ASPECTS CIVILS DE L'ENLÈVEMENT INTERNATIONAL D'ENFANTS »**

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ANNEX

PRELIMINARY DOCUMENT NO 2 OF DECEMBER 2010 –

**"QUESTIONNAIRE ON THE DESIRABILITY AND FEASIBILITY OF A
PROTOCOL TO THE *HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE
CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION*"**

INTRODUCTION TO THE QUESTIONNAIRE

Mandate

The Council on General Affairs and Policy of the Hague Conference, at its meeting of April 2009

"... authorised the Permanent Bureau to engage in preliminary consultations concerning the desirability and feasibility of a protocol to the [*Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*] containing auxiliary rules to improve the operation of the Convention".¹

Furthermore, the Council on General Affairs and Policy requested the Permanent Bureau to prepare a report on the consultations for the Special Commission on the practical operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (hereinafter "the 1980 Hague Convention" or "the Convention") in 2011. The Council stated that the Report should also "take into account the extent to which the provisions of the 1996 Hague Convention supplement those of the 1980 Hague Convention."²

To assist in the preparation of this report, in April 2010 the Council on General Affairs and Policy authorised the Permanent Bureau to circulate a Questionnaire "to States Parties and Members later this year seeking general views as well as views in relation to the specific elements which might form part of a protocol"³ to the 1980 Hague Convention.

Objectives of the Questionnaire

In accordance with the mandate, this Questionnaire seeks general views on the desirability and feasibility of a protocol, as well as views on specific matters which might form part of a protocol.

It is not the objective of this Questionnaire to gather opinions on the precise rules or language that should appear in a protocol, but rather on the broad elements which might be covered by a protocol, as well as the feasibility of achieving consensus on those matters.⁴ The purpose at this stage is to gather opinions which will inform the discussion on whether the Hague Conference should embark on the formal process of developing a protocol. This is a matter which will be discussed in the Special Commission, but the final decision lies with the Council on General Affairs and Policy.⁵

The Permanent Bureau intends, except where expressly asked not to do so, to place all replies to the Questionnaire on the Hague Conference website (< www.hcch.net >).

¹ "Conclusions and Recommendations of the Council on General Affairs and Policy of the Conference (31 March – 2 April 2009)", p. 2, available on the Hague Conference website at < www.hcch.net > under "Work in Progress" then "General Affairs".

² *Ibid.* References to "the 1996 Hague Convention" are to the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*.

³ "Conclusions and Recommendations of the Council on General Affairs and Policy of the Conference (7-9 April 2010)", p. 2, available on the Hague Conference website at < www.hcch.net > under "Work in Progress" then "General Affairs".

⁴ In relation to the issue of feasibility it is relevant to point out that as a minimum all the States Parties to the 1980 Hague Convention, as well as all Members of the Hague Conference on Private International Law, would be invited to participate in the negotiations regarding a protocol, and that such negotiations would proceed to the furthest extent possible on a consensus basis.

⁵ See notes 1 and 3.

We would appreciate that replies be sent to the Permanent Bureau, if possible by e-mail, to < secretariat@hcch.net > no later than **15 March 2011**.

Any queries concerning this Questionnaire should be addressed to William Duncan, Deputy Secretary General (< wd@hcch.nl >) and / or Nicolas Sauvage, Legal Officer (< ns@hcch.nl >).

**QUESTIONNAIRE ON THE DESIRABILITY AND FEASIBILITY OF A
PROTOCOL TO THE HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE
CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION**

Name of State:

For follow-up purposes

Name of contact person:

Name of Authority / Office:

Telephone number:

E-mail address:

PART I - POSSIBLE COMPONENTS OF A PROTOCOL

You are asked to give your views on each of the following possible components of a protocol. In doing so it would be helpful if you could indicate **for each of them**:

- Whether, in your opinion, provisions on these matters could serve a useful purpose; and
- How high a priority you would attach to the development of provisions on these matters.

1. Mediation, conciliation and other similar means to promote the amicable resolution of cases under the Convention⁶

- 1.1 Expressly authorising the use of mediation / conciliation / other means to promote the amicable resolution of cases under the Convention
- 1.2 Addressing issues of substance and procedure surrounding the use of such means (*e.g.*, concerning matters such as confidentiality, the interrelationship between the mediation process and return proceedings, or the recognition and enforcement of agreements resulting from mediation)
- 1.3 Others

⁶ See Arts 7(2) c) and 10 of the Convention. See also Part III of the "Conclusions and Recommendations of the Fifth Meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* and the practical implementation of the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* (30 October – 9 November 2006)" (hereinafter referred to as the "Conclusions and Recommendations of the 2006 Special Commission"), available on the Hague Conference website at < www.hcch.net > under "Child Abduction Section" then "Special Commission meetings". A Guide to Good Practice on Mediation under the 1980 Hague Child Abduction Convention is currently under preparation. A draft Guide will be submitted to the Special Commission meeting in June 2011. A "Preliminary Outline of the Guide to Good Practice on Mediation under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (for consultation with the expert group)" is available on the Hague Conference website at < www.hcch.net > under "Child Abduction Section" then "Cross-border family mediation". Co-ordination would be needed between the work on the Guide to Good Practice and the development of provisions on mediation in a protocol.

2. Direct judicial communications⁷

- 2.1 Providing a legal basis for the use of direct cross-border judicial communications in respect of cases brought under the Convention
- 2.2 Defining the scope of such direct communications and setting out procedural safeguards for their use
- 2.3 Providing an explicit basis for the International Hague Network of Judges
- 2.4 Others

3. Expeditious procedures⁸

- 3.1 More explicit or stricter provisions to ensure that return applications are processed rapidly at first instance, on appeal and at the enforcement stage
- 3.2 Others

4. The safe return of the child⁹

- 4.1 Specifying measures (e.g., interim protective orders) which may be taken by either of the States involved to help ensure the safe return of the child and, where appropriate, an accompanying parent
- 4.2 Providing for co-operation between courts or between Central Authorities in securing the safe return of the child and removing obstacles to return
- 4.3 Providing for an exchange of information following the return of the child
- 4.4 Others

⁷ See Part VI of the Conclusions and Recommendations of the 2006 Special Commission, *ibid.*

⁸ See Arts 2 and 11 of the Convention. See also para. 1.4.1 of the Conclusions and Recommendations of the 2006 Special Commission (*ibid.*), and Hague Conference on Private International Law, *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part II – Implementing Measures*, Jordan Publishing Limited, 2003, para. 6.3, available on the Hague Conference website at < www.hcch.net > under “Child Abduction Section” then “Guides to Good Practice”.

⁹ See Art. 7(2) *h*) of the Convention. See also para. 1.1.12, Part VIII and Appendix of the Conclusions and Recommendations of the 2006 Special Commission (*op. cit.* note 6). See also Hague Conference on Private International Law, *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part I – Central Authority Practice*, Jordan Publishing Limited, 2003, in particular para. 6.3, available on the Hague Conference website at *ibid.* See also relevant provisions of the 1996 Hague Convention.

5. Allegations of domestic violence

- 5.1 Providing guidance on the manner in which such allegations should be handled in the context of proceedings for the return of a child
- 5.2 Others

6. The views of the child¹⁰

- 6.1 Further provisions concerning the right of the child to be heard and to have his or her views taken into account in the course of return proceedings
- 6.2 Others

7. Enforcement of return orders¹¹

- 7.1 Explicit provisions concerning enforcement procedures (e.g., limiting legal challenges, promoting voluntary compliance)
- 7.2 Others

8. Access / contact¹²

- 8.1 Clarifying obligations under Article 21 of the Convention (e.g., the responsibilities of Central Authorities)
- 8.2 Facilitating contact between the child and the left-behind parent during the return procedure
- 8.3 Others

¹⁰ See Art. 13(2) of the Convention. See also Appendix of the Conclusions and Recommendations of the 2006 Special Commission (*op. cit.* note 6).

¹¹ See Part V of the Conclusions and Recommendations of the 2006 Special Commission (*op. cit.* note 6), and Hague Conference on Private International Law, *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part IV – Enforcement*, Bristol, Family Law (Jordan Publishing Limited), 2010, available on the Hague Conference website at *ibid.*

¹² See Arts 7(2) *f* and 21 of the Convention. See also paras 1.7.1 to 1.7.3 of the Conclusions and Recommendations of the 2006 Special Commission (*op. cit.* note 6), and Hague Conference on Private International Law, *Transfrontier Contact Concerning Children – General Principles and Guide to Good Practice*, Jordan Publishing Limited, 2008, available on the Hague Conference website at *ibid.* See also relevant provisions of the 1996 Hague Convention.

9. Definitions or refined definitions¹³

- 9.1 Rights of custody
- 9.2 Habitual residence
- 9.3 Others

10. International relocation of a child¹⁴

- 10.1 Addressing the circumstances in which one parent may lawfully remove a child to live in a new country
- 10.2 Promoting agreement between parents in respect of relocation
- 10.3 Others

11. Reviewing of the operation of the Convention¹⁵

- 11.1 Providing an explicit legal basis for convening the Special Commission to review the practical operation of the Convention and to encourage the development of good practices under the Convention
- 11.2 Requiring the co-operation of Contracting States in gathering statistics and case law under the Convention and in completing country profiles
- 11.3 Establishing a body competent to review States Parties' compliance with Convention obligations
- 11.4 Others

12. Others

Please indicate any other matters which you think should be considered for inclusion in a protocol containing auxiliary rules to improve the operation of the Convention.

¹³ See in particular Art. 5 of the Convention. See also para. 1.7.3 of the Conclusions and Recommendations of the 2006 Special Commission (*op. cit.* note 6), and paras 8 to 11 of the "Overall Conclusions of the Special Commission of October 1989 on the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*", available on the Hague Conference website at < www.hcch.net > under "Child Abduction Section" then "Special Commission meetings".

¹⁴ See paras 1.7.4 and 1.7.5 of the Conclusions and Recommendations of the 2006 Special Commission (*op. cit.* note 6).

¹⁵ Five meetings of the Special Commission to review the practical operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* have been held, in 1989, 1993, 1997, 2001, and 2006. This Questionnaire is drawn up for the attention of the Sixth Meeting which is planned for June 2011 (first part) and January 2012 (second part). Conclusions and Recommendations of previous meetings are available on the Hague Conference website at < www.hcch.net > under "Child Abduction Section" then "Special Commission meetings".

PART II – THE GENERAL QUESTION

1. In the light of your views given above, and considering that decisions will need to be taken by consensus, should the Hague Conference on Private International Law embark on the formal process of developing a protocol to the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*? (Please indicate if you are in favour, opposed or undecided.)
2. If in favour, what level of priority would you attach to this exercise?