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FAISABILITÉ D'UN PROTOCOLE À LA *CONVENTION DE LA HAYE DU 23 NOVEMBRE 2007 SUR LE RECOUVREMENT INTERNATIONAL DES ALIMENTS DESTINÉS AUX ENFANTS ET À D'AUTRES MEMBRES DE LA FAMILLE* CONSACRÉ AU RECOUVREMENT INTERNATIONAL DES ALIMENTS DESTINÉS AUX PERSONNES VULNÉRABLES

établi par le Bureau Permanent

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FEASIBILITY OF DEVELOPING A PROTOCOL TO THE *HAGUE CONVENTION OF 23 NOVEMBER 2007 ON THE INTERNATIONAL RECOVERY OF CHILD SUPPORT AND OTHER FORMS OF FAMILY MAINTENANCE* TO DEAL WITH THE INTERNATIONAL RECOVERY OF MAINTENANCE IN RESPECT OF VULNERABLE PERSONS

drawn up by the Permanent Bureau

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Introduction

1. The issue of the application of the *Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance* ("the 2007 Child Support Convention") to vulnerable persons was raised during the Twenty-First Session of the Hague Conference on Private International Law. Some delegations proposed that the 2007 Child Support Convention should be applicable in its entirety on a mandatory basis to maintenance in respect of vulnerable persons. However, other delegations did not feel ready to accept this proposal without examining its full implications. There was not enough time to do so during the Session, which explains Recommendation No 9 of the Final Act of the Twenty-First Session.[1]

2. In the light of this recommendation, the 2008 Council on General Affairs and Policy of the Hague Conference invited the Permanent Bureau to prepare a questionnaire on the feasibility of developing a protocol to the 2007 Child Support Convention to deal with the international recovery of maintenance in respect of vulnerable persons.[2] It was recommended that the responses should be submitted for discussion to the 2009 Special Commission[3] on the implementation of that Convention and a report made to the Council for its meeting of 2010.

3. Before providing a summary of the responses, it is appropriate to recall the definition of "vulnerable person" under the 2007 Child Support Convention. Article 3 *f)* states that "'vulnerable person' means a person who, by reason of an impairment or insufficiency of his or her personal faculties, is not able to support him or herself".

Summary of the responses

4. The questionnaire was divided into three parts: (A) maintenance obligations in respect of vulnerable persons which come within the compulsory scope of the Convention, followed by (B) maintenance obligations in respect of vulnerable persons which may be brought within the scope of the Convention by Contracting States by a declaration under Article 2, paragraph 3, and ending with (C) maintenance obligations in respect of vulnerable persons which cannot be brought within the scope of the Convention using this provision.

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[1] Recommendation No 9 of the Final Act of the Twenty-First Session of the Hague Conference on Private International Law, 23 November 2007, provides that:

> "The Twenty-First Session […] [r]ecommends that the Council on General Affairs and Policy should consider as a matter of priority the feasibility of developing a Protocol to the *Hague Convention [of 23 November 2007] on the International Recovery of Child Support and Other Forms of Family Maintenance* to deal with the international recovery of maintenance in respect of vulnerable persons. Such a Protocol would complement and build upon the *Hague Convention of 13 January 2000 on the International Protection of Adults*."

[2] See "Questionnaire on the feasibility of developing a protocol to the *Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance* to deal with the international recovery of maintenance in respect of vulnerable persons", drawn up by the Permanent Bureau, Prel. Doc. No 1 of May 2009 for the attention of the Special Commission of November 2009 on the implementation of the 2007 Child Support Convention and of the 2007 Protocol on Applicable Law, available on the Hague Conference website at < www.hcch.net > under "Work in Progress" then "Maintenance Obligations".

[3] See "Summary and compilation of responses to the Questionnaire on the feasibility of developing a protocol to the *Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance* to deal with the international recovery of maintenance in respect of vulnerable persons", drawn up by the Permanent Bureau, Prel. Doc. No 8 of November 2009 for the attention of the Special Commission of November 2009 on the implementation of the 2007 Child Support Convention and of the 2007 Protocol on the Law Applicable to Maintenance Obligations, available on the Hague Conference website, *ibid*. This study is based on answers received up to 22 October 2009 from 46 jurisdictions: Albania, Argentina, Australia, Belgium, Brazil, Bulgaria, Canada, Chile, China, China (Hong Kong SAR), China (Macao SAR), Croatia, Cyprus, Czech Republic, Denmark, Dominican Republic, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Israel, Japan, Latvia, Lithuania, Malaysia, Mexico, Monaco, The Netherlands, New Zealand, Norway, Paraguay, Poland, Portugal, Romania, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Turkey, the United Kingdom, the United States of America, and the European Commission (for questions 3, 8, 11 and 14).

(A) Maintenance obligations in respect of vulnerable persons which come within the compulsory scope of the Convention[4]

5. There are three areas of relevance which fall within the compulsory scope of the Convention. Firstly, an obligation arising from a parent-child relationship where the child is under 21 (or 18)[5] years may involve a vulnerable person under 21 (or 18) years. Secondly, the Convention covers a vulnerable spouse for the purposes of recognition and enforcement of a decision on maintenance obligations. Thirdly, where a decision on maintenance regarding a child with an impairment is made before the child reaches majority, the decision can be the subject of a direct request for recognition and enforcement after the child reaches majority (Art. 37(3)). With regard to the first two categories, most States reported that they had no special rules in domestic law regarding vulnerable persons because the persons in question are entitled to support whether they are vulnerable or not.[6]

(B) Maintenance obligations in respect of vulnerable persons which may be brought within the scope of the Convention by Contracting States[7]

6. Obligations which may be brought within the scope of the Convention by way of a declaration include obligations towards vulnerable persons which arise from family relationships, parentage, marriage or affinity. Most States that responded to the Questionnaire indicated that there are no special rules in their laws with respect to vulnerable persons arising from family relationships other than for children and spouses. Most States had not yet decided whether they intend to extend the application of the whole or any part of the Convention to maintenance obligations in respect of vulnerable persons. Two States indicated that they would not extend the application of the Convention and five States indicated that they would do so. When asked whether any special rules should be added, the majority of States indicated that this would not be necessary. Two States drew attention to the importance of maintenance obligations of a parent towards a child over the age of majority where the latter suffers from impairment even when the impairment occurs after the age of majority.

(C) Maintenance obligations in respect of vulnerable persons which cannot be brought within the scope of the Convention[8]

7. Most States did not identify any categories of maintenance obligations which cannot be brought within the scope of the Convention using the declaration under Article 2, paragraph 3. However, some States identified the following categories: (1) parties in a stable relationship; (2) pregnant women; (3) guardians responsible for orphaned children or incapacitated adults; (4) State assistance to persons with disabilities; and, (5) debtors of non-contractual obligations. With regard to the first category, it was noted that a stable relationship may constitute a family relationship in many legal systems. With regard to categories 4 and 5 there is a question as to whether these fall within the scope of maintenance. When asked whether any special rule should be added to the Convention, few States replied and almost all said no.

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[4] See Prel. Doc. No 8 (*op. cit.* note 3), at paras 5-9.
[5] Under Art. 2(2) of the 2007 Convention, any Contracting State may reserve the right to limit the application of the Convention under Art. 2(1) *a)* to persons who have not attained the age of 18 years.
[6] See Prel. Doc. No 8 (*op. cit.* note 3), at para. 10.
[7] *Ibid.*, at paras 11-16.
[8] *Ibid.*, at paras 17-19.

Conclusion with regard to the Questionnaire[9]

8. Out of the 46 responses to the questionnaire, eight[10] were to the effect that there is a need to develop a protocol to deal with the international recovery of maintenance in respect of a vulnerable person. Overall, the objective would be to protect the dependent child over the age of majority, the vulnerable spouse and the incapacitated adult. On the other hand, 38 responses to the questionnaire were to the effect that there is no need for the development of a protocol to deal with the international recovery of maintenance in respect of vulnerable persons. It is the view of most States that the Convention already contains sufficient flexibility, particularly within its existing provisions on scope, to allow coverage of maintenance obligations in respect of vulnerable persons.

Conclusion and Recommendation of the November 2009 Special Commission

9. "The Special Commission recognised the importance of ensuring that vulnerable persons are in a position to benefit from the provisions of the Convention. The Special Commission was of the opinion that the core scope of the Convention already covers a number of categories of maintenance obligations in respect of vulnerable persons. Moreover, the Convention contains sufficient flexibility, particularly within the provisions on scope, to enable States to bring other categories by declaration within the scope of the Convention. The Permanent Bureau should, nevertheless, continue to monitor the situation and, if experience reveals that there exist categories of maintenance obligation towards vulnerable persons which cannot be brought within the scope of the Convention under Article 2(3), or that special rules are needed in respect of vulnerable persons, this should be brought to the attention of the Council on General Affairs and Policy of the Conference."

[9] *Ibid*., at para. 21.
[10] Albania, Brazil, Canada (Nova Scotia and Saskatchewan), Chile, China (Macao SAR), Croatia, Dominican Republic and South Africa.