

**Special Commission on the
practical operation of the
1980 and 1996 Hague Conventions
(1-10 June 2011)**



Conclusions and Recommendations

adopted by the Special Commission

New Contracting States

1. The Special Commission welcomes the increase since the 2006 meeting of the Special Commission in the number of Contracting States to the 1980¹ (from 76 to 85) and 1996² (from 13 to 32) Conventions, and the number of States that have signed the 1996 Convention (7). The Special Commission calls for further efforts by Contracting States and by the Permanent Bureau, through the provision of advice and assistance, to extend the numbers of Contracting States.

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

Central Authority co-operation and communication under the 1980 Convention

3. Efforts should be made to ensure that Central Authorities act as a focal point for the provision of services or the carrying out of functions contemplated under Article 7 of the 1980 Convention. When the Central Authority does not itself provide a particular service or carry out a particular function, it should preferably itself engage the body which provides that service or carries out that function. Alternatively, the Central Authority should at least make available information regarding the body, including how to make contact with the body.

4. The Special Commission re-emphasises the crucial importance of the Central Authorities' active role in locating the child who has been wrongfully removed or retained. Where the measures to discover the whereabouts of the child within a Contracting State are not taken directly by the Central Authority but are taken by an intermediary, the Central Authority should remain responsible for expediting communications with the intermediary and informing the requesting State of the progress of efforts to locate the child, and should continue to be the central channel for communication in this regard.

5. Contracting States that have not already done so are asked to provide their Central Authorities with sufficient powers to request, where needed for the purpose of locating the child, information from other governmental agencies and authorities, including the police and, subject to law, to communicate such information to the requesting Central Authority.

6. The Special Commission draws attention to the serious consequences for the operation of the 1980 Convention of failure to inform the Permanent Bureau promptly of changes in the contact details of Central Authorities. In addition, the Permanent Bureau should undertake to remind Central Authorities of their duty in this respect once a year.

¹ The *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (hereinafter, the "1980 Convention").

² The *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* (hereinafter, the "1996 Convention").

7. The Special Commission re-emphasises the need for close co-operation between Central Authorities in the processing of applications and the exchange of information under the 1980 Convention, and draws attention to the principles of "prompt responses" and "rapid communication" set out in the *Guide to Good Practice under the 1980 Convention – Part I – Central Authority Practice*.

8. The Special Commission welcomes the increasing co-operation within States between the member(s) of the International Hague Network of Judges and the relevant Central Authority resulting in the enhanced operation of the Convention.

9. Central Authorities are encouraged to continue to provide information about and facilitate direct judicial communications including, where there are language difficulties, through the provision of translation services where appropriate and feasible.

10. The Special Commission encourages the Permanent Bureau to continue its work (described in Info. Doc. No 4) to modernise the recommended Request for Return model form and to create a form that can be completed electronically. The Special Commission also requests that the Permanent Bureau continue its work to develop a standardised Request for Access form. The Special Commission requests that different language versions of the forms should be made available on the Hague Conference website. For this purpose, States are encouraged to provide the Permanent Bureau with translations.

11. The Special Commission encourages the use of information technology with a view to increasing the speed of communication and improving networking between Central Authorities.

12. The requesting Central Authority should ensure that the application is complete. In addition to the essential supporting documents, it is recommended that any other complementary information that may facilitate the assessment and resolution of the case accompany the application.

13. The Special Commission re-emphasises that –

- (a) in exercising their functions with regard to the acceptance of applications, Central Authorities should respect the fact that evaluation of factual and legal issues (such as habitual residence, the existence of rights of custody, or allegations of domestic violence) is, in general, a matter for the court or other competent authority deciding upon the return application;
- (b) the discretion of a Central Authority under Article 27 to reject an application when it is manifest that the requirements of the Convention are not fulfilled or that the application is otherwise not well founded should be exercised with extreme caution. The requested Central Authority should not reject an application solely on the basis that additional documents or information are needed. Close co-operation between the Central Authorities involved to ensure that relevant documentation is made available and to avoid undue delay in processing applications is strongly encouraged. The requested Central Authority may ask the requestor to provide these additional documents or information. If the requestor does not do so within a reasonable period specified by the requested Central Authority, the requested Central Authority may decide that it will no longer process the application.

14. Central Authorities are reminded of the valuable role that the Country Profile for the 1980 Convention is expected to play in enabling States to exchange information on the requirements for making an application in the requested State.

15. The Special Commission welcomes the increasingly important role played by Central Authorities in international child abduction cases to bring about an amicable resolution of the issues including through mediation. At the same time, the Special Commission recognises that the use of measures to this end should not result in delay.

16. The requested Central Authority should, as far as possible, keep the requesting Central Authority informed about the progress of proceedings and respond to reasonable requests for information from the requesting Central Authority. When the requested Central Authority has knowledge of a judgment or decision made in return or access proceedings, it should promptly communicate the judgment or decision to the requesting Central Authority, together with general information on timelines for any appeal, where appropriate.

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

17. The Special Commission notes that in many Contracting States to the 1980 Convention applications concerning access under Article 21 are now processed in the same way as applications for return.

18. Central Authorities designated under the 1980 and / or 1996 Conventions are encouraged to take a pro-active and hands-on approach in carrying out their respective functions in international access / contact cases.

19. The Special Commission reaffirms the principles set out in the *General Principles and Guide to Good Practice on Transfrontier Contact Concerning Children* and strongly encourages Contracting States to the 1980 and 1996 Conventions to review their practice in international access cases in light of these principles, where necessary.

20. The Special Commission recognises that, pursuant to Articles 7(2) *b*) and 21 of the 1980 Convention, during pending return proceedings a requested Contracting State may provide for the applicant in the return proceedings to have contact with the subject child(ren) in an appropriate case.

Statistics relating to the 1980 Convention

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

22. The Special Commission reaffirms Recommendation No 1.14 of the 2001 meeting of the Special Commission and Recommendation No 1.1.16 of the 2006 meeting of the Special Commission –

"Central Authorities are encouraged to maintain accurate statistics concerning the cases dealt with by them under the Convention, and to make annual returns of statistics to the Permanent Bureau in accordance with the standard forms established by the Permanent Bureau in consultation with Central Authorities."

23. The Special Commission recommends that one statistical questionnaire be developed that is capable of being completed online, and that combines the data currently sought for INCASTAT (the International Child Abduction Statistical Database) with the data last sought for the statistical analysis of cases arising in 2008. The Special Commission recommends that the Permanent Bureau, in conjunction with certain interested States Parties, explore the possibility of automated data migration to INCASTAT.

Country Profile for the 1980 Convention

24. The Special Commission welcomes the development of the Country Profile for the 1980 Convention and the important improvement it makes to the exchange of information between Central Authorities.

25. All Contracting States that have not yet completed the Country Profile are strongly encouraged to do so as soon as possible.

26. The Special Commission recommends that Contracting States regularly update their Country Profile to ensure that the information remains current. The Permanent Bureau will send an annual reminder to Contracting States in this regard.

27. The Country Profile does not replace the Standard Questionnaire for Newly Acceding States. However, all newly acceding and ratifying States are encouraged to complete the Country Profile as soon as possible following their accession to or ratification of the 1980 Convention.

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

28. Immediately following a State becoming Party to the 1980 Convention (or, in an appropriate case, where a State is preparing to do so or has expressed a strong interest in doing so), the State in question should be offered, by way of a standard letter from the Permanent Bureau, the opportunity to visit an experienced Contracting State to the 1980 Convention for the purpose of gaining knowledge and understanding regarding the effective practical operation of the 1980 Convention.

29. The Permanent Bureau will maintain a list of all experienced Contracting States willing to accept such a visit and, when a newly acceding / ratifying (or interested) State responds positively to an offer, will provide details of Contracting States prepared to receive the newly acceding / ratifying (or interested) State for the two States concerned to organise and arrange the visit.

Immigration issues in the context of the 1980 Convention

30. In order to prevent immigration issues from obstructing the return of the child, Central Authorities and other competent authorities should where possible clarify the child's nationality and whether the child is in possession of the necessary travel documents as early as possible during the return procedure. When making a contact order, judges should bear in mind that there might be immigration issues that need to be resolved before contact can take place as ordered.

31. Where there is any indication of immigration difficulties which may affect the ability of a (non-citizen) child or taking parent to return to the requesting State or for a person to exercise contact or rights of access, the Central Authority should respond promptly to requests for information to assist a person in obtaining from the appropriate authorities within its jurisdiction without delay such clearances or permissions (visas) as are necessary. States should act as expeditiously as possible when issuing clearances or visas for this purpose and should impress upon their national immigration authorities the essential role that they play in the fulfilment of the objectives of the 1980 Convention.

Access to justice in the context of the 1980 Convention

32. The Special Commission highlights the importance of ensuring effective access to justice for both parties in return and access proceedings, as well as for the child where appropriate, while recognising that the means of ensuring such effective access may vary from State to State, particularly for Contracting States that have made a reservation under Article 26 of the Convention.

33. The Special Commission emphasises that the difficulty in obtaining legal aid at first instance or an appeal, or of finding an experienced lawyer for the parties, may result in delays and may produce adverse effects for the child as well as for the parties. The important role of the Central Authority in helping an applicant to obtain legal aid quickly or to find experienced legal representatives is recognised.

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

Domestic and family violence in the context of the 1980 Convention

35. The Special Commission notes that a large number of jurisdictions are addressing issues of domestic and family violence as a matter of high priority including through awareness raising and training.

36. Where Article 13(1) *b* of the 1980 Convention is raised concerning domestic or family violence, the allegation of domestic or family violence and the possible risks for the child should be adequately and promptly examined to the extent required for the purposes of this exception.

37. The Special Commission affirms its support for promoting greater consistency in dealing with domestic and family violence allegations in the application of Article 13(1) *b* of the 1980 Convention.

38. The Special Commission considered three proposals for future work with a view to promoting consistency in the interpretation and application of Article 13(1) *b* of the 1980 Convention, and in the treatment of issues of domestic and family violence raised in return proceedings under the Convention. These were –

- (a) a proposal that includes, among others, the drafting of a Guide to Good Practice on the implementation of Article 13(1) *b* (Work. Doc. No 1);
- (b) a proposal to establish a working group, drawn in particular from the International Hague Network of Judges, to consider the feasibility of developing an appropriate tool to assist in the consideration of the grave risk of harm exception (Work. Doc. No 2);
- (c) a proposal to establish a group of experts, including in particular judges, Central Authority experts and experts in the dynamics of domestic violence, to develop principles or a practice guide on the management of domestic violence allegations in Hague return proceedings (Prel. Doc. No 9, para. 151).

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

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

39. The Special Commission recognises the value of the assistance provided by the Central Authorities and other relevant authorities, under Articles 7(2) *d*), *e*) and *h*) and 13(3), in obtaining information from the requesting State, such as police, medical and social workers' reports and information on measures of protection and arrangements available in the State of return.

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

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

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

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

Rights of custody (1980 Convention)

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

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

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

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

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

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

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

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

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

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

Guides to Good Practice (1980 and 1996 Conventions)

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

The Practical Handbook on the 1996 Convention

53. The Special Commission welcomes the revised Draft Practical Handbook on the 1996 Convention (Prel. Doc. No 4) as a valuable document which provides beneficial guidance to persons involved in implementing and operating the Convention.

54. The Special Commission recommends that the Permanent Bureau, in consultation with experts, make amendments to the revised Draft Practical Handbook, in light of the comments provided at the Special Commission meeting.

55. The Special Commission looks forward to the publication of the Practical Handbook on the 1996 Convention following this final revision process.

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

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

Mediation

57. The Special Commission notes the many developments in the use of mediation in the context of the 1980 Convention.

58. The Special Commission welcomes the draft Guide to Good Practice on Mediation under the 1980 Convention. The Permanent Bureau is requested to make revisions to the Guide in light of the discussions of the Special Commission, taking account also of the advice of experts. Consideration will be given to the inclusion of examples of mediated agreements. The revised version will be circulated to Members and Contracting States for final consultations.

59. The Guide will be published in a form which allows updating.

60. The Special Commission expresses appreciation for the work carried out by the Working Party on Mediation in the context of the Malta Process and welcomes the *Principles for the establishment of mediation structures in the context of the Malta Process* (Prel. Doc. No 6).

61. The Special Commission notes the efforts already being made in certain States to establish a Central Contact Point in accordance with the Principles. States are encouraged to consider the establishment of such a Central Contact Point or the designation of their Central Authority as a Central Contact Point. The contact details of Central Contact Points are available on the Hague Conference website.

62. The Special Commission notes the request of the 2011 Council on General Affairs and Policy of the Hague Conference that the Working Party should continue to work on the implementation of mediation structures and, in particular, with the support of the Permanent Bureau, and in light of discussions in the Special Commission –

- “to facilitate wider acceptance and implementation of the Principles as a basic framework for progress;
- to consider further elaboration of the Principles; and,
- to report to the Council in 2012 on progress”. (See the Conclusions and Recommendations adopted by the Council on General Affairs and Policy of the Conference (5-7 April 2011).)

Article 15 of the 1980 Convention

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

Judicial communications (1980 Convention)

64. The Special Commission welcomes the extraordinary growth in the International Hague Network of Judges in the period from 2006 to 2011 which now includes more than 65 judges from 45 States. States that have not yet designated Hague Network judges are strongly encouraged to do so.

65. The Special Commission also welcomes the actions taken by States and regional organisations nationally and regionally regarding the establishment of judicial networks and the promotion of judicial communications.

66. The Special Commission emphasises the importance of direct judicial communications in international child protection and international child abduction cases.

Respective roles of judges and Central Authorities

67. The Special Commission reaffirms Recommendations Nos 1.6.4 and 1.6.5 of the 2006 meeting of the Special Commission –

“The Special Commission recognises that, having regard to the principle of the separation of powers, the relationship between judges and Central Authorities can take different forms.

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

Emerging Guidance and General Principles for Judicial Communications

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

Legal basis for direct judicial communications

69. Where there is concern in any State as to the proper legal basis for direct judicial communications, whether under domestic law or procedure, or under relevant international instruments, the Special Commission invites States to take the necessary steps to ensure that such a legal basis exists.

70. The Special Commission notes that the question of the desirability and feasibility of binding rules in this area, including a legal basis, will be considered during Part II of the Sixth Meeting of the Special Commission.

Effective secured electronic communications

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

Actions to be undertaken by the Permanent Bureau

72. In relation to future work, the Permanent Bureau in the light of the observations made during the meeting will –

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

The Judges' Newsletter on International Child Protection

73. The Special Commission supports the continued publication of *The Judges' Newsletter on International Child Protection* and expresses its appreciation to LexisNexis for its support in publishing and distributing the Newsletter.

74. The Special Commission urges that every effort should be made to make the Newsletter available in Spanish and encourages States to consider providing support for this purpose.

Conferences

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