RAPPORT RELATIF AUX COMMUNICATIONS ENTRE JUGES CONCERNANT LA PROTECTION INTERNATIONALE DE L’ENFANT

délibi par Philippe Lortie, Premier secrétaire

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REPORT ON JUDICIAL COMMUNICATIONS IN RELATION TO INTERNATIONAL CHILD PROTECTION
drawn up by Philippe Lortie, First Secretary


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INTRODUCTION

1. History – A first case of cross-border direct judicial communications

1. Fifteen years ago, for the first time to the knowledge of the Permanent Bureau, a direct judicial communication in relation to a specific case took place between two judges in different States Parties to the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (hereinafter the “1980 Hague Child Abduction Convention”). This was the D. v. B. decision of 1996 in which Judge Roger Baker, Superior Court (Family Division) of the District of Terrebonne, Quebec, contacted directly Judge James W. Stewart, Judge of the Superior Court of California, County of Santa Clara.

2. On 18 January 1996 two children for whom the married parents had joint rights of custody were taken by their mother from the United States of America to Canada, the mother’s State of origin. An escalation of legal proceedings followed and on 22 January the mother initiated custody proceedings in Quebec. On 7 February a court in California ordered the mother to return the children from Canada by 7 March. On 22 February the Quebec Court awarded the mother provisional custody. The father contested the jurisdiction of the court and on 7 March the California Supreme Court awarded him interim custody. Finally, the father applied to the Superior Court of Quebec for the return of the children. Further to direct judicial communications, the return was ordered. Judge Baker, the trial judge in Quebec, made contact with the responsible judge in California to ascertain whether the mother would be at a disadvantage for having refused to comply with the California order to return with the children. Judge Stewart of the Superior Court of California stated this would not be the case were a return ordered and offered to sign an additional order clarifying his 7 March 1996 order that would ensure the custody order was interim only. The 17 May 1996 Californian order was subsequently set out in full in the Canadian judgment.

3. Since the D. v. B. decision, the number of judges taking advantage of such communications has grown to a point that it has resulted in the creation of a solid international network of judges which is now represented in all regions of the world. The need to develop a framework for this Network and general principles for direct judicial communication, including appropriate safeguards, has also been recognised.

2. An international network of judges

4. The creation of the International Hague Network of Judges specialised in family matters (hereinafter “the Hague Network”) was first proposed at the 1998 De Ruwenberg Seminar for judges on the international protection of children. 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 States, in respect, at least initially, of issues relevant to the 1980 Hague Child Abduction Convention. It was felt that the development of such a network would

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1 D. v. B., 17 May 1996, transcript, affirmed by a majority decision by the Quebec Court of Appeal, 27 September 1996. A summary of the decision can be found at <www.incadat.com> Ref. HC/E/CA 369 [17/05/1996; Superior Court of Quebec; Terrebonne, Family Division (Canada); First Instance]. See also, P.R. Beaumont and P.E. McEleavy, The Hague Convention on International Child Abduction, Oxford University Press, 1999, at p. 168.

2 Certain elements of sub-parts 2. and 3. of this Introduction are drawn from Prel. Doc. No 3 A, infra, note 20, as both documents could be read independently.

3 Information on the 1998 De Ruwenberg Judicial Seminar is available on the Hague Conference website at <www.hcch.net> under “Child Abduction Section” then “Judicial Seminars on the International Protection of Children” and “Other Judicial Seminars”. 
facilitate communications and co-operation between judges at the international level and would assist in ensuring the effective operation of the 1980 Hague Child Abduction Convention. More than 10 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 Hague Child Abduction Convention.

5. Since its inception, a number of judicial conferences have supported the expansion of the Hague Network. Both the Fourth and Fifth Meetings of the Special Commission to review the operation of the 1980 Hague Child Abduction Convention discussed these developments and the Conclusions and Recommendations from both demonstrate support for the Hague Network and the continuation of work aimed at its further development. In January 2009, the Joint Conference of the European Commission-Hague Conference on Direct Judicial Communications on Family Law Matters and the Development of Judicial Networks (hereinafter "the Joint EC-HCCH Conference"), which took place in Brussels, emphasised the value of direct judicial communications in international child protection cases, as well as the development of international, regional and national judicial networks to support such communications. On that latter point, the Joint EC-HCCH Conference invited the different networks to operate in a complementary and co-ordinated manner in order to achieve synergies, and, as far as possible, to observe the same safeguards in relation to direct judicial communications. The Hague Network currently includes more than 60 judges from 43 States in all continents.

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4 A list of judicial conferences on the international protection of children, organised, facilitated or attended by the Permanent Bureau where Conclusions and Recommendations on judicial communications were adopted can be found in Annex A to Prel. Doc. No 3 B –Annexes – of April 2011.
5 "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 Permanent Bureau (hereinafter "Conclusions and Recommendations of the Fourth Meeting of the Special Commission"), available on the Hague Conference website at <www.hcch.net> under "Child Abduction Section" then "Special Commission meetings on the practical operation of the Convention" and "Preliminary Documents". See Conclusions and Recommendations No 5.5, 5.6 and 5.7 reproduced below under para. 9 of this document.
7 The Conclusions and Recommendations of the 15 to 16 January 2009 Joint EC-HCCH Judicial Conference are available on the Hague Conference website at <www.hcch.net> under "Child Abduction Section" then "Judicial Communications" and in Annex B to Prel. Doc. No 3 B –Annexes – of April 2011. These Conclusions and Recommendations were adopted by consensus by more than 140 judges from more than 55 jurisdictions representing all continents. Vol. XV of the The Judges' Newsletter is dedicated to the January 2009 Joint EC-HCCH Judicial Conference. It is available on the Hague Conference website at <www.hcch.net> under "Conventions" then "Convention No 28" and "HCCH Publications".
8 Argentina, Australia, Belgium, Brazil, Canada, Chile, China (Hong Kong, Special Administrative Region), Costa Rica, Cyprus, Czech Republic, Denmark, Dominican Republic, Ecuador, El Salvador, Finland, France, Gabon, Germany, Guatemala, Honduras, Iceland, Ireland, Israel, Kenya, Luxembourg, Malta, Mexico, Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Peru, Romania, Singapore, South Africa, Spain, Sweden, United Kingdom (England and Wales, Northern Ireland and Scotland), United States of America, Uruguay and Venezuela. A current list of members of the International Hague Network of Judges is available on the Hague Conference website at <www.hcch.net> under "Child Abduction Section" then "The International Hague Network of Judges".
3. **Role and functions of a member of the International Hague Network of Judges**

6. The role of a member of the Hague Network is to be a link between his or her colleagues at the domestic level and other members of the Network at the international level. There are two main communication functions exercised by members of the Network.

7. The first communication function is of a general nature (i.e., not case specific). It includes the sharing of general information from the Hague Network or the Permanent Bureau with his or her colleagues in the jurisdiction and assisting with the reverse flow of information. It may also encompass participation in international judicial seminars. Judicial communications can be very helpful from a general point of view: experiences regarding procedures and methods, which have been developed in the course of past and current proceedings, can be exchanged between judges. Through judicial communications, judges from different jurisdictions may be able to inform each other and learn from one another about the handling of proceedings involving applications for return and custody under the 1980 Hague Child Abduction Convention; it will also assist in promoting consistent interpretation of other Conventions. Judges will then better understand how their colleagues work in other jurisdictions. Ultimately, such exchanges may well lead to an increased appreciation of different “jurisdictional cultures”. These developments have also been assisted by the now bi-annual publication by the Permanent Bureau of *The Judges’ Newsletter on International Child Protection*.⁹

8. The second communication function consists of direct judicial communications with regard to specific cases, the objective of such communications being to address any lack of information that the competent judge has about the situation and legal implications in the State of the habitual residence of the child. In this context, members of the Hague Network may be involved in facilitating arrangements for the prompt and safe return of the child, including the establishment of urgent and/or provisional measures of protection and the provision of information about custody or access issues or possible measures for addressing domestic violence or abuse allegations. These communications will often result in considerable time savings and better use of available resources, all in the best interests of the child.

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1. **The March 2001 Fourth Meeting of the Special Commission**

9. During the Fourth Meeting of the Special Commission of March 2001 the issue of the feasibility and limitations of direct judicial communications and the development of an international network of judges was addressed in the context of issues surrounding the safe and prompt return of the child (and the custodial parent where relevant). The Special Commission adopted among others the following Conclusions and Recommendations that focused on international judicial communications between judges or between judges and other authorities:

"Direct judicial communications

5.5 Contracting States are encouraged to consider identifying a judge or judges or other persons or authorities able to facilitate at the international level communications between judges or between a judge and another authority.

5.6 Contracting States should actively encourage international judicial cooperation. This takes the form of attendance of judges at judicial conferences

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by exchanging ideas / communications with foreign judges or by explaining the possibilities of direct communication on specific cases.

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.

The Permanent Bureau should continue to explore the practical mechanisms for facilitating direct international judicial communications.”

2. The Special Commission of September / October 2002

10. A Preliminary Report on direct international judicial communications was presented to the Special Commission of September / October 2002. The 2002 Report was in part a summary of the responses to a 2002 Questionnaire received from 16 jurisdictions and one non-governmental international organisation. The Preliminary Report drew on conclusions and recommendations of various international judicial conferences and seminars, which had examined this subject before 2002, academic literature, existing national laws and regional norms in force at the time as well as *The Judges’ Newsletter*. At its September / October 2002 meeting the Special Commission adopted the following Conclusions and Recommendations:

“...The Permanent Bureau will:

(a) Continue the formal consultation with Member States of the Hague Conference as well as other States Parties to the 1980 Hague Convention, based on the Preliminary Report together with the Report that will be drawn...

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12 Austria, Bosnia and Herzegovina, Chile, China (Hong Kong Special Administrative Region), Denmark, Finland, France, Germany, Iceland, Netherlands, Poland, Switzerland, the United Kingdom (England and Wales, Northern Ireland and Scotland) and Uzbekistan.

13 International Centre for Missing and Exploited Children (ICMEC).

14 Supra, note 4.

up by the Permanent Bureau on the Conclusions and Recommendations of the Special Commission of September / October 2002.

(b) Continue informal consultations with interested judges based on the Preliminary Report together with the Report that will be drawn up by the Permanent Bureau on the Conclusions and Recommendations of the Special Commission of September / October 2002.

(c) Continue to examine the practical mechanisms and structures of a network of contact points to facilitate at the international level communications between judges or between a judge and another authority.

(d) Complete the Final Report that will include further analysis of policy issues and tentative conclusions.

(e) Draw up an inventory of existing practices relating to direct judicial communications in specific cases under the 1980 Hague Convention with the advice of a consultative group of experts drawn primarily from the judiciary."

3. The October / November 2006 Fifth Meeting of the Special Commission

11. A more elaborate Report on judicial communications was presented to the Fifth Meeting of the Special Commission of October / November 2006. The 2006 Report was based on the responses to a 2006 Questionnaire received from 45 jurisdictions and on all of the responses to the 2002 Questionnaire. The Report also drew on conclusions and recommendations of various international judicial conferences and seminars held until September 2006 that have examined this subject, academic literature, existing national laws and regional norms in force and all volumes of The Judges’ Newsletter. In essence, this Report offered an inventory of the different mechanisms in place to facilitate direct international judicial communications. It also identified the difficulties and constraints that States and judges may face with these mechanisms. At its October / November

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17 "Questionnaire concerning the Practical Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (Including questions on implementation of the Hague Convention of 19 October 1996 on Jurisdictions, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children)", drawn up by the Permanent Bureau, Prel. Doc. No 1 of April 2006 for the attention of the Special Commission of October / November 2006 on the Civil Aspects of International Child Abduction. This document is available on the Hague Conference website at < www.hcch.net > under "Conventions" then "Convention No 28" and "Questionnaires & Responses". Member States of the Hague Conference on Private International Law and States Parties to the 1980 Hague Convention were asked to describe any developments in the area of direct judicial communication. Furthermore, those who had responded to the 2002 Questionnaire were asked to describe any developments in this area since their response was made. As for the 2002 Questionnaire, responses were also sought from the international governmental and non-governmental organisations invited to attend the previous Special Commission.

18 Argentina, Australia, Austria, Canada, Chile, China (Hong Kong, Special Administrative Region), China (Macao, Special Administrative Region), Colombia, Costa Rica, Cyprus, Czech Republic, Denmark, Ecuador, El Salvador, Finland, France, Greece, Guatemala, Iceland, Ireland, Israel, Italy, Latvia, Lithuania, Malta, Mexico, Monaco, Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Poland, Portugal, Romania, Slovak Republic, South Africa, Spain, Switzerland, Sweden, United Kingdom (England and Wales, Northern Ireland), United Kingdom (Scotland), United States of America and Uruguay.

19 Supra, note 4.
2006 meeting the Special Commission adopted the following Conclusions and Recommendations:

"In relation to future work, the Permanent Bureau in the light of the observations made during the meeting will:

a) continue consultations with interested judges and other authorities based on Preliminary Document No 8;

b) continue to develop the practical mechanisms and structures of the International Hague Network of Judges;

c) continue to develop contacts with other judicial networks and to promote the establishment of regional judicial networks;

d) maintain an inventory of existing practices relating to direct judicial communications in specific cases under the 1980 Hague Convention and with regard to international child protection;

e) explore the value of drawing up principles concerning direct judicial communications, which could serve as a model for the development of good practice, with the advice of a consultative group of experts drawn primarily from the Judiciary;

f) explore the development of a secured system of communications for members of the International Hague Network of Judges."

II – WORK OF THE PERMANENT BUREAU SINCE 2006

12. The most important work undertaken since 2006 has been the drawing up of "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" (hereinafter the "Emerging Rules and Draft General Principles").

13. The Emerging Rules and Draft General Principles have been developed in stages. A preliminary draft was prepared by the Permanent Bureau in early 2008 taking into account the 2002 and 2006 Reports on judicial communications and the observations made during the 2006 Meeting of the Special Commission. The preliminary draft was then submitted to a group of experts which met at the Permanent Bureau in July 2008. The draft was improved in the light of comments made by the experts to provide a basis for further discussion and consultation at the Joint EC-HCCH Conference.
the Joint EC-HCCH Conference were representative of all the continents and legal traditions of the world as well as the different judicial networks such as the Hague Network, the European Judicial Network and IberRed. The Joint EC-HCCH Conference underlined the continued development and refinement of the Emerging Rules and Draft General Principles in consultation with judges from all regions of the world and different legal traditions. It is important to note that more than 140 judges from more than 55 jurisdictions representing all continents attended the Joint EC-HCCH Conference. The Emerging Rules and Draft General Principles were the subject of discussions at a number of judicial conferences which took place thereafter.

14. On 28 June 2010, the Permanent Bureau gathered together a group of international experts drawn from the judiciary to develop further the Emerging Rules and Draft General Principles in light of the Conclusions and Recommendations of the Joint EC-HCCH Conference. With a view to facilitate the work of the group of experts, a list of policy issues regarding these matters, prepared by the Permanent Bureau, was distributed to experts in advance of the meeting. Finally, all the members of the International Hague Network of Judges were consulted during the month of January 2011 on an improved version of the Emerging Rules and Draft General Principles.

15. The Emerging Rules and Draft General Principles have now been submitted to Members of the Organisation and State Parties to the 1980 Hague Child Abduction Convention for consultation prior to the meeting of the June 2011 Special Commission.

16. The Emerging Rules and Draft General Principles, which are in general self-explanatory, are, where relevant, individually supported by a reference indicating the origin of each principle. However, further background information may be useful in order to understand some of the policy choices made when drawing up some of the Emerging Rules and Draft General Principles. It is with this in mind that the following paragraphs have been included in this Report. It was also felt useful to include, where relevant, additional information concerning actual practice with regard to a number of the principles.

1. Development of the practical mechanisms and structures of the International Hague Network of Judges (including explanations of Principles Nos 1 and 2)

A. Designation of members of the International Hague Network of Judges

17. As of today, only sitting judges with authority and present experience in the area of international child protection have been designated as members of the Hague Network. During the course of consultations, judges have voiced a very clear preference for communicating only with peers that are bound by the same standards of independence and impartiality. This explains the wording of Principle No 1.2 which makes reference to the expression "sitting judges". As some of the authorities responsible for making such

26 See, ibid., Conclusion and Recommendation No 16.
28 The following experts met at the Permanent Bureau: The Honourable Judge Peter Boshier (New Zealand), the Honourable Justice Jacques Chamberland (Canada, Civil Law), Judge Martina Erb-Klunemann (Germany), Senior Judge Francisco Javier Forcada Miranda (Spain), Judge Myriam de Hemptinne (Belgium), Judge Jacques M.J. Keltjens (Netherlands), the Honourable Justice Judith Kreeger (United States of America), the Honourable Justice Dionisio Núñez Verdin (Mexico), the Honourable Judge Ricardo C. Pérez Manrique (Uruguay), Judge Lubomir Ptáček (Czech Republic), Judge Mônica Jacqueline Sifuentes Pacheco de Medeiros (Brazil) and the Right Honourable Lord Justice Mathew Thorpe (United Kingdom, England and Wales). Jenny Clift (United Nations Commission on International Trade Law (UNCITRAL)) joined the group as the officer responsible at the UNCITRAL Secretariat for judicial communications in insolvency matters.
designations are not familiar with the expression, it was decided to provide additional language in a footnote which reads “these are judges that are currently carrying out judicial functions”. Consultations prior to the June 2011 Special Commission will tell whether the footnote should remain or whether its content should be included in the Principle per se.

B. Procedure used in making the designation

18. All the designations that have been made are formal, i.e., designations that have been made by way of a signed letter or the transmission of an official document such as an order or a decree. Procedures for the designation of judges differ from one State to another. However, all designations generally involve the judiciary either in a consultative or in an appointing capacity. It appears that in most cases designations involve bodies responsible for the administration of the justice system or the management of the courts. The designation procedures for which the Permanent Bureau has a detailed record can be summarised as follows:

a) the designation is at the discretion of the Chief Judge;
b) the designation is at the discretion of the President / Chief Justice of the Supreme Court;
c) the designation is at the discretion of the President / Chief Justice of the Supreme Court after nomination by the heads of national Superior Courts;
d) the designation is upon the recommendation of the Supreme Court and confirmed by the Ministry of Justice;
e) the designation is at the discretion of the members of the court or the President / Chief Justice of the national or regional Superior Court or Court of Appeal;
f) the Central Authority consults the Chief Judge before making the designation;
g) the Chief Judge endorses the proposal of the Central Authority;
h) the Judicial Council makes the designation after consulting the National Association Judges;
i) the Judges’ Association makes the designation after consulting the concerned Judge;
j) the Judicial Council makes the designation sui generis;
k) the Judicial Council makes the designation in accordance with the law.

29 It is interesting to note that in some cases the Permanent Bureau receives a letter from the Ministry of Justice or a Note Verbal from the Embassy of the State concerned including the name of the member(s) of the Hague Network for their State but without any mention of the authority which has made the designation.
30 Australia, New Zealand and the United Kingdom (England and Wales).
31 Chile, Costa Rica, Cyprus, Dominican Republic, El Salvador, Gabon, Honduras, Israel, Kenya, Nicaragua, Panama, Paraguay, Peru, Uruguay and Venezuela (Comisión Judicial of the Supreme Court).
32 South Africa.
33 France (the Premier Président of La Cour de cassation proposed the judge, and the Directeur des Affaires civiles et du Sceau of the Ministry of Justice confirmed the designation).
34 Argentina (Tribunal Superior de Justicia de la Provincia de Córdoba), Finland (Helsinki Court of Appeal) and Ireland (the High Court).
35 United Kingdom (Scotland).
36 United Kingdom (Northern Ireland).
37 Denmark.
38 Iceland.
39 Canada and Ecuador.
the National Courts Administration makes the designation;\textsuperscript{41} 
\item[m)] the Minister or Ministry of Justice makes the designation.\textsuperscript{42}

19. Formal designations, whether made by the judicial branch alone or with the involvement of the executive branch, and sometimes in accordance with a law (\textit{e.g.}, a specific legislation or regulation), provide the office of the liaison judge with the necessary recognition and authority to function effectively both domestically and internationally, especially in relation to direct judicial communications concerning a specific case.

C. \textit{Information about judges}

20. The system put in place to manage the contact details of the members of the Hague Network has proven to be very effective. A copy of the list of judges, including their contact details, is made available for distribution only to members of the Network. By limiting access to the contact details of its members, the Network has increased its security by lowering the risk of receiving communications from non-desired persons. On the other hand, by making available to the public the names of the members of the Hague Network and the name of their court via the Hague Conference website, public awareness in relation to direct judicial communications has been raised with the result that more parties are inviting judges to make use of such communications.

D. \textit{National structures to assist members of the Hague Network}

21. It is noteworthy that a number of States, such as Argentina, Canada, Mexico and South Africa, have put in place national networks in support of the Hague Network.\textsuperscript{43} In the Netherlands, an Office of the Liaison Judge has been established by Statute.\textsuperscript{44} In the United Kingdom (England and Wales), the post of Head of International Family Law was created in January 2005.\textsuperscript{45} However, it is to be noted that in the majority of States, judicial communications are carried out by members of the Hague Network with little or no additional resources.

22. The Joint EC-HCCH Conference recognised that adequate resources, including administrative and legal resources, should be made available to support the work of Network judges as their workload increases.\textsuperscript{46} Furthermore, States experiencing a high volume of international child protection cases were invited to consider setting up an office to support the work of the Network judge or judges.\textsuperscript{47} Finally, the Joint EC-HCCH Conference recommended to advance the development of national networks in support of the international and regional networks.\textsuperscript{48}

\textsuperscript{41} Norway and Sweden.
\textsuperscript{42} Belgium and Spain. However, in these cases, it is not mentioned whether the judiciary was consulted.
\textsuperscript{44} See Judge R. de Lange-Tegelaar, "The Dutch Office of the Liaison Judge for International Child Protection (Blik)", \textit{ibid.}, p. 115.
\textsuperscript{45} See D. Williams, "Role and Functions of the Head of International Family Law Justice", \textit{ibid.}, p. 106.
\textsuperscript{46} See, \textit{supra}, note 7, Conclusion and Recommendation No 13.
\textsuperscript{47} See, \textit{ibid.}, Conclusion and Recommendation No 14.
\textsuperscript{48} See, \textit{ibid.}, Conclusion and Recommendation No 10.
2. Inventory of existing practices relating to direct judicial communications in specific cases under the 1980 Hague Child Abduction Convention and with regard to international child protection

A. Subject matter of direct judicial communications

23. The Emerging Rules and Draft General Principles include a list of examples of subject matters that can be the object of direct judicial communications. The examples, which reflect current practice and case law, have been included to provide guidance to judges that are new to this area. The list is comprised of the following examples:

- **a)** is it possible to schedule the case in the foreign jurisdiction?
  - i) to make interim orders, e.g., support, measure of protection;
  - ii) to ensure the availability of expedited hearings;
- **b)** are protective measures available for the child or other parent in the State where the child would be returned;
- **c)** can the foreign court accept and enforce undertakings offered by the parties in the initiating jurisdiction;
- **d)** is the foreign court willing to entertain a mirror order (i.e., the same order in both jurisdictions) if the parties are in agreement;
- **e)** were orders made by the foreign court;
- **f)** were findings about domestic violence made by the foreign court;
- **g)** would a transfer of jurisdiction under Article 8 or 9 of the 1996 Hague Child Protection Convention\(^{49}\) be appropriate?

24. All these examples, with the exception of the last one, directly concern the application of the 1980 Hague Child Abduction Convention. It is interesting to note that an important body of case law exists in relation to the transfrontier establishment, modification or exercise of child custody and contact rights when parties have seized, on the one hand a court in the United States of America and, on the other hand, a court in a foreign country, to decide the matter. In these cases, the courts, which usually enter into communications either on the basis of the United States Uniform Child Custody Jurisdiction Act (UCCJA)\(^{50}\) or the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA),\(^{51}\) discuss the issue of jurisdiction with a view to decide which court is better placed to hear and make a decision on the issues of custody and contact rights.\(^{52}\) In the _Hoole v. Hoole_ case,\(^{53}\) in a rather unique precedent, the courts held a joint hearing by conference call at which all parties were present. At the hearing, both parties agreed to the jurisdiction of the Court of British Columbia and then made an agreement before the court with regard to the custody issues at stake.

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\(^{50}\) See, infra, para. 44.

\(^{51}\) Ibid.


\(^{53}\) Ibid.
25. As a result, the scope of the Emerging Rules and Draft General Principles encompasses the “international protection of children” which includes communications under the 1980 and 1996 Hague Conventions and could include communications under regional instruments such as the Brussels II $a$ Regulation,$^{54}$ the 1989 Inter-American Convention$^{55}$ and the Council of Europe Convention of 1980.$^{56}$

26. Consideration was given to broadening the scope of the Emerging Rules and Draft General Principles to “family law”. However, the general view of the judges consulted was that the addition of the term “family law” to the expression “international child protection” would make the scope of the Hague Network too broad in comparison to its original purpose under the 1980 Hague Child Abduction Convention. Concerns were expressed with regard to the inclusion of any family law issues in general as it could bring within the Network a very broad range of specialised judges. It was felt that, at a time when half of the States Parties to the 1980 Hague Child Abduction Convention have not yet designated a judge for the purpose of the Hague Network, it was important to keep the scope of the Network limited in order to attract those that still have some hesitations. This being said, this should not stop the Network from broadening its scope in the long term.

B. Methods of communications

27. According to the practice of judges consulted and to case law dealing with direct judicial communications, the great majority of communications take place either by telephone or conference call. The latter is used when the parties are in attendance. When documents have to be transmitted, it is usually done by fax. In only one case was the use of e-mail reported.$^{57}$ In this case, the parties were copied on all the e-mails exchanged.

C. Language issues

28. Again in accordance with practice and case law on the subject matter, all the communications, with a few exceptions, take place on the basis of a common language. In the majority of the cases English is the preferred language. In the Latin American region, Spanish is the preferred language. A few cases report the use of interpretation. In one case, the communication, which took place in English and Spanish with the assistance of an official Spanish language interpreter, was recorded by court stenographers.$^{58}$ The parties were then provided with copies of each of these proceedings. In another case, the telephone calls that took place in English and German were interpreted by an appointed law guardian.$^{59}$

$^{57}$ Re A (Custody Decision after Maltese Non-Return Order) [2006] EWHC 3397, [2007] 1 FLR 1923, INCADAT ref. HC/E/UKe 883 [29/11/2006; High Court (Family Division) (Malta), First Instance].
$^{58}$ Hector G. v. Josefina P. (19 December 2003), Supreme Court, Bronx County, New York, available at Westlaw [771 N.Y.S.2d 316].
3. Development of principles concerning judicial communications, including commonly accepted safeguards for direct judicial communications in specific cases (including explanations of Principle No 6)

29. This Report will not discuss the Principles for General Judicial Communications which are in general self-explanatory. However, it was felt important to provide some explanations with respect to the Principles for Direct Judicial Communications.

30. Very detailed work has been carried out in relation to the Principles for Direct Judicial Communications in specific cases and more specifically the Communications Safeguards which include overarching principles and commonly accepted procedural safeguards. It is important to note that the Fourth Meeting of the Special Commission of March 2001 had already provided as Recommendation No 5.6 a list of commonly accepted safeguards followed in Contracting States in which direct judicial communications are practised. These safeguards were reaffirmed by the Fifth Meeting of the Special Commission of October / November 2006. As a result of the discussions held during the Fifth Meeting of the Special Commission of 2006 and the Joint EC-HCCH Conference, as well as the consultations held thereafter, it is suggested to improve the wording of the commonly accepted safeguards found in Recommendation No 5.6 of March 2001.

A. Overarching principles

31. The Draft General Principles now include a principle to the effect that “every judge engaging in direct judicial communications must respect the law of his or her own jurisdiction”. While this principle goes without saying, consultations have shown that its inclusion is appropriate. For example, it was indicated that the taking of evidence should follow the channels prescribed by law.

32. Principles Nos 6.2 and 6.3 which read respectively “when communicating, each judge seized should maintain his or her independence in reaching his or her own decision” have been reproduced here showing in track changes the new text:

**Overarching principles**

6.1 Every judge engaging in direct judicial communications must respect the law of his or her own jurisdiction.

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:

- communications to be limited to logistical issues and the exchange of information;
- ordinarily, parties are to be notified in advance 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;
- confirmation of any agreement concluded 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.

60 See, supra, note 20, Principles Nos 3-5, at pp. 8-9.
61 Ibid., Principles Nos 6-8, at pp. 10-13.
62 Ibid., Principle No 6, at pp. 10-11.
64 Ibid., Principle No 6.4-6.5, at p. 11.
65 See, supra, para. 9.
66 Ibid. For ease of reference, the original commonly accepted safeguards have been reproduced here showing in track changes the new text:

**Overarching principles**

6.1 Every judge engaging in direct judicial communications must respect the law of his or her own jurisdiction.

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.

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- 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.
on the matter at issue” and “communications must not compromise the independence of
the judge seized in reaching his or her own decision on the matter at issue” are replacing
what used to be the first commonly accepted safeguard which read “communications to
be limited to logistical issues and the exchange of information”. It is the general view of
those consulted that Principles Nos 6.2 and 6.3 address more adequately the pith and
substance of the limitation of the communication which is the protection of the
independence of the judiciary.

33. In an earlier stage of the consultation, it had been suggested to add the words “and
should not address the merits of the case” to what used to be the first commonly
accepted safeguard. However, during the Joint EC-HCCH Conference and consultations
carried out thereafter, it appeared that the proposed principle which read
“communications should be limited primarily to logistical issues and the exchange of
information [and should not address the merits of the case]” was too limited, to some
extent vague and perhaps even ambiguous. First, practice shows that sometimes there
are more than purely logistical issues being discussed. Secondly, it is not clear whether
the words “and the exchange of information” is intended to include only information
relating to logistical issues.68 Finally, the term “merits” may be understood differently by
those from different linguistic backgrounds and from different legal traditions.

34. Principles Nos 6.2 and 6.3 are complementary and work together. The starting point
of each provision is different. They address respectively: 1) the perspective of the judge
seized of the matter; and, 2) the perspective of the judge talking to the judge seized of
the matter. In summary, under Principle No 6.2 the judge seized of the matter should
not allow himself or herself to be influenced by other judges in coming to a decision on
the merits. Under Principle No 6.3 when communicating, judges should not seek to
influence the judge who will be deciding the matter. Both provisions apply irrespective of
which judge initiates the communication and could also cover the situation where both
judges are seized (by the same parties but for a different cause of action) or also in the
case of a transfer of jurisdiction under Articles 8 and 9 of the 1996 Hague Child
Protection Convention.

35. Concerns were expressed by one member of the 28 June 2010 Working Group to
the effect that Principle No 6.3 could discourage more timid judges from entering into
judicial communications. It is a legitimate concern. On the other hand, it appears from
the consultations carried out and experiences reported to the Permanent Bureau that
some judges are concerned about being subject to pressures from assertive judges. They
need a safeguard in this respect and Principles Nos 6.2 and 6.3 seek to provide an
effective balance between these two concerns.

B. Commonly accepted procedural safeguards

36. Principle No 6.4 includes a number of modifications in comparison to
Recommendation No 5.6 of the Fourth Meeting of the Special Commission. The
modifications to the text follow from the views of experts consulted that consideration
should be given to amend Recommendation No 5.6.69

i) Notification of the parties

37. It appeared from the Joint EC-HCCH Conference and consultations held thereafter
that the requirement of notification needed to be given some flexibility. In some
jurisdictions parties must always be notified in advance of the nature of the proposed

68 See Justice M. Finlay Geoghegan, “Overarching principle for direct judicial communications and commonly
accepted safeguards (Draft Principle No 6)”, The Judges’ Newsletter on International Child Protection, Vol. XV,
Autumn 2009, supra, note 7, p. 74.
69 See, supra, note 66.
communication, where in other jurisdictions there is not such a requirement. The requirement to give notice to the parties sometimes depends on the subject matter of the proposed communication.

ii) Record of the communications

38. It appeared from the Joint EC-HCCH Conference and consultations held thereafter that the parties can be informed in different ways of the content of the communication. The consultations showed that in all the jurisdictions consulted, parties have to be informed of the content of the communication one way or another. The second safeguard was amended accordingly.

iii) Conclusions in writing

39. It appeared from the Joint EC-HCCH Conference and consultations held thereafter that the use of the term “agreement” was not appropriate. It was felt that it may be contrary to the concept of judicial independence for two judges to confirm an agreement or to come to an agreement. Therefore the term “conclusions” was preferred.

iv) Presence of the parties

40. It appeared from the Joint EC-HCCH Conference and consultations held thereafter that the parties should be given an opportunity to be present when direct judicial communications take place. However, it appeared from consultations that the presence of the parties is not always required. The necessity for the parties to be present during such communications depends on the subject matter of the communication. This being said, due process will be preserved regardless, as the parties will always have the possibility to consult a record of the communications.

4. Promoting the establishment of regional judicial networks

41. Over the years, through the work of the Liaison Legal Officer for Latin American, a Regional Network of Judges has seen the light of day in Latin America as a subset of the Hague Network. Furthermore, many European Judges from the Hague Network are also part of the European Judicial Network thus creating some synergies between the two networks. The Permanent Bureau continues to promote regional initiatives where possible.

III – FUTURE WORK

1. Finding a proper legal basis for direct judicial communications

42. Having a legal basis for direct judicial communications is probably one of the most important safeguards to the communication process. It will provide for authority, transparency and predictability for both the parties (and their representatives) and the judges involved. Having a legal basis for such communications could be the entry point for judges to follow the future Hague Conference General Principles and Safeguards for Direct Judicial Communications. Such a legal basis could also result in judges adopting recommended practice or enacting rules of court for such communications. In the decision, Re M. and J.,70 it was felt that the chapeau of Article 771 of the 1980 Hague Child Abduction Convention provided a sufficient legal basis for direct judicial communications. However, consultations have shown that a clearer legal basis may be required either at the domestic level or at the international level. The following paragraphs provide a description of different instruments which set a proper legal basis

70 See, infra, note 80.
71 “Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention”.

for direct judicial communications in the areas of insolvency, child custody and child abduction.

A. The UNCITRAL Model Law on Cross-Border Insolvency

43. The area of cross-border insolvency has made use of direct judicial communications for some time. The first case to deal with the issue was the Maxwell Communication case in 1991. Soon thereafter, on 30 May 1997, the United Nations Commission on International Trade Law (UNCITRAL) adopted a Model Law on Cross-Border Insolvency. It includes three articles dealing with co-operation with foreign courts. The articles were designed to overcome the problem of national laws which did not provide a legal basis for direct judicial communications. It was thought that the enactment of such a legal basis would be helpful in legal systems in which judges have little discretion to operate outside statutory authority. Even in jurisdictions where there is a tradition of judicial flexibility (for instance, with the common law doctrine of inherent jurisdiction), the enactment of a legislative framework for direct judicial communications has proved to be useful.

B. The UCCJA and UCCJEA of the United States of America

44. The states in the United States of America are, to the knowledge of the Permanent Bureau, the only jurisdictions that have specifically provided for direct judicial communications in child custody matters. The 1968 UCCJA first provided for direct judicial communications both at the national and international levels. In this respect, judges of different jurisdictions can communicate with each other in respect of a matter which may be pending in both jurisdictions or which may need to be transferred from one jurisdiction to another. The successor to the UCCJA, the 1997 UCCJEA, provides more extensive provisions for judicial communication.

C. The Inter-American Model Rules of Procedure for the International Return of Children

45. In an effort to provide a legal basis for the designation of judges to the International Hague Network of Judges and the conduct of direct judicial communications under the 1980 Hague Child Abduction Convention and the 1989 Inter-American Convention on the International Return of Children, the Hague Conference joined forces with the Instituto Interamericano del Niño, la Niña y Adolescentes (which falls under the auspices of the Organization of American States) to develop in September 2007 the Inter-American Model Rules of Procedure for the International Return of Children. Article 21 deals with direct judicial communications. It provides that “a Liaison Judge shall be appointed with the responsibility for facilitating direct judicial communications between the foreign and national courts in relation to pending cases covered by [these

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72 In Re Maxwell Communication Corp., 170 B.R. 800.
75 See, e.g., the relevant Sections of Illinois State No 750 ILCS 35 reproduced in Annex E to Prel. Doc. No 3 B – Annexes – of April 2011.
76 The relevant Sections of the UCCJEA in this regard are reproduced in Annex F to Prel. Doc. No 3 B – Annexes – of April 2011.
rules]”. Article 21 provides further that “enquiries may be reciprocal and shall be made via the Liaison Judge, recorded on the relevant case files and notified to the parties”.

D. The Canadian Recommended Practices for Court-to-Court Judicial Communications

46. The Canadian Judicial Council, which has approved the establishment of the Canadian Network of Contact Judges in support of the International Hague Network of Judges, has given the Canadian Network the mandate to explore the concept of judicial networking and collaboration in cases of child abduction and custody. The Canadian Network has drawn up a checklist which sets out recommendations for such practices. While the Recommended Practices are not mandatory, they provide a transparent and predictable basis for judicial communications.

E. Case Law

47. Further to the D. v. B. decision of 1996, a number of cases have dealt with the issue of direct judicial communications. Some of these cases are reported in the International Child Abduction Database (INCADAT) of the Hague Conference on Private International Law. Case law, for a number of judges around the world in jurisdictions of common law tradition, can serve as precedent for direct judicial communications. However, a brief analysis of this case law shows that most of the decisions are somewhat silent on the safeguards pertaining to direct judicial communication. INCADAT only provides for a sample of the case law on this subject, albeit one which is probably representative of the main trends in this area. Only half of these decisions indicate the legal basis used for direct judicial communications. They rarely mention whether the judge gave notice to the parties before the communication took place and whether the judge sought the agreement of the parties for such communications. Only two decisions indicate that a record of the communication was made available to the parties.

F. A protocol to the 1980 Hague Child Abduction Convention?

48. With an international network of more than 60 judges from 43 States there is clearly a need to provide, at the international level, a legal basis for direct judicial communication. If a protocol to the 1980 Hague Child Abduction Convention were to be developed in the near future, consideration should be given to the inclusion of provisions inviting the designation of members to the International Hague Network of Judges and authorising direct judicial communications in specific cases. Consideration should also be given to the inclusion in a protocol of the General Principles for Direct Judicial Communications, more especially the overarching principles and the commonly accepted safeguards, if their texts prove to be mature enough. In any event,

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77 the Inter-American Model Rules of Procedure for the International Return of Children are available on the Hague Conference website at <www.hcch.net> under “Child Abduction Section” then “Judicial Seminars on the International Protection of Children”, “Latin America” and “Report of Round Table 3”.


79 See, supra, note 1.

80 Re M. and J. (Abduction) (International Judicial Collaboration) [1999] 3 FCR 721, INCADAT ref. HC/E/UKe 266 [16/08/1999; High Court (England); First Instance]; D. v G. [2001] 1179 HKCU 1, INCADAT ref. HC/E/HK 595 [04/12/2001; High Court of the Hong Kong Special Administrative Region - Court of Appeal; Appellate Court]; Re A (Custody Decision after Maltese Non-Return Order) [2006] EWHC 3397, [2007] 1 FLR 1923, INCADAT ref. HC/E/UKe 883 [29/11/2006; High Court (Family Division) (Malta); First Instance]. See also the case law, supra, note 52.


82 Ibid., Principle No 6.4-6.5.
consideration should be given to the endorsement by the Special Commission of the Emerging Rules and Draft General Principles for members of the Hague Network.

2. **Development of a secured system of communication for members of the International Hague Network of Judges**

49. The Permanent Bureau has started to collect information about secured communications systems (e-mail and videoconferencing systems) which have been developed in other organisations such as the Organization of American States and IberRed. The Permanent Bureau hopes to be able to report on these findings during the meeting of the Special Commission.

**IV – POSSIBLE CONCLUSIONS AND RECOMMENDATIONS**

50. The Special Commission may wish to consider the following possible Conclusions and Recommendations in relation to judicial communications.

1. **Endorsement of Preliminary Document No 3 A**

The Special Commission gives its general endorsement to the rules and principles set out in Preliminary Document No 3 A, in particular:

(a) the Emerging Rules regarding the Development of the International Hague Network of Judges, which include rules concerning the designation of, and information about members of the Network; and,

(b) the 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.

2. **Development of binding rules at the international level in relation to judicial communications**

The Special Commission recommends that further consideration be given to the possibility of binding rules (through a protocol or other instrument) at the international level on certain aspects of judicial communications, in particular:

(a) providing a legal basis for direct judicial communications under the 1980 Hague Child Abduction Convention and / or the 1996 Hague Child Protection Convention;

(b) embodying general principles and generally accepted safeguards for direct judicial communications in specific cases, as well as some of the Emerging Rules regarding the Development of the International Hague Network of Judges.

3. **Development of binding and non-binding rules at the national level in relation to judicial communications**

(a) 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 necessary steps should be taken to ensure that such legal basis exists under national law. Such a legal basis could be found in guidelines issued by national judicial councils, rules of court, regulations, model laws or domestic law.
(b) The development of national rules relating to communications at the domestic level between the member of the Hague Network and his or her colleagues within the jurisdiction for the purpose of cross-border direct judicial communications in specific cases are encouraged.

4. Future work

The Permanent Bureau would like to suggest the following possible future work programme:

(a) explore the development of a secured system of communications, such as secured e-mails and videoconferencing, 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 and to ensure consistency in the safeguards applied in relation to direct judicial communications;

(c) maintain an inventory of existing practices relating to direct judicial communications in specific cases under the 1980 Hague Child Abduction Convention and with regard to international child protection;

(d) draw up a short information document on direct judicial communications that could be used by judges when contacting a colleague who is not familiar with direct judicial communications in relation to international child protection matters;

(e) develop, with the advice of a consultative group of experts drawn primarily from the judiciary, a practical handbook for judges under the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention, including issues concerning general and direct judicial communications, taking into account Conclusions and Recommendations of Special Commission meetings on the practical operation of the Conventions, existing good practices, training material and national handbooks.