

\* **Special Focus** \*

## Report of Part I of the Sixth Meeting of the Special Commission on the Practical Operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention, 1-10 June 2011

drawn up by the Permanent Bureau

### 1. Introduction

Part I of the Sixth Meeting of the Special Commission on the Practical Operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (the 1980 Convention) and the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* (the 1996 Convention) took place in The Hague from 1 to 10 June 2011. In preparation for the Special Commission, it was decided that the subjects to be covered were too extensive for one meeting. The exceptional decision was made for the first time to hold the Special Commission in two separate parts, with the second part taking place seven months after the first part, from 25 to 31 January 2012.

The 2011 Special Commission (Part I), one of the largest ever, included more than 300 experts and observers from 69 States and 19 organisations. 58 of the States were Contracting States to the 1980 Convention and 27 of the States were Contracting States to the 1996 Convention. Five States were invited to participate in the meeting as observers, namely Indonesia, Namibia, Oman, Saudi Arabia and Zambia. Representatives of three inter-governmental organisations and 16 non-governmental organisations also participated as observers. Among the participants were 55 judges from 30 States, including 25 members of the International Hague Network of Judges from 21 States.

Ten Preliminary Documents drawn up by the Permanent Bureau were prepared for the Special Commission. Six Information Documents were also made available to participants of the Special Commission. These documents are all available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under "Work in Progress" then "Child Abduction".

The agenda of the Special Commission followed a number of specific themes which stimulated a detailed discussion on a range of current issues. The highlights of those discussions are mentioned in this Report. The Special Commission themes were:

- Statistical survey of 2008 cases under the 1980 Hague Convention
- Co-operation among Central Authorities under the 1980

Convention and the processing of applications for return by Central Authorities

- Applications concerning access/contact under the 1980 and 1996 Conventions
- Domestic violence allegations and return proceedings<sup>1</sup>
- Judicial Networking and Direct Judicial Communications
- Consideration of the revised Draft Practical Handbook on the operation of the 1996 Convention
- Consideration of the Draft Guide to Good Practice on Mediation under the 1980 Convention

The Permanent Bureau provided an update as to the status of the 1980 and 1996 Conventions. There were nine new Contracting States to the 1980 Convention since 2006,<sup>2</sup> bringing the total to 85. There were 19 new Contracting States to the 1996 Convention,<sup>3</sup> bringing the total to 32, with a further seven signatory States (the remaining six European Union Member States and the United States of America). Several States had indicated in the replies to Questionnaire No 1 that they were considering implementation of the 1996 Convention.<sup>4</sup>

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

Part II of the Special Commission will take place in The Hague from 25 January to 31 January 2012. It will consider the desirability and feasibility of specific areas of further work in connection with the 1980 and 1996 Conventions. It will also consider international family relocation, the future of the "Malta Process" and the role of the Permanent Bureau in supporting and monitoring the 1980 and 1996 Hague Conventions.

### 2. Statistical survey of 2008 cases under the 1980 Hague Convention

The following is taken from the "Statistical analysis of applications made in 2008 under the 1980 Hague Convention: Part I – Global Report", drawn up by Professor Nigel Lowe of the Cardiff University Law School and which was presented at the Special Commission.<sup>5</sup>

#### Notes

<sup>1</sup> Including the endorsement of the 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.

<sup>2</sup> Albania, Andorra, Armenia, Gabon, Morocco, San Marino, Seychelles and Singapore.

<sup>3</sup> Armenia, Austria, Croatia, Cyprus, Dominican Republic, Finland, France, Germany, Ireland, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Spain, Switzerland, Ukraine and Uruguay.

<sup>4</sup> See the responses to Question 14.2 of Questionnaire No 1. State responses to Questionnaire No 1 are compiled in Prel. Doc. No 10. The response of South Africa to Questionnaire No 1 was received after the compilation was prepared, and is available separately on the website of the Hague Conference.

<sup>5</sup> The full report is available on the website of the Hague Conference at [www.hcch.net](http://www.hcch.net) under "Child Abduction Section" then "Special Commissions", Preliminary Document Nos 8A, 8B and 8C.

### a. Background and rationale of the project

This is the third statistical survey into the operation of the *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (hereinafter, “the Convention”) conducted by the Centre of International Family Law Studies at Cardiff University Law School (under the Directorship of Professor Nigel Lowe) in collaboration with the Permanent Bureau of the Hague Conference on Private International Law. The majority of funding for this project was generously provided by the International Centre for Missing and Exploited Children (ICMEC) with contributions from the Permanent Bureau and Cardiff Law School.

This survey concerns applications made in 2008. Previous surveys concerned those made in 1999 and 2003. As with the previous surveys, accuracy was sought by approaching each Contracting State for their own data.

### b. Executive Summary

Replies have been received from 60<sup>6</sup> of the 81 States party to the Convention in 2008.<sup>7</sup> Detailed information has been provided on a total of 2,321 incoming applications, comprising 1,961 return and 360 access applications. Compared with the 2003 survey, there has been a 45% increase in return applications and a 40% increase in access applications.

#### i. Return Applications

The report shows that 69% of taking persons were mothers, a figure that has stayed virtually constant throughout past surveys at 68% in 2003 and 69% in 1999. In 2008, 28% of the taking persons were fathers and the remaining 3% comprised grandparents, institutions or other relatives.

Where the information was available (in 17% of the applications which constituted a sample size of 335 applications), the large majority (72%) of taking persons were the “primary carer” of the child.<sup>8</sup> Where the taking person was the mother, this figure was 88% but only 36% where the taking person was the father. 60% of taking persons had the same nationality as the requested State.<sup>9</sup> Proportionately more taking fathers (64%) had the same nationality as the requested State compared with 59% of mothers.

#### Notes

<sup>6</sup> Albania, Argentina, Armenia, Australia, Austria, Belgium, Brazil, Bulgaria, Canada, Chile, China - Hong Kong and Macau, Colombia, Costa Rica, Croatia, Cyprus, Czech Republic, Denmark, Dominican Republic, Ecuador, El Salvador, Estonia, Finland, France, Georgia, Germany, Greece, Guatemala, Hungary, Honduras, Iceland, Ireland, Israel, Italy, Latvia, Lithuania, Luxembourg, Malta, Mexico, Monaco, Montenegro, Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Poland, Portugal, Romania, Serbia, Slovenia, South Africa, Spain, Sweden, Switzerland, Turkey, UK (England and Wales, Northern Ireland, Scotland, Isle of Man, Bermuda, Cayman Islands, Falkland Islands), Ukraine, Uruguay and USA.

<sup>7</sup> There are now 87 Contracting States following the accession of Andorra, Morocco, Gabon, Guinea, Singapore and the Russian Federation.

<sup>8</sup> 40% were the sole primary carer of the child and 33% were a joint primary carer. These figures have been rounded up.

<sup>9</sup> Either their sole nationality was the same as the requested State or they held dual or triple citizenship, one of which was the nationality of the requested State.

A total of 2,705 children were involved in the 1,961 return applications, making an average of 1.38 children per application. A large majority of applications (69%) involved a single child and there were close to equal numbers of boys and girls with 51% of children being male and 49% female. The average age of a child involved in a return application was 6.4 years, but 6.0 years if taken by a mother and 7.2 years if by a father.

The overall return rate was 46%,<sup>10</sup> lower than the 51% recorded in 2003 and 50% in 1999, and comprised 19% voluntary returns and 27% judicial returns. A further 3% of applications concluded with access being agreed or ordered, the same proportion as in 2003. The report shows that 15% of applications ended in a judicial refusal (higher than 13% in 2003 and 11% in 1999), 18% were withdrawn (15% in 2003 and 14% in 1999) and the number of applications still pending at the cut off date of 30th June 2010 was 8%, lower than the 9% in 2003 and 1999. There was a decrease in the rate of rejection by the Central Authorities under Article 27 with 5% of applications ending in this way in 2008 compared with 6% in 2003 and 11% in 1999.

In 2008, 44% of applications were decided in court (44% in 2003 and 43% in 1999). 61% of court decisions resulted in a judicial return order being made compared with 66% in 2003 and 74% in 1999.

In 2008, 286 judicial refusals were recorded with reasons available in 262 of these applications. A further 7 applications involved a judicial refusal (4 applications ending with different outcomes for different children and 3 in more than one outcome) giving a total of 269 applications with reasons for refusal. The figures are complicated because 18% of the applications were refused for more than one reason. If all the reasons relied upon are combined then, following the pattern in previous surveys, the most frequently cited reason for refusal was Article 13(1) *b*) (27%). 17% of the applications were refused following the child’s objections, 15% because the child was not found to be habitually resident in the Requesting State and 13% citing Article 12.

In 2008, applications generally took longer to reach a conclusion. The average time taken to reach a decision of judicial return was 166 days (125 days in 2003 and 107 in 1999) and a judicial refusal took an average of 286 days to conclude (233 in 2003 and 147 in 1999). For applications resulting in a voluntary return the average time taken was 121 days (98 days in 2003 and 84 days in 1999).

11% of all applications in 2008 involved an appeal (24% of all applications that went to court). Looking only at the applications that did not involve an appeal and the first instance decisions of those that did, the average time taken to reach a decision was 168 days. By contrast, applications that went on appeal took an average of 324 days to conclude.

The 2008 survey also inquired for the first time into how the

#### Note

<sup>10</sup> Calculated excluding applications where the outcome was missing.

time taken to reach a decision was split between the Central Authorities and the courts. On average, a Central Authority held the case for 76 days before sending it to court and the court then took 153 days to dispose of it.

#### *ii. Access Applications*

In the 360 access applications made under Article 21 in 2008,<sup>11</sup> 79% involved a mother as the respondent (79% in 2003 and 86% in 1999). 50% of respondents had the same nationality as the requested State as against 53% in 2003 and 40% in 1999. As in 2003, 72% of applications concerned a single child and a total of 477 children were involved making an average of 1.33 children per application. The overall average age of a child involved was 7.8 years (7.9 years in 2003), 7.5 years if the respondent was the mother and 9.1 years if it was the father of the child. As with previous studies there was an even distribution of boys and girls with 49% being female and 51% male.

The overall rate at which access was agreed or ordered fell to 21% from 33% in 2003 and 43% in 1999. 31% of applications were withdrawn (22% in 2003 and 26% in 1999), 17% pending and 14% ending in reasons described as 'other'. 13% were rejected and 3% refused.

Access applications took much longer to resolve than return applications and the average time taken to reach a final outcome was 309 days if there was a voluntary agreement for access, 357 days if access was judicially ordered and 276 days if access was refused. 73% of applications that were judicially determined and 74% of voluntary settlements took over 6 months to resolve.

### **3. Domestic and family violence allegations and return proceedings**

The Special Commission considered Preliminary Document No 9 concerning domestic and family violence in the context of return proceedings. Domestic violence issues have increasingly been raised as an area of concern in case law, in *The Judges' Newsletter on International Child Protection* and academic literature.<sup>12</sup> While the subject had been discussed at previous Special Commission meetings, discussion had focused only on the issue of securing safe return.

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

#### Notes

<sup>11</sup> Not including return applications where the outcome was that access was agreed or judicially granted.

<sup>12</sup> At the meeting of the Council on General Affairs and Policy in 2011, the topic of the recognition of foreign civil protection orders made, for example, in the context of domestic violence cases, was added to the Agenda of the Conference: see para. 23 of the Conclusions and Recommendations adopted by the Council.

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

#### **a. Existing research and evidentiary aspects**

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

The Permanent Bureau indicated that its research presented in Preliminary Document No 9 was limited, given the length of the document. Also, it was reported that there is general statistical uncertainty as to the number of global Hague proceedings which involve domestic violence issues, due to the lack of focused research in this area. However, States' responses to Questionnaire I provided some useful information.<sup>13</sup> Sixteen States noted that the issue of domestic violence or abuse was "often raised" under Article 13(1) b) as an exception to the return of the child. Two States noted that allegations were raised "very often" and three States reported that such allegations were raised "quite often". A further three States specified that such allegations were regularly raised, but constituted a minority of cases, or that the seriousness of the allegations varied. Five States reported that such allegations were raised on occasion, sometimes or "sporadically", a further five States reported that such allegations were not often raised, and six reported having no cases of this type to date. Some States gave specific figures of cases where such allegations were raised: the United Kingdom (England and Wales) reported that these allegations were present in less than 20% of return cases, while Germany noted that academic studies of the applications handled by the Central Authority showed that between 10% and 14% of its Article 13(1) b) cases had involved allegations of domestic violence or child abuse.

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

#### Note

<sup>13</sup> See responses to Question 5.1.

proceedings and adequate attention to the safety and well being of an affected parent and child.

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

The experts agreed that domestic violence is a complex issue that requires a focused approach. Many confirmed that there was an increase in the number of cases alleging domestic violence as an exception to return under Article 13(1) *b*) and that domestic violence claims were always or should always be taken very seriously.

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

In the case of a return application where allegations of domestic violence have been raised, a number of experts indicated that the role of the court of the requested State is to assess, in light of the availability and efficacy of measures of protection in the requesting State and the evidence on file, the risk that the return of the child would expose him or her (and the accompanying parent, most often the primary care-giver) to physical or psychological harm or otherwise place the child in an intolerable situation. Recognising that a mere allegation of domestic violence was insufficient to justify the application of the Article 13(1) *b*) exception, experts indicated that the level of proof required should be substantial and appropriate in order to determine that the allegations are well-founded.

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

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

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

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

The Permanent Bureau highlighted the important role of Central Authorities (Art. 7(2) *h*) of the 1980 Convention), the International Hague Network of Judges and the information in the completed Country Profiles<sup>14</sup> in organising protective measures to enable safe return under the 1980 Convention.

The Permanent Bureau also drew attention to some of the key issues in this area. First, in relation to voluntary undertakings, research to date showed that undertakings were commonly not respected where they were not enforceable or where there was no monitoring or follow-up after return. It suggested discussion on how undertakings should be employed and how undertakings and / or conditions to return could be made enforceable. Second, it noted access to justice issues that could arise after the return of the taking parent, relating to fair custody proceedings and financial resources to participate in custody proceedings.<sup>15</sup> Third, the Permanent Bureau raised the issue of follow-up and information exchange after return: that is, what follow-up should be pursued after return, and whether Central Authorities, judges, or other authorities in the requested or requesting State should be responsible.

Finally, in relation to the 1996 Convention, the Permanent Bureau explained that there was nothing to prevent judges from considering harm to parents when determining whether, and if so which, necessary protective measures should be made in respect of a child in “cases of urgency” (see Art. 11).<sup>16</sup> Other provisions in the 1996 Convention could also be helpful, for example Articles 30(2) and 34 with respect to information exchange.

Several experts raised the issue of the need for a proper legal framework for the recognition and enforcement of protective measures in international cross-border situations so that a

#### Notes

<sup>14</sup> See Question 11.2.

<sup>15</sup> See also the discussion below at paras 136-141 on access to justice following return.

<sup>16</sup> Art. 1 of the 1996 Convention makes clear that any protective measures taken must be measures “directed to the protection of the person or property of the child”.

return order under the 1980 Convention would not give rise to a new flight.<sup>17</sup> A number of experts noted that the 1996 Convention may provide some useful tools in this respect. The importance of securing legal effect for the measures of protection in all the States concerned was emphasised. The importance of mutual trust and support between the authorities concerned was also underscored in relation to the availability and efficacy of the measures of protection put in place to protect the child and the accompanying parent upon return.

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

### c. Promoting consistency in judicial practices

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

## 4. Consideration of the draft Practical Handbook to the 1996 Convention<sup>18</sup>

The Permanent Bureau recalled the Conclusions and Recommendations of the 2006 Special Commission,<sup>19</sup> inviting the Permanent Bureau to begin work on the preparation of a practical guide to the 1996 Convention. The Permanent Bureau explained that an Implementation Checklist had been prepared and a first draft of the Handbook circulated in 2009.

Reminding the experts of the non-binding nature of the Handbook, the Permanent Bureau welcomed the experts' comments on Preliminary Document No 4, particularly on the structure and the substance of the Handbook, including any errors or omissions, as well as on the follow-up steps to be taken. The Permanent Bureau emphasised that the Handbook was of a different nature from the Guides to Good Practice. It was intended to be a practical tool for Central Authorities, judges, lawyers and other child protection officials. Through the use of plain language, relevant and comprehensive case examples and simple flowcharts, it is hoped that the Handbook will promote a clear understanding of how the Convention is intended to operate in practice, thereby ensuring that good practice under the Convention is

established and fostered from the outset in Contracting States.

The structure of the Handbook follows that of the 1996 Convention. It discusses the objectives and scope of application of the Convention, questions of jurisdiction, applicable law, recognition and enforcement as well as the role of Central Authorities and co-operation mechanisms. The Handbook also addresses certain special topics in separate chapters, amongst others international child abduction, access/contact, mediation and kafala and cross-border placements.

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

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

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

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

## 5. Judicial networking and direct judicial communications<sup>20</sup>

### Development of the International Hague Network of Judges

The Permanent Bureau introduced the development of the International Hague Network of Judges, noting that the Network had more than tripled in the last five years, with more than 60 judges from 45 States. It also noted that a

#### Notes

<sup>17</sup> See *supra* note 71.

<sup>18</sup> Prel. Doc. No 4.

<sup>19</sup> See Conclusions and Recommendations 2.2 – 2.3.

#### Note

<sup>20</sup> Prel. Docs Nos 3 A, 3 B, 3 C.

number of States such as Argentina, Canada and Mexico had implemented national networks, and in one State, the Netherlands, there had been legislation to create an office of the liaison judges. The Permanent Bureau made reference to the joint conference of the European Commission and the Hague Conference on Direct Judicial Communications on Family Law Matters and the Development of Judicial Networks, held in Brussels (15-16 January 2009) and the time devoted by the Permanent Bureau to consolidating the network.

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

Those States in which direct judicial communications have taken place as a result of the designation of a judge to the Hague Network found this practice to be successful in assisting with the safe return of children. For example, an expert from Australia noted that direct judicial communications were used to obtain mirror orders or complementary orders to ensure safe return, to obtain evidence, including oral evidence, and to discuss the timetable of matters in the other jurisdiction.<sup>21</sup> Several experts commented that the Network judges helped to resolve applications more quickly.

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

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

Some experts voiced concerns about protecting the confidentiality of information when judges exchanged information concerning specific cases. A few experts thought

that the independence of judges could also be jeopardised. In this respect, a number of experts did not consider this an issue since judges respect the principles of judicial independence and impartiality and protect confidential information. All experts agreed on the need to protect the independence of judges.

#### Discussion of principles: emerging rules

The discussion of the Principles was based on Preliminary Document No 3A of March 2011 entitled “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”. The Permanent Bureau explained the methodology followed in developing these principles, emphasising the methodical and careful approach that had been taken. The Principles which, in the first place, had been prepared with the assistance of a group of experts mainly constituted of judges, were each the subject of specific discussion by each of the panels of the joint conference co-organised by the European Commission and the Hague Conference that took place in Brussels in January 2009. The Permanent Bureau indicated that the emerging rules and principles could be separated and that States could choose the relevant parts and adapt them to their needs. Concerning the discussion of emerging rules, the Permanent Bureau noted that they reflect current practice and take into account the Conclusions and Recommendations of previous Special Commissions as well as the conclusions of other judicial seminars.<sup>22</sup> It outlined comments received on the draft emerging rules from various States.<sup>23</sup>

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

Some experts were concerned with the wording of paragraphs 1.2 to 1.6 of Preliminary Document No 3 A, in particular paragraph 1.3, in relation to the appointment of judges to the Network. To account for the differences between national laws, it was suggested to avoid limiting the possibility to designate judges to the Hague Network by judicial authorities when, in some States, this is the role of the executive.

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

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

#### Note

<sup>21</sup> See also responses to Question 6.4 of Questionnaire I for further examples.

#### Notes

<sup>22</sup> See further Prel. Doc. No 3 B and Info. Doc. No 3.

<sup>23</sup> See further Prel. Doc. No 3 C.

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

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

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

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

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

The Permanent Bureau stated that the responses to the Country Profiles<sup>24</sup> revealed some confusion as to what was meant by a “legal basis” for direct judicial communications. The Permanent Bureau explained that the question was whether a judge could undertake direct judicial communications in the absence of a domestic law which provides for such communication. It suggested that work may be necessary on the determination of a legal basis within jurisdictions and invited experts to restrict their comments on their domestic rules.

#### Notes

<sup>24</sup> Question 21.

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

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

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

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

An expert from Switzerland introduced Working Document No 4,<sup>25</sup> indicating that it was based upon co-operation and reciprocity. He indicated that States may need a legal basis at the international level to allow direct judicial communications.

The Permanent Bureau proposed a preliminary discussion among experts on the merits of developing a legal basis for direct judicial communications. It indicated that sometimes reform of domestic law found its source in international Conventions. In this respect, it referred to powers of attorney (“powers of representation”) as they are provided for in the 2000 Hague Adults Convention, without which States such as Switzerland, France and Italy might not have legislated domestically to give life to that concept. Leaving aside the

#### Notes

<sup>25</sup> It provided:  
“The Special Commission promotes, without prejudice to more specific principles, further examination of legal rules, in view of a later approval, as follows –

1. Each Contracting State shall designate one or more judges having as task to promote co-operation amongst the competent authorities of that State and to facilitate communications and the exchange of information between these authorities and those of other Contracting States in situations to which the Convention applies.
2. The Central Authority or the judicial authority, seized with the request for return, may, if the situation of the child and the review of the conditions of its return so require, request any authority of another Contracting State which has relevant information to communicate such information.
3. The Central Authority or the judicial authority, seized with the request for return, may in individual cases, if the situation of the child and the review of the conditions of its return so require, take measures for the protection of the child upon its return and enquire in particular about the measures which the competent authorities of the State where the child was habitually resident immediately before its removal or retention can take for the protection of the child upon its return.”

specific question of what form a legal basis should take, it proposed the following provision as an example: “Where appropriate, a competent authority may engage in direct judicial communications with regard to a specific case with another competent authority of another State”.

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

With regard to the Swiss proposal, many experts felt that its consideration was premature and preferred that this discussion be postponed to Part II of the Special Commission. The discussion concluded by highlighting that experts recognised the need to explore the development of binding rules, but they almost unanimously felt that the consideration of binding rules would be premature. For this reason, it was more appropriate to discuss the matter during Part II of the Special Commission. The Chair noted that the need for a legal framework enabling direct judicial communications appeared to be largely a domestic legal matter.

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

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

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

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

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

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

The Permanent Bureau recalled the importance of *The Judges' Newsletter*, which is distributed in 115 States to over 800 recipients, including judges, Central Authorities and practitioners, in promoting the development of international judicial communication and co-operation. The Permanent Bureau thanked States for their positive feedback on the Newsletter in the responses to Questionnaire I, and noted the suggestions for improvement.<sup>26</sup> It also highlighted some recent improvements to the format of the printed and electronic versions of the Newsletter, and noted that attempts would be made for the Newsletter to be published more regularly.

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

Finally, the Permanent Bureau noted that, since 2009, the Permanent Bureau had not published a Spanish version of the Judges' Newsletter due to insufficient funding for translation. The Permanent Bureau stressed that it would be pleased to receive support from States in order to resume translation in Spanish of the Judges' Newsletter, but noted that contributors could nevertheless continue to send their submissions to the Permanent Bureau in Spanish for translation into English and French. An expert from Uruguay reported that the Newsletter was widely used in his State, and emphasised the importance of it being made available in Spanish.

#### Judicial conferences and meetings

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

The Special Commission highlighted the importance of interdisciplinary judicial conferences and seminars and emphasised their importance for the effective functioning of the 1980 and 1996 Conventions.<sup>27</sup>

#### Notes

<sup>26</sup> Responses to Question 22.1(b).

<sup>27</sup> See Conclusions and Recommendations Nos 2.10 and 5.6 of the 2001 Special Commission, Conclusion and Recommendation No 1.6.6 of the 2006 Special Commission and Conclusion and Recommendation No 75 of the 2011 Special Commission (Part I).



## 6. Consideration of the draft Guide to Good Practice on Mediation under the 1980 Convention

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

The Permanent Bureau introduced the Draft Guide to Good Practice on Mediation and explained that the areas covered by the Draft Guide include mediator training, access to mediation and mediation principles/models/methods, having regard to specific challenges that arise in the context of 1980 Convention proceedings, such as the need for expeditious procedures, involvement of multiple legal systems, and cultural, religious and language differences.

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

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

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

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

### Specialised training for mediation

The Permanent Bureau presented information about specialised training for mediation in international child abduction cases and safeguarding the quality of mediation. It noted that of 37 responses to the Country Profiles,<sup>28</sup> 11 States indicated that they had legislation dealing with mediator accreditation, and 11 States indicated that they regulated the qualifications of mediators. The overall picture was that standards for mediator qualification and accreditation were not widely legislated, especially in relation to specialised training for family and international disputes. The Permanent Bureau indicated that, given the different approaches taken by States this was not yet an area where

consensus could be found. Therefore, the Guide sought only to give guidance as to the result of initiatives to promote specialised training, without prejudice as to how this would be achieved (legislation, accreditation, etc.).

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

The question of safeguarding the quality of mediation and possibly establishing common standards for evaluating the quality of mediation was also raised.

### Access to mediation and assessment of suitability

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

The Permanent Bureau drew attention to the suggestion made in the Guide that States should consider making legal aid available for mediation in child abduction cases. Of the 37 Country Profiles<sup>29</sup> analysed, only five States indicated that legal assistance was available for mediation, and five indicated that free mediation services were available. However, the Permanent Bureau noted the distinction between providing assistance for legal proceedings and for mediation, having regard to Article 26 of the 1980 Convention, as well as the fact that mediation costs could differ immensely among States.

The Permanent Bureau drew attention to the importance of the child's involvement when it came to rendering the agreement legally binding in some jurisdictions. It noted that out of 37 Country Profiles,<sup>30</sup> two States indicated that mediators must see the child and two States responded that the views of the child must be taken into consideration. Eleven States replied that it was up to the discretion of the mediator. In three States, the child's views played no role. All experts insisted on taking into account the interests of the child and, in particular, the need to reassure the child.

### Mediation and domestic violence

The Permanent Bureau presented Chapter 10 on mediation and accusations of domestic violence. It recalled that the draft Guide did not take a position on whether cases with domestic violence issues were suitable for mediation, but would draw attention to safeguards to take into consideration where mediation was

#### Notes

<sup>29</sup> Question 19.3.

<sup>30</sup> Question 19.4.

#### Note

<sup>28</sup> Question 19.2.

considered appropriate. The Permanent Bureau indicated that mediation should never put the vulnerable party in danger and added that this objective could be achieved by the presence of experienced and specially trained mediators.

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

### Rendering the mediated agreement legally binding

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

### Issues of jurisdiction and applicable law

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

### The Principles on Mediation developed within the Malta Process<sup>31</sup>

The Permanent Bureau referred to the Malta Conferences, held in 2004, 2006 and 2009, involving judges and government officials from a balanced representation of both Contracting and non-Contracting States to the 1980 Convention which sought to increase knowledge and understanding of how different legal systems operated as well as identifying ways of administrative and legal co-operation. Following a proposal of Canada at the Third Malta Conference in 2009, the Council on General Affairs and Policy had given the Permanent Bureau the mandate to establish a Working Party on Mediation in the context of the Malta Process, promoting the development of mediation structures to help resolve cross-border disputes

#### Note

<sup>31</sup> Prel. Doc. No 6. Further information about the Malta Process is available on the Hague Conference website.

concerning custody of, or contact with, children. It was noted that the development of mediation services did not replace the development of legal structures, but was seen as complementary.

The Working Party was formed of experts from six Contracting States to the 1980 Convention<sup>32</sup> and six non-Contracting States,<sup>33</sup> as well as two independent experts, and was co-chaired by Ms Thomsen (Canada) and Mr Justice Jillani (Pakistan). The Permanent Bureau referred to Preliminary Document No 6 and gave further details as to the Working Party's activities and steps towards the finalisation, in November 2010, of the "Principles for the establishment of mediation structures in the context of the Malta Process" and the "Explanatory memorandum".

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

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

The Permanent Bureau recognised that the development of the Principles and the establishment of the Central Contact Points was only the first step. It referred to the Conclusions and Recommendations of the Council on General Affairs and Policy of April 2011 mandating the Working Party to: (i) facilitate wider acceptance and implementation of the Principles as a basic framework for the process; and, (ii) consider further elaboration of the Principles.<sup>34</sup> It noted that the Working Party would report on the progress of its work at the next Council on General Affairs and Policy.

## 7. Conclusions and Recommendations

### Adopted by the Special Commission

#### *New Contracting States*

- 1 The Special Commission welcomes the increase since the 2006 meeting of the Special Commission in the number of Contracting States to the 1980<sup>35</sup> (from 76 to 85) and 1996<sup>36</sup> (from 13 to 32) Conventions, and the

#### Notes

<sup>32</sup> Australia, Canada, France, Germany, the United Kingdom and the United States of America.

<sup>33</sup> Egypt, India, Jordan, Malaysia, Morocco and Pakistan. Morocco has since become a State Party to the 1980 Convention.

<sup>34</sup> Conclusion and Recommendation No 8, Council on General Affairs and Policy, 5-7 April 2011.

<sup>35</sup> The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (hereinafter, the "1980 Convention").

<sup>36</sup> The Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (hereinafter, the "1996 Convention").

number of States that have signed the 1996 Convention (7). The Special Commission calls for further efforts by Contracting States and by the Permanent Bureau, through the provision of advice and assistance, to extend the numbers of Contracting States.

- 2 The Special Commission suggests that an informal network of experts be arranged to discuss strategies and challenges in the implementation of the 1996 Convention, for example, with discussion carried out through a "listserv" (a closed electronic list).

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

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

"rapid communication" set out in the *Guide to Good Practice under the 1980 Convention – Part I – Central Authority Practice*.

- 8 The Special Commission welcomes the increasing co-operation within States between the member(s) of the International Hague Network of Judges and the relevant Central Authority resulting in the enhanced operation of the Convention.
- 9 Central Authorities are encouraged to continue to provide information about and facilitate direct judicial communications including, where there are language difficulties, through the provision of translation services where appropriate and feasible.
- 10 The Special Commission encourages the Permanent Bureau to continue its work (described in Info. Doc. No 4) to modernise the recommended Request for Return model form and to create a form that can be completed electronically. The Special Commission also requests that the Permanent Bureau continue its work to develop a standardised Request for Access form. The Special Commission requests that different language versions of the forms should be made available on the Hague Conference website. For this purpose, States are encouraged to provide the Permanent Bureau with translations.
- 11 The Special Commission encourages the use of information technology with a view to increasing the speed of communication and improving networking between Central Authorities.
- 12 The requesting Central Authority should ensure that the application is complete. In addition to the essential supporting documents, it is recommended that any other complementary information that may facilitate the assessment and resolution of the case accompany the application.
- 13 The Special Commission re-emphasises that –
  - (a) in exercising their functions with regard to the acceptance of applications, Central Authorities should respect the fact that evaluation of factual and legal issues (such as habitual residence, the existence of rights of custody, or allegations of domestic violence) is, in general, a matter for the court or other competent authority deciding upon the return application;
  - (b) the discretion of a Central Authority under Article 27 to reject an application when it is manifest that the requirements of the Convention are not fulfilled or that the application is otherwise not well founded should be exercised with extreme caution. The requested Central Authority should not reject an application solely on the basis that additional documents or information are needed. Close co-operation between the Central Authorities involved to ensure that relevant documentation is made available

and to avoid undue delay in processing applications is strongly encouraged. The requested Central Authority may ask the requestor to provide these additional documents or information. If the requestor does not do so within a reasonable period specified by the requested Central Authority, the requested Central Authority may decide that it will no longer process the application.

- 14 Central Authorities are reminded of the valuable role that the Country Profile for the 1980 Convention is expected to play in enabling States to exchange information on the requirements for making an application in the requested State.
- 15 The Special Commission welcomes the increasingly important role played by Central Authorities in international child abduction cases to bring about an amicable resolution of the issues including through mediation. At the same time, the Special Commission recognises that the use of measures to this end should not result in delay.
- 16 The requested Central Authority should, as far as possible, keep the requesting Central Authority informed about the progress of proceedings and respond to reasonable requests for information from the requesting Central Authority. When the requested Central Authority has knowledge of a judgment or decision made in return or access proceedings, it should promptly communicate the judgment or decision to the requesting Central Authority, together with general information on timelines for any appeal, where appropriate.

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

- 17 The Special Commission notes that in many Contracting States to the 1980 Convention applications concerning access under Article 21 are now processed in the same way as applications for return.
- 18 Central Authorities designated under the 1980 and / or 1996 Conventions are encouraged to take a pro-active and hands-on approach in carrying out their respective functions in international access / contact cases.
- 19 The Special Commission reaffirms the principles set out in the *General Principles and Guide to Good Practice on Transfrontier Contact Concerning Children* and strongly encourages Contracting States to the 1980 and 1996 Conventions to review their practice in international access cases in light of these principles, where necessary.
- 20 The Special Commission recognises that, pursuant to Articles 7(2) b) and 21 of the 1980 Convention, during pending return proceedings a requested Contracting State may provide for the applicant in the return proceedings to have contact with the subject child(ren) in an appropriate case.

*Statistics relating to the 1980 Convention*

- 21 The Special Commission acknowledges the great value of the “Statistical analysis of applications made in 2008 under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*” (Prel. Doc. No 8) carried out by Nigel Lowe and Victoria Stephens, and notes the increase in the number of Hague return applications, the marginally lower proportion of returns and the apparent increase in the time taken to conclude Hague return proceedings.
- 22 The Special Commission reaffirms Recommendation No 1.14 of the 2001 meeting of the Special Commission and Recommendation No 1.1.16 of the 2006 meeting of the Special Commission –  

“Central Authorities are encouraged to maintain accurate statistics concerning the cases dealt with by them under the Convention, and to make annual returns of statistics to the Permanent Bureau in accordance with the standard forms established by the Permanent Bureau in consultation with Central Authorities.”
- 23 The Special Commission recommends that one statistical questionnaire be developed that is capable of being completed online, and that combines the data currently sought for INCASTAT (the International Child Abduction Statistical Database) with the data last sought for the statistical analysis of cases arising in 2008. The Special Commission recommends that the Permanent Bureau, in conjunction with certain interested States Parties, explore the possibility of automated data migration to INCASTAT.

*Country Profile for the 1980 Convention*

- 24 The Special Commission welcomes the development of the Country Profile for the 1980 Convention and the important improvement it makes to the exchange of information between Central Authorities.
- 25 All Contracting States that have not yet completed the Country Profile are strongly encouraged to do so as soon as possible.
- 26 The Special Commission recommends that Contracting States regularly update their Country Profile to ensure that the information remains current. The Permanent Bureau will send an annual reminder to Contracting States in this regard.
- 27 The Country Profile does not replace the Standard Questionnaire for Newly Acceding States. However, all newly acceding and ratifying States are encouraged to complete the Country Profile as soon as possible following their accession to or ratification of the 1980 Convention.

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

- 28 Immediately following a State becoming Party to the 1980 Convention (or, in an appropriate case, where a State is preparing to do so or has expressed a strong interest in doing so), the State in question should be offered, by way of a standard letter from the Permanent Bureau, the opportunity to visit an experienced Contracting State to the 1980 Convention for the purpose of gaining knowledge and understanding regarding the effective practical operation of the 1980 Convention.
- 29 The Permanent Bureau will maintain a list of all experienced Contracting States willing to accept such a visit and, when a newly acceding / ratifying (or interested) State responds positively to an offer, will provide details of Contracting States prepared to receive the newly acceding / ratifying (or interested) State for the two States concerned to organise and arrange the visit.

*Immigration issues in the context of the 1980 Convention*

- 30 In order to prevent immigration issues from obstructing the return of the child, Central Authorities and other competent authorities should where possible clarify the child's nationality and whether the child is in possession of the necessary travel documents as early as possible during the return procedure. When making a contact order, judges should bear in mind that there might be immigration issues that need to be resolved before contact can take place as ordered.
- 31 Where there is any indication of immigration difficulties which may affect the ability of a (non-citizen) child or taking parent to return to the requesting State or for a person to exercise contact or rights of access, the Central Authority should respond promptly to requests for information to assist a person in obtaining from the appropriate authorities within its jurisdiction without delay such clearances or permissions (visas) as are necessary. States should act as expeditiously as possible when issuing clearances or visas for this purpose and should impress upon their national immigration authorities the essential role that they play in the fulfilment of the objectives of the 1980 Convention.

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

- 32 The Special Commission highlights the importance of ensuring effective access to justice for both parties in return and access proceedings, as well as for the child where appropriate, while recognising that the means of ensuring such effective access may vary from State to State, particularly for Contracting States that have made a reservation under Article 26 of the Convention.
- 33 The Special Commission emphasises that the difficulty in obtaining legal aid at first instance or an appeal, or of finding an experienced lawyer for the parties, may result in delays and may produce adverse effects for the child as

well as for the parties. The important role of the Central Authority in helping an applicant to obtain legal aid quickly or to find experienced legal representatives is recognised.

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

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

- 35 The Special Commission notes that a large number of jurisdictions are addressing issues of domestic and family violence as a matter of high priority including through awareness raising and training.
- 36 Where Article 13(1) *b*) of the 1980 Convention is raised concerning domestic or family violence, the allegation of domestic or family violence and the possible risks for the child should be adequately and promptly examined to the extent required for the purposes of this exception.
- 37 The Special Commission affirms its support for promoting greater consistency in dealing with domestic and family violence allegations in the application of Article 13(1) *b*) of the 1980 Convention.
- 38 The Special Commission considered three proposals for future work with a view to promoting consistency in the interpretation and application of Article 13(1) *b*) of the 1980 Convention, and in the treatment of issues of domestic and family violence raised in return proceedings under the Convention. These were –
- (a) a proposal that includes, among others, the drafting of a Guide to Good Practice on the implementation of Article 13(1) *b*) (Work. Doc. No 1);
  - (b) a proposal to establish a working group, drawn in particular from the International Hague Network of Judges, to consider the feasibility of developing an appropriate tool to assist in the consideration of the grave risk of harm exception (Work. Doc. No 2);
  - (c) a proposal to establish a group of experts, including in particular judges, Central Authority experts and experts in the dynamics of domestic violence, to develop principles or a practice guide on the management of domestic violence allegations in Hague return proceedings (Prel. Doc. No 9, para. 151).

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

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

- 39 The Special Commission recognises the value of the assistance provided by the Central Authorities and other

relevant authorities, under Articles 7(2) *d*), *e*) and *h*) and 13(3), in obtaining information from the requesting State, such as police, medical and social workers' reports and information on measures of protection and arrangements available in the State of return.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*The Practical Handbook on the 1996 Convention*

- 53 The Special Commission welcomes the revised Draft Practical Handbook on the 1996 Convention (Prel. Doc. No 4) as a valuable document which provides beneficial guidance to persons involved in implementing and operating the Convention.
- 54 The Special Commission recommends that the Permanent Bureau, in consultation with experts, make amendments to the revised Draft Practical Handbook, in light of the comments provided at the Special Commission meeting.
- 55 The Special Commission looks forward to the publication of the Practical Handbook on the 1996 Convention following this final revision process.

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

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

*Mediation*

- 57 The Special Commission notes the many developments in the use of mediation in the context of the 1980 Convention.
- 58 The Special Commission welcomes the draft Guide to Good Practice on Mediation under the 1980 Convention. The Permanent Bureau is requested to make revisions to the Guide in light of the discussions of the Special Commission, taking account also of the advice of experts. Consideration will be given to the inclusion of examples of mediated agreements. The revised version will be circulated to Members and Contracting States for final consultations.
- 59 The Guide will be published in a form which allows updating.
- 60 The Special Commission expresses appreciation for the work carried out by the Working Party on Mediation

in the context of the Malta Process and welcomes the *Principles for the establishment of mediation structures in the context of the Malta Process* (Prel. Doc. No 6).

- 61 The Special Commission notes the efforts already being made in certain States to establish a Central Contact Point in accordance with the Principles. States are encouraged to consider the establishment of such a Central Contact Point or the designation of their Central Authority as a Central Contact Point. The contact details of Central Contact Points are available on the Hague Conference website.
- 62 The Special Commission notes the request of the 2011 Council on General Affairs and Policy of the Hague Conference that the Working Party should continue to work on the implementation of mediation structures and, in particular, with the support of the Permanent Bureau, and in light of discussions in the Special Commission –
- “to facilitate wider acceptance and implementation of the Principles as a basic framework for progress;
  - to consider further elaboration of the Principles; and,
  - to report to the Council in 2012 on progress”. (See the Conclusions and Recommendations adopted by the Council on General Affairs and Policy of the Conference (5-7 April 2011).)

*Article 15 of the 1980 Convention*

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

*Judicial communications (1980 Convention)*

- 64 The Special Commission welcomes the extraordinary growth in the International Hague Network of Judges in the period from 2006 to 2011 which now includes more than 65 judges from 45 States. States that have not yet designated Hague Network judges are strongly encouraged to do so.
- 65 The Special Commission also welcomes the actions taken by States and regional organisations nationally and regionally regarding the establishment of judicial networks and the promotion of judicial communications.
- 66 The Special Commission emphasises the importance of direct judicial communications in international child protection and international child abduction cases.

*Respective roles of judges and Central Authorities*

- 67 The Special Commission reaffirms Recommendations Nos 1.6.4 and 1.6.5 of the 2006 meeting of the Special Commission –
- “The Special Commission recognises that, having

regard to the principle of the separation of powers, the relationship between judges and Central Authorities can take different forms.

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

*Emerging Guidance and General Principles for Judicial Communications*

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

*Legal basis for direct judicial communications*

- 69 Where there is concern in any State as to the proper legal basis for direct judicial communications, whether under domestic law or procedure, or under relevant international instruments, the Special Commission invites States to take the necessary steps to ensure that such a legal basis exists.
- 70 The Special Commission notes that the question of the desirability and feasibility of binding rules in this area, including a legal basis, will be considered during Part II of the Sixth Meeting of the Special Commission.

*Effective secured electronic communications*

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

*Actions to be undertaken by the Permanent Bureau*

- 72 In relation to future work, the Permanent Bureau in the light of the observations made during the meeting will –
- (a) explore further the development of secured systems of communications, such as secured video-conferencing, in particular for members of the International Hague Network of Judges;
  - (b) continue to develop contacts with other judicial networks, to promote the establishment of regional judicial networks, as well as consistency in the safeguards applied in relation to direct judicial communications;
  - (c) continue to maintain an inventory of existing practices relating to direct judicial communications in specific cases under the 1980 Convention and with regard to international child protection; and,
  - (d) draw up a short information document for judges on direct judicial communications.

*The Judges' Newsletter on International Child Protection*

- 73 The Special Commission supports the continued publication of *The Judges' Newsletter on International Child Protection* and expresses its appreciation to LexisNexis for its support in publishing and distributing the Newsletter.
- 74 The Special Commission urges that every effort should be made to make the Newsletter available in Spanish and encourages States to consider providing support for this purpose.

*Conferences*

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