

<b>Title</b>	Direct judicial communications and a possible network of judges under the 2000 Protection of Adults Convention
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<b>Action to be Taken</b>	For Decision <input type="checkbox"/> For Approval <input type="checkbox"/> For Discussion <input checked="" type="checkbox"/> For Action / Completion <input type="checkbox"/> For Information <input type="checkbox"/>
<b>Annexes</b>	Annex I – Principles for Direct Judicial Communications in specific cases including commonly accepted safeguards, Principles 6-9
<b>Related Documents</b>	Prel. Doc. No 4 of February 2022 – Draft Practical Handbook on the Operation of the 2000 Protection of Adults Convention

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# Direct judicial communications and a possible network of judges under the 2000 Protection of Adults Convention

## I. Introduction

- 1 The development of the draft Practical Handbook on the Operation of the 2000 Protection of Adults Convention (hereinafter, “draft Practical Handbook”)<sup>1</sup> underlined the multiple occasions where the *HCCH Convention of 13 January 2000 on the International Protection of Adults* (hereinafter, “2000 Protection of Adults Convention” or “2000 Convention”) mandates or encourages cooperation between Central and / or competent authorities. The purpose of this document is to highlight these provisions and examine how direct judicial communications<sup>2</sup> could be of use in meeting the obligations enshrined in these provisions.
- 2 This document also explores the possibility of designating authorities under the 2000 Protection of Adults Convention, including but not limited to the designation of authorities for the purpose of requests under Articles 8 and 33, as provided for in Article 42.
- 3 Following consultations with the International Hague Network of Judges (hereinafter, “IHNJ”), consideration will be given to the possibility of placing the aforementioned designated authorities within the auspices of a network. The feasibility of expanding the existing IHNJ under the *HCCH Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (hereinafter, “1980 Child Abduction Convention”) and the *HCCH 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, “1996 Child Protection Convention”) to include matters under the 2000 Protection of Adults Convention will also be explored.

## II. Direct judicial communications under the 2000 Protection of Adults Convention

- 4 The 2000 Convention provides for instances in which cooperation between competent authorities is necessary to guarantee the protection of the adult. Direct judicial communications<sup>3</sup> between competent authorities may take place with a view to coordinate jurisdiction issues (Chapter II – Jurisdiction) or as a result of direct requests for information between the authorities of different Contracting Parties called upon to take measures of protection (Chapter V – Co-operation). In Chapter II, communications may take place directly between competent authorities and, where appropriate, with the assistance of the relevant Central Authorities, as long as the independence

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<sup>1</sup> “Draft Practical Handbook on the Operation of the 2000 Protection of Adults Convention” (hereinafter, “draft Practical Handbook”), Prel. Doc. No 4 of February 2022 (available on the HCCH website at [www.hcch.net](http://www.hcch.net) under “Protection of Adults” then “Special Commission meetings” and “First meeting of the Special Commission on the practical operation of the 2000 Protection of Adults Convention”).

<sup>2</sup> For the purpose of this document “direct judicial communications” are to be understood as direct interjurisdictional communications concerning a specific case which may involve judicial and / or administrative authorities. This document does not concern communications between Central Authorities.

<sup>3</sup> See Annex I – Principles for Direct Judicial Communications in specific cases including commonly accepted safeguards, Principles 6-9, in “Emerging Guidance regarding the development of the International Hague Network of Judges and 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” (hereinafter, “Emerging Guidance on Direct Judicial Communications”). The Emerging Guidance on Direct Judicial Communications was endorsed by 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), See “Conclusions and Recommendations and Report of Part I of the Sixth Meeting of the Special Commission on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention (1-10 June 2011)”, Prel. Doc. No 14 of November 2011 (available on the HCCH website [www.hcch.net](http://www.hcch.net) under “Child Abduction” then “Special Commission meetings” and “Sixth Special Commission meeting (Part I, June 2011; Part II, January 2012)”).

and impartiality of competent authorities<sup>4</sup> is upheld. This may involve direct judicial communications with regard to specific cases.<sup>5</sup>

## A. Direct judicial communications under Chapter II – Jurisdiction

5 The rules on jurisdiction contained in Chapter II of the 2000 Protection of Adults Convention form a complete and closed system. This system does not allow for conflicting jurisdictions and necessitates coordination between competent authorities when taking, assuming or transferring jurisdiction. Under the 2000 Convention, only one competent authority may take jurisdiction at a given time, over a specific matter. This way, the Convention avoids conflicting decisions being issued on matters falling under its scope. The Convention applies as an integral whole to Contracting Parties.<sup>6</sup>

### 1. Article 7 – Concurrent subsidiary jurisdiction of the authorities of the State of the nationality of the adult

6 The need for competent authorities to communicate is first noted in Article 7(1) of the 2000 Protection of Adults Convention which relates to the concurrent subsidiary jurisdiction of the authorities of the State of which the adult is a national:

“Article 7

1. Except for adults who are refugees or who, due to disturbances occurring in their State of nationality, are internationally displaced, the authorities of a Contracting State of which the adult is a national have jurisdiction to take measures for the protection of the person or property of the adult if they consider that they are in a better position to assess the interests of the adult, and after advising the authorities having jurisdiction under Article 5 or Article 6, paragraph 2.”

7 Paragraph 60 of the Explanatory Report on the 2000 Protection of Adults Convention (hereinafter, “Explanatory Report”)<sup>7</sup> emphasises that the authorities of the State of which the adult is a national are obliged to inform the authorities with primary jurisdiction (under Art. 5 or 6), in advance, of their intention to intervene. This is to ensure that, when the authorities of the State of nationality contemplate exercising their jurisdiction, there are no pending proceedings or decisions made in the State the authorities of which have primary jurisdiction.

8 Article 7(2) also provides that the authorities having primary jurisdiction (under Art. 5 or 6) or transferred jurisdiction (under Art. 8) are to inform the authorities of the State of which the adult is a national about decisions made or any proceedings pending. If they are informed of decisions made or proceedings pending, competent authorities of the State of nationality should not exercise their jurisdiction:

“Article 7

2. This jurisdiction shall not be exercised if the authorities having jurisdiction under Article 5, Article 6, paragraph 2, or Article 8 **have informed** the authorities of the State of which the adult is a national that they have taken the measures required by the situation or have decided that no measures should be taken or that proceedings are pending before them.” [*emphasis added*]

9 It would not be enough for the competent authorities of the State of which the adult is a national to become aware of decisions made or proceedings pending through other means, such as

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<sup>4</sup> The term “competent authorities” is to be understood as referring to judicial or administrative authorities.

<sup>5</sup> See Annex I.

<sup>6</sup> “Draft Practical Handbook”, *op. cit.* (note 1), para. 4.2.

<sup>7</sup> P. Lagarde, “Explanatory Report on the Hague Convention of 13 January 2000 on the International Protection of Adults”, The Hague, HCCH, 2017.

documents in the case file.<sup>8</sup> It is important to note that the measures taken under Article 7(1) shall lapse as soon as the authorities having jurisdiction under Articles 5, 6(2) or 8 have taken measures required by the situation or have decided that no measures are to be taken. These authorities shall then inform the authorities which have taken measures in accordance with Article 7(1).<sup>9</sup>

10 In order to fulfil their obligations under the 2000 Convention, competent authorities taking jurisdiction under Articles 5, 6, 7 and 8 must communicate with one another, e.g., through direct judicial communications.<sup>10</sup>

## 2. Article 8 – Transfer of jurisdiction to an appropriate forum

11 Cooperation between authorities is also provided for under Article 8 of the 2000 Convention, concerning the transfer of jurisdiction to an appropriate forum:

“Article 8

1. The authorities of a Contracting State having jurisdiction under Article 5 or Article 6, if they consider that such is in the interests of the adult, may, on their own motion or on an application by the authority of another Contracting State, request the authorities of one of the States mentioned in paragraph 2 to take measures for the protection of the person or property of the adult. The request may relate to all or some aspects of such protection.”

## 3. Article 9 – Jurisdiction of the authorities of the State where property of the adult is situated

12 Article 9 of the 2000 Convention introduces concurrent subsidiary jurisdiction of the authorities of the State where property of the adult is situated:

“Article 9

The authorities of a Contracting State where property of the adult is situated have jurisdiction to take measures of protection concerning that property, to the extent that such measures are compatible with those taken by the authorities having jurisdiction under Articles 5 to 8.”

13 This jurisdiction is accepted only for matters which have not yet been decided by competent authorities with general jurisdiction under Articles 5 to 8 or for the purpose of measures that can be superimposed on existing measures taken by such competent authorities. To ensure that the measure taken in accordance with Article 9 is compatible with those taken by competent authorities having jurisdiction under Articles 5 to 8, consideration should be given to having proper communication / coordination between the concerned competent authorities.<sup>11</sup>

14 While Article 9 does not impose any obligations for communication as Article 7 does, it may be useful for competent authorities of the Contracting Party where property of the adult is located to contact the competent authorities of Contracting Parties that have general jurisdiction under Articles 5 to 8, to ascertain what measures have already been taken, in order to assure the necessity, the relevance and the compatibility of the envisaged measures. Such communications between competent authorities could be done similarly to what is provided for under Article 10(4). Namely, the competent authorities which contemplate taking measures under Article 9 are encouraged, if possible, to exchange information with the authorities of the Contracting Party of the habitual residence of the adult.<sup>12</sup>

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<sup>8</sup> *Ibid.*, para. 62.

<sup>9</sup> 2000 Protection of Adults Convention, Art. 7(3).

<sup>10</sup> When competent authorities communicate with each other, they should be mindful of standards of judicial independence and impartiality. Judges communicating under the 2000 Protection of Adults Convention should give consideration to following Principles 6-9 of the Emerging Guidance on Direct Judicial Communications, see Annex I.

<sup>11</sup> Draft Practical Handbook, *op. cit.* (note 1), para. 4.35.

<sup>12</sup> *Ibid.*, para. 4.37.

#### 4. Article 10 – Jurisdiction in case of urgency

15 The 2000 Protection of Adults Convention places an obligation to inform the competent authorities of the State of the habitual residence of the adult of measures taken, in a situation of urgency, by the State in whose territory the adult is present or the property belonging to the adult is located:

“Article 10

4. The authorities which have taken measures under paragraph 1 shall, if possible, inform the authorities of the Contracting State of the habitual residence of the adult of the measures taken.”

16 This obligation should be met “if possible” and only once the urgent measures have been taken.<sup>13</sup> This is unlike the obligation to inform under Articles 7(1) and 11(1), where jurisdiction is dependent on communication in advance.<sup>14</sup> Given that any urgent measures of protection taken by the competent authorities of the Contracting Party exercising jurisdiction under Article 10 will lapse as soon as the competent authorities with jurisdiction under Articles 5 to 9 have taken a decision,<sup>15</sup> Contracting Parties should communicate regarding the most effective way to protect the interests of the adult.<sup>16</sup>

#### 5. Article 11 – Measures for the protection of the person which are temporary in nature and of limited territorial effect

17 Article 11 provides for concurrent subsidiary jurisdiction, in exceptional situations, to competent authorities in the State where the adult is present to take measures of protection which are temporary in nature and the territorial effect of which is limited to that State. Similarly to Article 7, this base of jurisdiction depends on the authorities of the habitual residence being informed in advance.<sup>17</sup> The competent authorities of both Contracting Parties must cooperate in order to avoid any duplication and determine the best way forward to ensure the protection of the adult. For example, the competent authorities which contemplate taking a measure under Article 11 should communicate with the competent authorities in the State of habitual residence of the adult and inform them of the situation and of the temporary measures contemplated. This would enable the competent authorities in the State of habitual residence to thoroughly examine the situation of the adult and take any necessary long-term measures for their protection.<sup>18</sup>

18 Given that any temporary measure taken will lapse as soon as the competent authorities with general jurisdiction under Articles 5 to 8 make a decision,<sup>19</sup> after having taken measures on the basis of Article 11, a competent authority may also cooperate with the competent authorities in any of those other States it considers necessary, in the spirit of continued protection of the adult. For example, the competent authorities of the Contracting Party that took measures under Article 11 could communicate with the competent authorities of the adult’s State of nationality (Art. 7) and inform them of the situation of the adult and of the temporary measures taken. This would avoid any incompatibility or duplication of measures, as the competent authorities, exercising jurisdiction under Article 7, would have no other way of being informed of the measures taken by competent authorities under Article 11.<sup>20</sup>

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<sup>13</sup> P. Lagarde, *op. cit.* (note 7), para. 82.

<sup>14</sup> *Ibid.*, paras 60, 82 and 84.

<sup>15</sup> 2000 Protection of Adults Convention, Art. 10(2).

<sup>16</sup> Draft Practical Handbook, *op. cit.* (note 1), para. 6.3.

<sup>17</sup> P. Lagarde, *op. cit.* (note 7), para. 84.

<sup>18</sup> Draft Practical Handbook, *op. cit.* (note 1), para. 7.7.

<sup>19</sup> 2000 Protection of Adults Convention, Art. 11(2).

<sup>20</sup> Draft Practical Handbook, *op. cit.* (note 1), para. 7.9.

19 Such communication may be carried out directly between competent authorities or, where appropriate, with the assistance of the Central Authorities.<sup>21</sup> It is important to note that when the habitual residence of the adult is in a non-Contracting Party and a temporary protective measure has been taken for the adult under Article 11 in a Contracting Party, communications could take place between competent authorities from Contracting Parties and non-Contracting Parties.<sup>22</sup>

## **B. Direct judicial communications under Chapter V – Co-operation**

20 The cooperation mechanisms under Chapter V of the 2000 Convention mainly concern cooperation between Central Authorities. In accordance with Article 29(1) of the 2000 Convention, Central Authorities shall cooperate with each other and promote cooperation amongst the competent authorities in their States to achieve the purposes of the Convention. Chapter V also provides for the possibility of communications and direct requests for information between the competent authorities of different Contracting Parties (Arts 32, 33 and 34).<sup>23</sup> Such communications may be addressed to Central Authorities or directly to other competent authorities. Experiences with direct judicial communications under the 1980 Child Abduction and 1996 Child Protection Conventions show that, in some States, competent authorities can only communicate with competent authorities that abide by the same standards of independence and impartiality. As a result, some competent authorities may not communicate directly with foreign Central Authorities, a flexibility which is provided for in Articles 32, 33 and 34.

21 In the light of the flexibility in the choice of channels for cooperation under Chapter V, it would be recommended that Central Authorities and competent authorities inform each other about the communications they would be involved in<sup>24</sup> to minimise the risk of duplication.

## **6. Article 32 – Requests for concrete information and assistance with regard to a specific adult**

22 Without prejudice to the many communication possibilities between Central Authorities provided for in Chapter V – Co-operation, the need for communication between competent authorities is particularly underlined in that chapter. Paragraph 132 of the Explanatory Report emphasises that there is nothing in the Convention against direct communication among non-Central Authorities (*i.e.*, competent authorities).

23 Such exchange of information relating to a specific adult is provided for in Article 32 of the 2000 Convention:

“Article 32

Paragraph 1 – Where a measure of protection is contemplated, the competent authorities under the Convention, if the situation of the adult so requires, may request any authority of another Contracting State which has information relevant to the protection of the adult to communicate such information.”

24 As stated in paragraph 134 of the Explanatory Report, Article 32 authorises the competent authority of a Contracting Party, when it contemplates taking a measure of protection, to ask any other authority of another Contracting Party which has useful information for the protection of the adult to communicate it. This flexibility of operation may be advantageous.<sup>25</sup> Such cooperation could be enhanced by the designation of the Central Authority as a contact point which could facilitate the

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<sup>21</sup> *Ibid.*, para. 7.10.

<sup>22</sup> *Ibid.*, para. 7.11.

<sup>23</sup> P. Lagarde, *op. cit.* (note 7), para. 129. While Chapter V of the 2000 Convention provides for flexibility in this regard, some limitations may occur, *e.g.*, in some States domestic law may prescribe a particular manner of communication or a Contracting Party may declare that requests under Art. 32(1) shall be communicated to its authorities only through its Central Authorities, in accordance with Art. 32(2).

<sup>24</sup> Emerging Guidance on Direct Judicial Communications, *op. cit.* (note 3), Principle 9.1.

<sup>25</sup> P. Lagarde, *op. cit.* (note 7), para. 136.

coordination of these requests. Without prejudice to the cooperation with Central Authorities under Article 32, this communication could also be facilitated by a designated member of the judiciary who could assist with locating the relevant competent authority and introducing the direct judicial communication, where necessary.<sup>26</sup> In accordance with Article 32(3), the competent authorities of a Contracting Party may also request assistance from the competent authorities of another Contracting Party in the implementation of measures of protection taken under the 2000 Convention.

## 7. Article 33 – Transborder placements

25 Article 33 of the 2000 Convention institutes the only procedure for obligatory consultation provided by the Convention:<sup>27</sup>

“Article 33

1. If an authority having jurisdiction under Articles 5 to 8 contemplates the placement of the adult in an establishment or other place where protection can be provided, and if such placement is to take place in another Contracting State, it shall first consult with the Central Authority or other competent authority of the latter State. To that effect it shall transmit a report on the adult together with the reasons for the proposed placement.”

26 Under Article 33, the competent authority considering the placement of the adult must first consult with the Central Authority or competent authority of the other Contracting Party.<sup>28</sup> The latter of these options will involve direct communication between competent authorities.

## 8. Article 34 – Adult in serious danger

27 Meanwhile Article 34 of the 2000 Convention establishes an obligatory information procedure:

“Article 34

In any case where the adult is exposed to a serious danger, the competent authorities of the Contracting State where measures for the protection of the adult have been taken or are under consideration, if they are informed that the adult's residence has changed to, or that the adult is present in, another State, shall inform the authorities of that other State about the danger involved and the measures taken or under consideration.”

28 Article 34 relates to the case in which the competent authorities of a Contracting Party, who have taken or are going to take a measure of protection for an adult exposed to serious danger, are informed of the adult's change of residence to, or of their presence in, another Contracting Party. The authorities who have taken or are going to take a measure have the obligation to inform the authorities of the State in which the adult now resides, or is present in, of this serious danger and of the measures taken or under consideration.<sup>29</sup>

## C. Other opportunities for direct judicial communications under the 2000 Protection of Adults Convention

29 During the online global meeting of the IHNJ in January 2022,<sup>30</sup> other areas where a need for direct judicial communications may arise were identified. Judges considered the possible cooperation

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<sup>26</sup> In accordance with Art. 32(2), a Contracting State may declare that requests under Art. 32(1) shall be communicated to its authorities only through its Central Authority.

<sup>27</sup> P. Lagarde, *op. cit.* (note 7), para. 138.

<sup>28</sup> Draft Practical Handbook, *op. cit.* (note 1), para. 11.16.

<sup>29</sup> P. Lagarde, *op. cit.* (note 7), para. 140.

<sup>30</sup> Information about the January 2022 meeting of the IHNJ is available on the HCCH website in the “News Archive” section at <https://www.hcch.net/en/news-archive/details/?varevent=841>.

between judicial authorities in relation to the verification of the validity and extent of powers of representation and issues of enforcement and execution.

### III. Designation of an authority for the purpose of communication under the 2000 Protection of Adults Convention

#### A. Designation of an authority under Article 42 for the purpose of Articles 8 and 33

- 30 Article 42 of the 2000 Protection of Adults Convention provides for the possibility of designating an authority<sup>31</sup> to which requests under Article 8 and Article 33 are to be addressed. This provision intends to facilitate the practical operation of the Articles to which it refers by permitting the requesting authority of a Contracting Party to know which authority should be addressed, in the requested State, when a transfer of jurisdiction to a more appropriate forum (Art. 8) or a placement abroad (Art. 33) is contemplated. While designation is optional,<sup>32</sup> it may be useful in practice, as it can facilitate more efficient communications. Article 42 provides for flexibility as to which authority can be designated for the purpose of cooperation and simplifying the communication process.
- 31 It is worth noting that, for the purpose of Article 8,<sup>33</sup> while only a competent authority can make a request to transfer jurisdiction, the request could be addressed either to a competent authority or to a Central Authority to process the request made to the appropriate competent authority. In this regard, one must bear in mind that some competent authorities will never contact Central Authorities because of independence and impartiality concerns. As a result, Contracting Parties may designate a competent authority<sup>34</sup> and / or the Central Authority to which requests under Article 8 could be addressed for liaison purposes.
- 32 The designated authority under Article 42 for the purpose of Article 8 could provide information on aspects of the law and procedure, including assisting with locating the relevant competent authority in their State and introducing the direct judicial communication.<sup>35</sup> The designated authority under Article 42 for the purpose of Article 8 may also provide useful information on the best ways to proceed, for instance, regarding the information or documentation that the competent authority may require before considering the transfer of jurisdiction.<sup>36</sup>
- 33 Regarding the designation of an authority for the purpose of Article 33, experience shows that the consultation procedure under Article 33<sup>37</sup> can involve a large number of authorities in various States. Designating an authority which could coordinate this process could improve the cooperation and ensure effective exchange of information. For the purpose of Article 33, Contracting Parties may designate a competent authority<sup>38</sup> and / or the Central Authority.

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<sup>31</sup> In addition to designating the Central Authority, a Contracting Party could decide to designate a member of the judiciary instead of a competent authority. See below, Sub-Part B “Designation of a member of the judiciary for the purpose of direct judicial communications under the 2000 Protection of Adults Convention”.

<sup>32</sup> P. Lagarde, *op. cit.* (note 7), para. 151.

<sup>33</sup> See, *supra*, para. 11.

<sup>34</sup> Due to the judicial nature of communications under Art. 8, it would be recommended to designate a member of the judiciary to which requests under Art. 8 could be addressed. This designation should not prevent Central Authorities from providing assistance, as necessary, as described in para. 32 below.

<sup>35</sup> Draft Practical Handbook, *op. cit.* (note 1), para. 5.14.

<sup>36</sup> *Ibid.*, para. 5.15.

<sup>37</sup> See, *supra*, paras 25-26.

<sup>38</sup> Instead of designating a competent authority, a Contracting Party could decide to designate a member of the judiciary. See, *supra*, note 3131.

## **B. Designation of a member of the judiciary for the purpose of direct judicial communications under the 2000 Protection of Adults Convention**

- 34 The designation of a member of the judiciary, who will be responsible for judicial communications under the 2000 Convention, could facilitate coordination and / or communications under Chapter II – Jurisdiction, and, to some extent, under Articles 32 and 34, thereby ensuring the compatibility of measures taken and the effective protection of the adult. The designated member of the judiciary could serve as a contact point, receiving and channelling incoming communications, as well as initiating and facilitating outgoing requests. Over time, such designated members of the judiciary could develop expertise and collect information in the area of protection of adults, enhancing cooperation under the Convention.
- 35 The designated member of the judiciary should be a sitting judge,<sup>39</sup> or a member of the judiciary bound by the same standards as sitting judges, in order to make certain that communications take place between authorities bound by the same standards of judicial independence and impartiality. It is also a recognised principle that the designated members of the judiciary should include judges with authority and present experience<sup>40</sup> in the area of protection of adults, as this facilitates cooperation. Where two or more judges are designated for a State, it is established practice that the designation should identify the territorial units or systems of law for which each judge has responsibility and should indicate the judge who is the primary contact and the judge who is the alternate contact.<sup>41</sup>
- 36 Details of the designated judges could be forwarded to the Permanent Bureau (PB) for inclusion in a list of designated members of the judiciary available in both English and French.<sup>42</sup> The information to be provided for inclusion in the list of designated members of the judiciary could consist of the name of the judge and, if possible, in order to assist the PB with translation, the position of the judge and the name of the court where the judge sits in both French and English, in addition to the position and the name in the original language(s). Other information to be provided includes the official contact details of the judge and the language(s) in which they are able to communicate in writing and orally.<sup>43</sup> A copy of the list of designated judges, including their contact details, could be made available for distribution only to other designated members of the judiciary. However, names and positions of the designated judges could be available to the public through the HCCH website.<sup>44</sup>

## **IV. Benefits of developing a network of designated members of the judiciary under the 2000 Protection of Adults Convention**

- 37 Developing a network of designated members of the judiciary under the 2000 Protection of Adults Convention could produce added value to the cooperation between competent authorities. As an organised and structured group, the network could facilitate the exchange of information, knowledge and good practices about measures of protection in various jurisdictions.<sup>45</sup> Network judges could encourage members of the judiciary to engage, where appropriate, in direct judicial

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<sup>39</sup> Emerging Guidance on Direct Judicial Communications, *op. cit.* (note 3), Principle 1.2.

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*, Principle 1.8. Competent authorities responsible for making such designations vary from State to State. Examples of these competent authorities include judicial councils, supreme courts, chief justices, assemblies of judges or, sometimes, the Ministry of Justice or other relevant government department. The process for designation of judges should respect the independence of the judiciary. Designation of judges in States that are not Parties to the 2000 Protection of Adults Convention is also encouraged. Designations should be made by way of signed letter or the transmission of any official document from the competent authority responsible for the designation (see Principles 1.2, 1.3, 1.4 and 1.7).

<sup>42</sup> *Ibid.*, Principle 2.1.

<sup>43</sup> *Ibid.*, Principle 2.2.

<sup>44</sup> *Ibid.*, Principle 2.4.

<sup>45</sup> *Ibid.*, Principle 4.4.

communications,<sup>46</sup> as well as provide or facilitate the provision of responses to enquires from foreign judges.<sup>47</sup>

38 The network of judges could also play an important role in promoting the 2000 Protection of Adults Convention and the area of protection of adults generally,<sup>48</sup> as well as the effective working relationships between all those involved in the matter. Members of the network could initiate and participate in training seminars and raise awareness of relevant legislation and the 2000 Convention.<sup>49</sup> Meetings involving network judges at a national, bilateral, regional or multilateral level could, over time, build necessary trust and confidence between designated members of the judiciary and assist in the exchange of information.<sup>50</sup>

39 A network of judges could extend beyond Contracting Parties to the 2000 Protection of Adults Convention<sup>51</sup> which would allow coordination with non-Contracting States, where necessary. For example, it would facilitate communications with non-Contracting Parties under Article 10(3) of the 2000 Convention.

## V. Extension of the International Hague Network of Judges (IHNJ) to the 2000 Protection of Adults Convention

### A. Background information on the IHNJ

40 The creation of the IHNJ specialising in family matters was first proposed at the 1998 De Ruwenberg Seminar for Judges on the international protection of children.<sup>52</sup> It was recommended that the relevant authorities (e.g., court presidents or other officials as is appropriate within the different legal cultures) in the different jurisdictions designate one or more members of the judiciary to act as a channel of communication and liaison with their national Central Authorities, with other judges within their jurisdictions and with judges in other Contracting Parties, in respect, at least initially, of issues relevant to the 1980 Child Abduction Convention. It was felt that the development of such a network would facilitate communications and cooperation between judges at the international level and would assist in ensuring the effective operation of the 1980 Child Abduction Convention.<sup>53</sup>

### B. Extension of the IHNJ to other Conventions

41 Almost 25 years later, it is now recognised that there is a broad range of international instruments, both regional and multilateral, in relation to which direct judicial communications can play a role beyond the 1980 Child Abduction Convention.<sup>54</sup> Since its inception, a number of judicial

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<sup>46</sup> *Ibid.*, Principle 5.1.

<sup>47</sup> *Ibid.*, Principle 5.2.

<sup>48</sup> *Ibid.*, Principle 4.5.

<sup>49</sup> *Ibid.*, Principle 3.1.

<sup>50</sup> *Ibid.*, Principle 4.4.

<sup>51</sup> *Ibid.*, Principle 1.4.

<sup>52</sup> Information on the 1998 De Ruwenberg Judicial Seminar is available on the HCCH website at [www.hcch.net](http://www.hcch.net) under “Child Abduction Section” then “Judicial Seminars on the International Protection of Children” and “Other Judicial Seminars”.

<sup>53</sup> Emerging Guidance on Direct Judicial Communications, *op. cit.* (note 3), p. 6.

<sup>54</sup> See The Conclusions and Recommendations of the Joint EC-HCCH Judicial Conference, Conclusion and Recommendation No 17. The Conclusions and Recommendations of the Joint EC-HCCH Judicial Conference are available on the HCCH website at [www.hcch.net](http://www.hcch.net) under “Child Abduction Section” then “Judicial Communications”. These Conclusions and Recommendations were adopted by consensus by more than 140 judges from more than 55 jurisdictions representing all continents.

conferences have supported the expansion of the IHNJ. The Fourth,<sup>55</sup> Fifth<sup>56</sup> and Sixth<sup>57</sup> Meetings of the Special Commission (SC) to review the operation of the 1980 Child Abduction Convention discussed these developments, and their Conclusions and Recommendations demonstrate support for the IHNJ and the continuation of work aimed at further development.

### C. Advantages and disadvantages of including the 2000 Protection of Adults Convention under the IHNJ

- 42 The possible advantages and practical aspects of extending the IHNJ to the 2000 Protection of Adults Convention were discussed at two online IHNJ meetings in November 2021 and January 2022 respectively. It was emphasised that creating a new, distinct network of judges for the purpose of the 2000 Convention would not be efficient due to the small number of cases that arise under the Convention. It is also important to note that the current framework of the IHNJ is easily transposable to the 2000 Convention.<sup>58</sup> Judges present at the meetings agreed that the future of the IHNJ lies with its expansion to other Conventions, predominantly in the area of family law.
- 43 Although some judges questioned whether they would be able to effectively perform their functions in relation to the 2000 Protection of Adults Convention, as they are not experts in the field, it was noted that members of the IHNJ can exercise a liaison / conduit function in relation to this Convention, while continuing to serve as experts in relation to child protection cases. This role of members of the IHNJ as links between their colleagues at the domestic level and other members of the IHNJ at the international level was enshrined in the Emerging Guidance on Direct Judicial Communications.<sup>59</sup> Hague Network Judges may not only provide, but also facilitate the provision of responses to focused enquiries from foreign judges concerning legislation and Conventions and their operation in their jurisdiction.<sup>60</sup> The role of Hague Network Judges is to receive and, where necessary, channel incoming judicial communications and initiate or facilitate outgoing communications. The Hague Network Judge may be the judge involved in the communication itself, or they may facilitate the communication between the judges seized with the specific case.<sup>61</sup> As such, a high level of expertise in the area of protection of adults will not be required to effectively perform this liaison / conduit function.
- 44 Moreover, during the IHNJ meetings it was emphasised that the 2000 Protection of Adults Convention contains some mechanisms similar to those under the 1996 Child Protection Convention. In addition, a number of resources on the 2000 Convention are, or will soon be,

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<sup>55</sup> “Conclusions and Recommendations of the Fourth Meeting of the Special Commission to review the operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (22–28 March 2001)”, drawn up by the PB, see Conclusions and Recommendations Nos 5.5 to 5.7 (available on the HCCH website at [www.hcch.net](http://www.hcch.net) under “Child Abduction Section” then “Special Commission meetings on the practical operation of the Convention” and “Preliminary Documents”).

<sup>56</sup> “Conclusions and Recommendations of the Fifth Meeting of the Special Commission to review the operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and the practical implementation of the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children (30 October–9 November 2006)”, adopted by the Special Commission, see Part VI (available on the HCCH website at [www.hcch.net](http://www.hcch.net) under “Child Abduction Section” then “Special Commission meetings on the practical operation of the Convention”).

<sup>57</sup> Conclusions and Recommendations of Part I and Part II of the Sixth Meeting of the Special Commission to review the practical operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction 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, which took place in The Hague respectively from 1 to 10 June 2011 and from 25 to 31 January 2012.

<sup>58</sup> See Emerging Guidance on Direct Judicial Communications, *op. cit.* (note 3). See also List of Members of the IHNJ and IHNJ Secure Portal (available on the HCCH website at [www.hcch.net](http://www.hcch.net) under “Child Abduction” then “The International Hague Network of Judges”).

<sup>59</sup> Emerging Guidance on Direct Judicial Communications, *op. cit.* (note 3), p. 7.

<sup>60</sup> *Ibid.*, Principle 5.2.

<sup>61</sup> *Ibid.*, p. 12.

available to facilitate the familiarisation with the subject matter (e.g., the Explanatory Report, the Practical Handbook and the Country Profile).

- 45 Members of the IHNJ also discussed the possibility of appointing additional judges with authority and expertise in the area of adult protection who could be responsible for direct judicial communications under the 2000 Protection of Adults Convention. This would allow each judge designated by a State to only receive judicial communications related to the Convention(s) in which they have expertise. The flexibility of the IHNJ in this regard was emphasised.
- 46 Experiences of the IHNJ in relation to child protection matters demonstrate that, over time a certain mutual understanding can develop where members of the IHNJ and Central Authorities respect each other's competences and have a clear understanding of their respective roles and mandates.

## **VI. Possible Conclusions and Recommendations**

- 47 Contracting Parties are invited to consider designating one or more members of the judiciary for the purpose of judicial communications under the 2000 Convention, including for the purpose of Article 42, with a view to, in the future, organise such members of the judiciary into a network. Designated members of the judiciary should be sitting judges, or members of the judiciary bound by the same standards of independence and impartiality as a sitting judge, with authority and, ideally, with present experience in the area of protection of adults.
- 48 The SC is invited to consider recommending to the 2023 Council on General Affairs and Policy (CGAP) to extend, with the necessary adaptations, the Emerging Guidance on Direct Judicial Communications<sup>62</sup> to the 2000 Protection of Adults Convention.
- 49 The SC is invited to consider recommending to the 2023 CGAP the extension of the IHNJ to include members of the judiciary designated for the purpose of the 2000 Protection of Adults Convention.

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<sup>62</sup> *Op. cit.* (note 3).

## **ANNEX**

## Annex I – Principles for Direct Judicial Communications in specific cases including commonly accepted safeguards, Principles 6-9

### 6 Communication safeguards

#### OVERARCHING PRINCIPLES

- 6.1 Every judge engaging in direct judicial communications must respect the law of his or her own jurisdiction.<sup>1</sup>
- 6.2 When communicating, each judge seized should maintain his or her independence in reaching his or her own decision on the matter at issue.
- 6.3 Communications must not compromise the independence of the judge seized in reaching his or her own decision on the matter at issue.

#### COMMONLY ACCEPTED PROCEDURAL SAFEGUARDS

- 6.4 In Contracting States in which direct judicial communications are practised, the following are commonly accepted procedural safeguards:<sup>2</sup>
- except in special circumstances, parties are to be notified of the nature of the proposed communication;
  - a record is to be kept of communications and it is to be made available to the parties;<sup>3</sup>
  - any conclusions reached should be in writing;
  - parties or their representatives should have the opportunity to be present in certain cases, for example via conference call facilities.
- 6.5 Nothing in these commonly accepted procedural safeguards prevents a judge from following rules of domestic law or practices which allow greater latitude.

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<sup>1</sup> Prel. Doc. No 8 of October 2006 drawn up for the attention of the Fifth Meeting of the Special Commission to review the operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (The Hague, 30 October – 9 November 2006) (hereinafter, “Prel. Doc. No 8/2006 on Judicial Communications”), para. 73 under 5 *m*). For example, the taking of evidence should follow the channels prescribed by law.

<sup>2</sup> The text of Principle 6.4 follows from the views of experts consulted that consideration should be given to amend Recommendation No 5.6 of the Fourth Meeting of the Special Commission, which originally stated: “In Contracting States in which direct judicial communications are practised, the following are commonly accepted safeguards:

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

<sup>3</sup> It is to be noted that records can be kept in different forms such as, for example, a transcription, an exchange of correspondence, a note to file.

## 7 Initiating the communication

### NECESSITY

- 7.1 In considering whether the use of direct judicial communications is appropriate, the judge should have regard to speed, efficiency and cost-effectiveness.

### TIMING – BEFORE OR AFTER THE DECISION IS TAKEN

- 7.2 Judges should consider the benefit of direct judicial communications and when in the procedure it should occur.
- 7.3 The timing of the communication is a matter for the judge initiating the communication.<sup>4</sup>

### MAKING CONTACT WITH A JUDGE IN THE OTHER JURISDICTION

- 7.4 The initial communication should ordinarily take place between two Hague Network Judges in order to ascertain the identity of the judge seized in the other jurisdiction.<sup>5</sup>
- 7.5 When making contact with a judge in another jurisdiction, the initial communication should normally be in writing (see Principle No 8 below) and should in particular identify:
- a the name and contact details of the initiating judge;
  - b the nature of the case (with due regard to confidentiality concerns);
  - c the issue on which communication is sought;
  - d whether the parties before the judge initiating the communication have consented to this communication taking place;
  - e when the communication may occur (with due regard to time differences);
  - f any specific questions which the judge initiating the communication would like answered;
  - g any other pertinent matters.
- 7.6 The time and place for communications between the courts should be to the satisfaction of both courts. Personnel other than judges in each court may communicate fully with each other to establish appropriate arrangements for the communication without the necessity for participation of counsel unless otherwise ordered by either of the courts.<sup>6</sup>

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<sup>4</sup> Prel. Doc. No 8/2006 on Judicial Communications, *supra*, note 1, para. 73 under 5 n).

<sup>5</sup> *Ibid.*, under 5 o).

<sup>6</sup> See American Law Institute, “Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases”, appearing as Annex K in Prel. Doc. No 8/2006 on Judicial Communications, *supra*, note 1, Guideline 7 d).

## **8 The form of communications and language difficulties**

- 8.1 Judges should use the most appropriate technological facilities in order to communicate as efficiently and as swiftly as possible.<sup>7</sup>
- 8.2 The initial method and language of communication should, as far as possible, respect the preferences, if any, indicated by the intended recipient in the list of members of the Hague Network. Further communications should be carried out using the initial method and language of communication unless otherwise agreed by the judges concerned.
- 8.3 Where two judges do not understand a common language, and translation or interpretation services are required, such services could be provided either by the court or the Central Authority in the country from which the communication is initiated.
- 8.4 Hague Network Judges are encouraged to improve their foreign language skills.

### WRITTEN COMMUNICATIONS

- 8.5 Written communications, particularly in initiating the contact, are valuable as they provide for a record of the communication and help alleviate language and time zone barriers.
- 8.6 Where the written communication is provided through translation, it is good practice also to provide the message in its original language.
- 8.7 Communications should always include the name, title and contact details of the sender.
- 8.8 Communications should be written in simple terms, taking into account the language skills of the recipient.
- 8.9 As far as possible, appropriate measures should be taken for the personal information of the parties to be kept confidential.
- 8.10 Written communications should be transmitted using the most rapid and efficient means of communication and, in those cases where it is necessary for confidential data to be transmitted, secured means of communication should be employed.
- 8.11 Written communications should always be acknowledged as soon as possible with an indication as to when a response will be provided.
- 8.12 All communications should be typewritten.
- 8.13 Ordinarily, communications should be in writing, save where the judges concerned are from jurisdictions with proceedings conducted in the same language.

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<sup>7</sup> 2001/470/EC: Council Decision of 28 May 2001 establishing a European Judicial Network in civil and commercial matters, Art. 8, *OJ L 174, 27/06/2001*, pp. 25-31.

## ORAL COMMUNICATIONS

- 8.14 Oral communications are encouraged where judges involved come from jurisdictions which share the same language.
- 8.15 Where the judges do not speak the same language, one or both of them, subject to an agreement between the two judges concerned, should have at their disposal a competent and neutral interpreter who can interpret to and from their language.
- 8.16 Where necessary, personal information concerning the parties should be anonymised for the purposes of oral communication.
- 8.17 Oral communications can take place either by telephone or videoconference and, in those cases where it is necessary that they deal with confidential information, such communications should be carried out using secured means of communication.

## 9 Keeping the Central Authority informed of judicial communications

- 9.1 Where appropriate, the judge engaged in direct judicial communications may consider informing his or her Central Authority that a judicial communication will take place.