

**NOTE D'INFORMATION ET QUESTIONNAIRE CONCERNANT
UN NOUVEL INSTRUMENT MONDIAL SUR LE RECOUVREMENT INTERNATIONAL
DES ALIMENTS ENVERS LES ENFANTS ET D'AUTRES MEMBRES DE LA FAMILLE**

établi par William Duncan
Secrétaire général adjoint

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A NEW GLOBAL INSTRUMENT ON THE INTERNATIONAL RECOVERY
OF CHILD SUPPORT AND OTHER FORMS OF FAMILY MAINTENANCE**

drawn up by William Duncan
Deputy Secretary General

*Document préliminaire No 1 de juin 2002
à l'intention de la Commission spéciale sur les Obligations Alimentaires*

*Preliminary Document No 1 of June 2002
for the attention of the Special Commission on Maintenance Obligations*

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**INFORMATION NOTE AND QUESTIONNAIRE CONCERNING
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I BACKGROUND

The Special Commission on Maintenance Obligations of the Hague Conference on Private International Law of April 1999 met "to examine the operation of the Hague Conventions on maintenance obligations and the New York Convention of 20 June 1956 on the Recovery Abroad of Maintenance and to examine the desirability of revising those Hague Conventions, and the inclusion in a new instrument of judicial and administrative co-operation".¹

On the question of reform of the system, the Special Commission reached the following unanimous recommendation:

"The Special Commission on the operation of the Hague Conventions relating to maintenance obligations and of the New York Convention on the Recovery Abroad of Maintenance,

- having examined the practical operation of these Conventions and having taken into account other regional and bilateral instruments and arrangements,*
- recognising the need to modernise and improve the international system for the recovery of maintenance for children and other dependent persons,*
- recommends that the Hague Conference should commence work on the elaboration of a new worldwide international instrument.*

The new instrument should:

- contain as an essential element provisions relating to administrative co-operation,*
- be comprehensive in nature, building upon the best features of the existing Conventions, including in particular those concerning the recognition and enforcement of maintenance obligations,*
- take account of future needs, the developments occurring in national and international systems of maintenance recovery and the opportunities provided by advances in information technology,*
- be structured to combine the maximum efficiency with the flexibility necessary to achieve widespread ratification.*

The work should be carried out in co-operation with other relevant international organisations, in particular the United Nations.

The Hague Conference, while accomplishing this task, should continue to assist in promoting the effective operation of the existing Conventions and the ratification of the New York Convention and the two Hague Conventions of 1973.

¹ Report on and Conclusions of the Special Commission on Maintenance Obligations of April 1999, drawn up by the Permanent Bureau in December 1999, paragraph 1 (<http://www.hcch.net/e/workprog/maint.html>).

The Special Commission recalls and emphasises the importance of the practical recommendations contained in the General Conclusions of the Special Commission of November 1995, which were drawn up by the Permanent Bureau (General Affairs, Prel. Doc. No 10, May 1996)."

Following this recommendation, the Special Commission on General Affairs of May 2000 concluded that there should be included with priority on the Conference's agenda "the drawing up of a new comprehensive convention on maintenance obligations, which would improve the existing Hague Conventions on this matter and include rules on judicial and administrative co-operation. Non-Member States of the Hague Conference, in particular signatory States of the New York Convention of 1956, should be invited to participate in the future work."²

Commission I on General Affairs and Policy of the Nineteenth Diplomatic Session of the Hague Conference on Private International Law, which met from 22-24 April 2002, reaffirmed the conclusion of the Special Commission on General Affairs and Policy of May 2000 and added that "every effort should be made to ensure that the processes involved are inclusive, including by the provision if possible of Spanish translation of key documents and facilities for Spanish interpretation at plenary meetings".³

II PLAN OF ACTION

The Permanent Bureau is currently carrying out research and consultations to prepare the ground for negotiations within the Hague Conference on the new global instrument on maintenance obligations. A report will be prepared by the Permanent Bureau to provide Member and other States with background information on developments at the national and international level, and to identify some of the issues which are likely to be the subject of debate when negotiations over the new instrument begin. It is planned that this report should be available to States before the end of 2002, and that a first Special Commission to begin the negotiations should be convened in the first part of the year 2003.

III THE QUESTIONNAIRE

In order to gather relevant information, as well as to test opinion in a preliminary way on the principal elements that might be included in the new instrument, the Permanent Bureau has devised a questionnaire which is set out below. The questionnaire is being sent out to all Member States of the Hague Conference, to States Parties to the New York Convention of 1956 and to relevant international governmental and non-governmental organisations. The questionnaire will also be posted on the Hague Conference website at: <http://www.hcch.net>.

The questionnaire falls into four parts which concern, first, practice under the existing international instruments, second, practice under national systems, third, the elements to be included in the new instrument, and fourth, negotiating partners.

The project to establish a new instrument on maintenance obligations has the potential to benefit hundreds of thousands of persons, children and adults, in many States around the world, and to contribute to the reduction of welfare / social security dependency. The questionnaire is an important element in establishing firm foundations on which to build the new instrument. The States and organisations to whom the questionnaire is addressed are kindly asked to provide their responses to the Permanent Bureau, if possible, **by the end of September 2002.**

² Conclusions of the Special Commission of May 2000 on General Affairs and Policy of the Conference, Prel. Doc. No 10 of June 2000, page 17, paragraph 9 (<http://www.hcch.net/e/workprog/genaff.html>).

³ Working Document No 4 from Commission I, distributed on 24 April 2002.

PART I PRACTICE UNDER EXISTING INTERNATIONAL INSTRUMENTS

The questionnaire on maintenance obligations, which was sent out in advance of the Special Commission of April 1999 has already provided much information on practice under the existing international instruments. Parts I to IV of that questionnaire are attached to this document as Annex I.

States and organisations which responded to the questionnaire in 1999 are requested only to supply supplementary responses to Parts I to IV of that questionnaire, covering any relevant developments since April 1999.⁴

States and organisations which were not able to respond in 1999 are asked to provide full responses.

PART II QUESTIONS CONCERNING NATIONAL SYSTEMS OF MAINTENANCE OBLIGATIONS IN RESPECT OF CHILDREN AND OTHER FAMILY MEMBERS

Form of maintenance decision

- 1 What form may a maintenance decision take in respect of (a) a child and (b) a spouse or other family member? In particular, are they confined to periodic payments of money? Are there any circumstances in which a lump sum, property transfer or similar order may be made to satisfy a maintenance obligation?

Eligibility

- 2 Who is eligible in your country to benefit from a maintenance decision? (e.g. child, spouse, other relative, etc).
- 3 What is your definition of a "dependent" child for child support purposes?
- 4 Which is the law applicable to the question of eligibility of (a) child and (b) a spouse or other family member to obtain maintenance?

Procedures for the initial assessment of maintenance

- 5 Is child support determined through an administrative or a judicial process?
- 6 Is the process different where either the applicant or the respondent live abroad? If so, please give details.
- 7 Is the process different where the application is for maintenance for a spouse or other family member rather than a child? If so, can the two processes be joined?

⁴ See extracts from responses to the Questionnaire on Maintenance Obligations, Prel. Doc. No 3 for the attention of the Special Commission of April 1999 (<http://www.hcch.net/e/workprog/maint.html>).

Methods of calculating maintenance

- 8 Is the assessment of child support based on a formula, guidelines, or other criteria? Please outline the principal elements involved in making an assessment.
- 9 Are there any differences in the assessment criteria employed when (a) the applicant or (b) the respondent live abroad?
- 10 Is the method different when the application is for maintenance in respect of a spouse or other family member rather than a child?
- 11 Which is the law applicable to the assessment of maintenance for (a) child and (b) a spouse or other family member?

Reassessment / adjustment / modification of maintenance decisions or assessments

- 12 Are maintenance payments in respect of children or spouses or other family members subject to automatic reassessment, and if so, by whom and with what frequency?
- 13 Are such payments subject to automatic adjustment in accordance with an external marker, such as the cost of living index, and if so, by what mechanisms and with what frequency?
- 14 In what circumstances may a maintenance decision or assessment in respect of a child or a spouse or other family member be varied / modified upwards or downwards? Is this done by the same authority that made the original determination?
- 15 In what circumstances may a foreign decision or assessment be varied / modified on the application of a resident debtor?

Establishing paternity

- 16 Which is the law applicable to the determination of paternity in the context of child support proceedings?
- 17 Please summarise your administrative and legal requirements concerning the establishment of paternity in the context of child support proceedings.
- 18 Please outline the legal procedures and the methods (including the scientific methods) by which paternity may be established in the context of proceedings for child support. Please indicate the costs that typically would be involved, who would bear these costs, whether the costs are capable of being covered by legal aid, and whether any distinction is made between residents and non-residents in these matters.
- 19 May the recognition or enforcement of a foreign child support decision be refused (a) if it entails a determination of paternity, or (b) if a law or a method is applied to that determination different from that applied in your country? If so, please explain the reasons.

Legal and administrative aid and assistance

- 20 What forms of assistance (including administrative assistance, legal aid and advice) are available in your country to:
- a* a resident claimant for child support;
 - b* a claimant for child support who is resident abroad.
- 21 Please specify the principal eligibility requirements, including any means tests, for the different forms of assistance available.
- 22 Are the rules and procedures concerning legal or administrative aid or assistance different for applications for maintenance for a spouse or other family member?

Legal costs and expenses

- 23 What are the typical legal costs and expenses (including lawyers' fees and court costs) involved in an application for child support or maintenance in respect of a spouse or other family member? Can you indicate how these costs and expenses will vary from the initial application through any processes of appeal or review?
- 24 Is it possible for payment of costs and expenses to be met from maintenance payments?

Collection and transfer arrangements and enforcement of decisions

- 25 How is the payment and collection of (a) child support and (b) maintenance for a spouse or other family member organised in your country?
- 26 What, if any, particular arrangements apply where payments are to be made or collected from abroad?
- 27 What are the procedures for enforcing (a) child support decisions and (b) maintenance decisions in respect of a spouse or other family member?
- 28 Please list the methods available for the enforcement of (a) child support decisions and (b) maintenance decisions in respect of a spouse or other family member. In particular, please indicate whether any of the following enforcement / collection methods are available in your jurisdiction:
- wage withholding;
 - tax refund intercepts;
 - garnishment from bank accounts or other sources;
 - deductions from social security payments;
 - forced sale of property;
 - division of pension benefits; and
 - committal to prison.
- 29 What are the typical banking costs involved in the transfer of maintenance payments from / to your country?
- 30 Have any arrangements been developed in your country, either by the public or the private sector, to facilitate the easy and low-cost transfer of payments to / from abroad?

PART III QUESTIONS CONCERNING THE ELEMENTS TO BE INCLUDED IN THE NEW INSTRUMENT

- 31 Please list any shortcomings in the current processes for the obtaining or recovery abroad of child support or other forms of family maintenance by persons resident in your country which might be improved or remedied in the new instrument.
- 32 Please list any shortcomings in the current processes by which a foreign applicant seeks to obtain or recover child support or other forms of family maintenance from a person resident in your jurisdiction which might be improved or remedied in the new instrument.
- 33 Bearing in mind that the new instrument is to be “comprehensive in nature, building on the best features of the existing Conventions”, and that the precise structure of the new instrument has yet to be determined, please indicate any preliminary views you have on the key elements to be addressed in the new instrument. In doing so, you may find it helpful to use the following list and to indicate what degree of importance, if any, you attach to each of the items listed:
- a* provisions concerning administrative co-operation;
 - b* provisions for the recognition and enforcement of foreign decisions;
 - c* applicable law principles;
 - d* uniform direct rules of jurisdiction applying to the determination and modification of decisions in respect of maintenance;
 - e* provisions specifying the assistance to be provided to an applicant from another Contracting Party;
 - f* provisions concerning legal aid and assistance to be provided to an applicant from another Contracting Party;
 - g* provisions concerning co-operation in the establishment of paternity;
 - h* provisions concerning co-operation in the international transfer of funds at low cost;
 - i* provisions enabling Contracting Parties to avoid providing services to applicants from abroad where they are not available on a reciprocal basis;
 - j* standard forms;
 - k* provisions aimed at securing compliance with obligations under the instrument;
 - l* provisions concerning public bodies claiming reimbursement of benefits paid to a maintenance creditor;
 - m* others. Please specify.
- 34 With regard to the overall structure of the new instrument, and bearing in mind that the new instrument should “combine the maximum efficiency with the flexibility necessary to achieve widespread ratification”,
- a* which of the elements that you have mentioned under 33 should be included as core elements in the sense that all Contracting Parties should without exception be bound to comply with them,
 - b* which of those elements should be optional, in the sense that Contracting Parties would have the freedom to opt in or opt out of them, and
 - c* do you favour a general principle that, where recognition of an existing decision is not possible in the country where the debtor resides, the authorities of that country should be under an obligation to provide assistance to the creditor in obtaining a new decision?

- 35 In the case of States which have entered into bilateral or regional arrangements, please indicate which elements within those arrangements you would wish to see replicated or reflected in the new global instrument.

PART IV NEGOTIATING PARTNERS AND MISCELLANEOUS

- 36 Apart from the Member States of the Hague Conference and States Parties to the New York Convention of 1956 (a full list is provided in Annex II) are there any other States that you would wish to be invited to take part in the negotiations on the new instrument?
- 37 Would you be prepared to contribute to a fund (a) to enable poorer States to be able to take part in the negotiations or (b) to enable principal documents to be translated into Spanish and simultaneous interpretation in Spanish to be available at plenary sessions?
- 38 Do you have a website or brochure which provides information about the system of support and other forms of family maintenance in your country? If so, please provide details or a copy of any publications.

Note: *Respondents are also invited to comment on any other matters which they consider material to the development of the new instrument.*

ANNEX I***Preliminary Document No 1 for the attention of the
Special Commission of April 1999*****QUESTIONNAIRE ON MAINTENANCE OBLIGATIONS****(Parts I to III only)**

PART I NEW YORK CONVENTION OF 20 JUNE 1956 ON THE RECOVERY ABROAD OF MAINTENANCE

Section A – Questions addressed to States Parties

- 1 Do your authorities treat the New York Convention as complementary to (i.e. to be used in combination with) other international instruments such as the 1958 and 1973 Hague Conventions on the Enforcement of Decisions relating to Maintenance Obligations or the Brussels and Lugano Conventions?
- 2 When acting as the requested State, do your authorities require a "decision" from the State of origin before taking steps for the recovery of maintenance?
- 3 What documentation do you require from a transmitting agency? Which documents are required in the original?
- 4 What are your standard procedures following receipt of documentation from a transmitting agency?
- 5 Are there any issues that have arisen concerning the categories of persons eligible to apply as "in need" and "dependent"?
- 6 Do you make use of standard forms, whether acting as a receiving or transmitting agency? (If so, could you please supply copies).
- 7 Do your authorities permit public bodies / agencies to make use of the Convention procedures to recover maintenance payments on behalf of the maintenance creditor or to recover monies already paid by that public body / agency to the creditor, and if so, subject to what conditions (e.g. power of attorney)?
- 8 Legal assistance:
 - (a) Do you provide legal assistance to the claimant?
 - (b) What form does this take?
 - (c) Is it subject to any conditions or limitations?
 - (d) Are applications for spousal and child support treated differently?
- 9 What costs incurred by your authorities, when acting as the receiving agency, are charged to the requesting State (or the claimant)?
- 10 What are your requirements with regard to the translation of documents submitted by the transmitting agency?
- 11 Which languages do personnel in your authority (a) use, and (b) accept?

- 12 Does your authority accept any responsibility with regard to the transfer / receipt of maintenance payments on behalf of the creditor?
- 13 What rules / procedures apply with regard to the conversion of maintenance payments into the currency of the creditor's State?
- 14 What methods of transferring funds are least costly for the maintenance creditor?
- 15 Are you aware of cases in which UN personnel, or personnel of other international organisations or Embassy staff, have claimed immunity under the Convention? If so, how were these cases resolved?
- 16 What powers or procedures are available to your authority to locate the whereabouts or place of work of a maintenance debtor / respondent?
- 17 What is your policy in respect of a maintenance debtor / respondent whose entire income consists of public assistance payments?
- 18 Does your authority have power to take or apply for any provisional or protective measures?
- 19 What powers or procedures are available to your authority to determine the extent of assets of a maintenance debtor / respondent?
- 20 What are the principal problems, which you experience in dealing with cases (a) as a transmitting agency, and (b) as a receiving agency?
- 21 Do you have any statistics indicating the number and outcome of cases brought under the New York Convention? If so, could you please supply them. If possible, please distinguish between incoming and outgoing cases, and indicate the other States involved.
- 22 Are there any States with whom you experience chronic difficulties in relation to the operation of the Convention?

Section B – Questions addressed to non-Party States

- 1 Are there particular reasons why your State has not ratified the New York Convention?
- 2 Are there any modifications / improvements to the New York Convention, which would make ratification by your State a more attractive proposition?
- 3 In relation to the negotiation of any bilateral or other arrangements to which your State is, or is to become Party, which of the issues raised in Section A have been of significance? Are there other issues not raised in Section A, which have been significant?

PART II HAGUE CONVENTIONS OF 1958 AND 1973 ON THE RECOGNITION AND ENFORCEMENT OF DECISIONS RELATING TO MAINTENANCE OBLIGATIONS

Section A – Questions addressed to States Party to one or both Conventions

- 1 Does a limitation period operate in respect of an action for the enforcement of a maintenance obligation? Which law governs any such limitation period?
- 2 Does a limitation period operate in respect of the execution of a writ for the recovery of maintenance? Which law governs any such limitation period?
- 3 Do your procedures for enforcement permit the debtor to claim inability to pay?
- 4 Do your procedures allow for the possibility of modifying the content of a decision registered in application of the 1973 Convention?
- 5 Is the debtor entitled to bring modification proceedings in respect of the foreign decision? If so, on what jurisdictional basis and on what grounds?

Section B – Questions addressed to non-Party States

- 1 Are there any particular reasons why your State has not ratified / acceded to either of the Hague Conventions?
- 2 Are there any modifications / improvements to the Hague Conventions which would make ratification / accession a more attractive proposition for your State?

PART III HAGUE CONVENTIONS OF 1956 AND 1973 ON THE LAW APPLICABLE TO MAINTENANCE OBLIGATIONS

Section A – Questions addressed to States Party to one or both Conventions

- 1 Which law is applied by your courts to incidental / preliminary questions (*e.g.*, as to the paternity of a child) arising in the course of maintenance proceedings within the scope of the Hague Conventions?
- 2 In a decision of 21 February 1997 (*Nederlandse Jurisprudentie* 1998, No 416), the Netherlands Supreme Court ruled that Article 8 of the Hague Convention of 1973, in the light of its history and that of the Convention as a whole, was not incompatible with the admission of a choice by divorced spouses of the governing law, the law chosen being that of the country of their common habitual residence for a long period and of the forum. (Dutch law, chosen by the parties, was applied rather than Iranian Law which governed the divorce.)

Is this decision consistent with the manner in which Article 8 has been interpreted by your courts? If not, do you think that an amendment of Article 8 would be desirable to allow expressly for a choice of law by the spouses?
- 3 Do your courts interpret the Hague Convention of 1973 as applying to maintenance obligations of one spouse in respect of children of the other spouse to whom she / he is in *loco parentis*?
- 4 Have any particular difficulties arisen in applying / interpreting either the 1956 or the 1973 Conventions?

Section B – Questions addressed to non-Party States

- 1 Are there any particular reasons why your State has not ratified the 1956 or 1973 Conventions?
- 2 Are there any modifications / improvements to the 1956 or 1973 Conventions which would make their ratification / accession a more attractive proposition for your State?
- 3 Are spouses (or any other category of persons) free under your system to choose the law which will govern their maintenance obligations?

ANNEX II

***List of Non-Member States of the
Hague Conference on Private International Law
which are Parties to the New York Convention of 20 June 1956
on the Recovery of Maintenance Abroad***

States Parties

Algeria
Barbados
Burkina Faso
Cape Verde
Central African Republic
Colombia
Ecuador
Guatemala
Haïti
Niger
Pakistan
Philippines
Holy See
Tunisia