

**QUESTIONNAIRE SUR LA 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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**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

*Document préliminaire No 1 de mai 2009 à l'intention
de la Commission spéciale de novembre 2009 sur la mise en œuvre de
la Convention de 2007 sur le recouvrement des aliments et
du Protocole de 2007 sur la loi applicable*

*Preliminary Document 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*

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Introduction

At its meeting of 1 to 3 April 2008, having regard to the Recommendation made by the Twenty-First Session of the Conference,¹ the 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 *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 deal with the international recovery of maintenance in respect of vulnerable persons. It was recommended and concluded that the responses should be submitted to the Special Commission on the implementation of that Convention² and a report made to the Council meeting of 2010.

This Questionnaire is addressed to all the Members of the Organisation as well as non-Member States of the Organisation that participated as Observers in the Twenty-First Session of the Hague Conference on Private International Law held in The Hague from 5 to 23 November 2007.

In view of the possible preparation of an analysis of the responses before the November 2009 Special Commission and in the light of a number of additional documents that will be distributed during the next three months for comments at different dates in September and October,³ the Permanent Bureau would very much appreciate receiving your response to this Questionnaire (in either English or French) **before 24 July 2009**. Answers should be sent via e-mail to < secretariat@hcch.net > with the following heading in the subject field: "Questionnaire – Vulnerable Persons Protocol – [name of the Member of the Organisation / non-Member State]".

Identification

For follow-up purposes

Name of State / Organisation: Republic of South Africa
 Name of contact person: Mr John N Makhubele
 Name of Authority / Office: Department of Justice and Constitutional Development
 Telephone number: +27 315 1111
 E-mail address: _____

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 This Special Commission will take place in The Hague during the second and third weeks of November 2009. A convocation for the meeting with precise dates and a draft agenda will be sent in June 2009.

³ Such documents will include a draft Handbook for case workers on the operation of the 2007 Child Support Convention, a checklist for implementation, draft Recommended Forms, a draft Country Profile and preliminary documents on the development of iSupport, the international electronic case management and Internet based communication system in support of the 2007 Child Support Convention.

Uploading of the Responses onto the HCCH Website

The Permanent Bureau envisages uploading the responses to this Questionnaire onto the HCCH website, as this may assist other States / Organisation in preparing their own responses or their position before the November 2009 Special Commission. Does your State / Organisation agree to making its response available for uploading onto the HCCH website?

✓ YES – Our response to the Questionnaire may be uploaded onto the HCCH website

NO – No detail of our response may be uploaded onto the HCCH website

In the absence of an answer to this question your response to the Questionnaire will be uploaded onto the HCCH website.

Background

The issue of the application of the 2007 Child Support Convention to vulnerable persons was raised during the Twenty-First Session of the Conference. According to some States, the 2007 Child Support Convention in its entirety should have been applicable on a mandatory basis to maintenance in respect of vulnerable persons. However, other States were not ready to accept this proposal without examining its full implication. 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.⁴

As an introduction to this Questionnaire it is necessary to explain the extent to which maintenance obligations in respect of vulnerable persons:⁵ (A) are already included within the compulsory scope of the 2007 Child Support Convention; (B) may be brought within its scope by a declaration made by a Contracting State under Article 2(3); (C) cannot be brought within the scope of the Convention; and, (D) are not *per se* within the scope of the *Hague Convention of 13 January 2000 on the International Protection of Adults* ("the 2000 Adults Convention").

(A) Maintenance obligations in respect of vulnerable persons which come within the compulsory scope of the Convention⁶

Where the vulnerable person is a child below the age of 21 years,⁷ maintenance obligations of a parent towards him or her come within the compulsory scope of the Convention by virtue of Article 2(1) *a*). The obligations arise from the parent / child relationship regardless of whether the child is or is not a vulnerable person.

Similarly where the vulnerable person is a spouse, maintenance obligations of the other spouse towards him or her come within the compulsory scope of the Convention if and when the conditions of Article 2(1) *b*) or *c*) are met. The obligations arise from the spousal relationship regardless of whether the spouse is or is not a vulnerable person.

There is only one case in which an obligation towards a vulnerable person as such comes within the compulsory scope of the Convention. The Convention provides in Article 37(3) that it shall apply, in the case of direct requests to competent authorities, "to a decision granting maintenance to a vulnerable person over the age specified in [Article 2(1) *a*)] where such decision was rendered before the person reached that age and provided for maintenance beyond that age by reason of the impairment".

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

A Contracting State may by declaration bring within the scope of the Convention (or any part of the Convention) any obligation towards a vulnerable person which arises from a family relationship, parentage, marriage or affinity. The following are some examples:

⁴ See, *supra*, note 1, for the text of Recommendation No 9.

⁵ For the purpose of the 2007 Child Support Convention "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" (Art. 3 *f*)).

⁶ It should be noted that the scope of the *Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations* is broader than that of the Convention and that therefore the Protocol automatically applies to a broad range of maintenance obligations in respect of vulnerable persons, in particular to any such obligations which arise "from a family relationship, parentage, marriage or affinity" (Art. 1(1)).

⁷ Or 18 years depending on whether a State has made a reservation in accordance with Art. 2(2).

- an obligation of a parent towards a child over the age of 21 years where impairment arises after that age;
- an obligation of a parent towards a child over the age of 21 years where an impairment and an obligation arise before that age in cases other than those covered by Article 37(3);
- an obligation of one spouse towards the other where that other spouse is a "vulnerable person" in cases other than those covered by Article 2(1) *b*) and *c*);
- an obligation of any other specified relation (such as a grandparent, a grandchild, an uncle or aunt, a niece or nephew) towards a vulnerable person.

Any such declaration made by one Contracting State will give rise to mutual obligations between that State and any other Contracting State which has made an equivalent declaration (Art. 2(3)).

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

It may well be that most recognised maintenance obligations towards vulnerable persons come within categories (A) and (B) above. However, some countries may recognise circumstances in which a maintenance obligation towards a vulnerable person is placed on a person or a body with no family relationship with the vulnerable person. Indeed, it is part of the purpose of this Questionnaire to discover the extent to which such obligations exist.

(D) The 2000 Adults Convention does not apply to maintenance obligations *per se*

Even though the 2000 Adults Convention does not apply to maintenance obligations *per se*, it is applicable to the issue of powers of representation which would include provisions to make arrangements for the international recovery of maintenance on behalf of the adult who is not in a position to protect his or her interests. For example, in accordance with Article 15 of the 2000 Convention, the law of the adult's habitual residence at the time of the agreement or act, unless one of the laws mentioned in Article 15(2) has been designated expressly in writing, would govern the existence, extent, modification and extinction of powers of representations. Article 16 which provides for the withdrawal or modification of powers of representation by measures taken by an authority having jurisdiction under the 2000 Convention would also be applicable.

In the light of this background, the objectives of the Questionnaire are:

- (1) to learn more from States concerning maintenance provisions under domestic laws in respect of vulnerable persons;
- (2) to identify any special rules which may need to be added to the 2007 Child Support Convention, by way of a protocol, with regard to those maintenance obligations in respect of vulnerable persons which are within or are capable of being brought within the scope of the Convention; and
- (3) to identify any categories of maintenance obligations towards vulnerable persons which at the moment cannot be brought within the scope of the Convention.

Questions

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

1) Does the law of your State / Organisation provide specifically for maintenance obligations arising from a parent-child relationship towards a vulnerable person under the age of 21 years (or 18 years)?

✓ YES
 NO

2) Does the law of your State / Organisation provide specifically for maintenance obligations for a spouse towards a vulnerable spouse?

✓ YES
 NO

3) Can you please identify any special rules which may need to be added to the 2007 Child Support Convention, by way of a protocol, with regard to maintenance obligations:
 a) arising from a parent-child relationship towards a vulnerable person under the age of 21 years (or 18 years); or, b) for a spouse towards a vulnerable spouse:

a) *In the Republic of South Africa the maintenance obligation arising from a parent –child relationship towards a vulnerable person applies to a child of 18 years and/or beyond the age of 18 years. It extends until the person maintained is self-supportive and is further dependent on the need for further support based on evidence or motivation for maintenance support.*

b) *It might be necessary to add an equivalent or similar section providing for the maintenance of spouse in terms of the Spousal Maintenance legislation and /or the equivalent rule to Rule 43 of the Uniform Rules of the High Court in relation to maintenance of a spouse pending litigation of divorce to provide for allowance and assistance to vulnerable spouse to litigate at the same strength as the spouse with financial strength.*

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

4) Does the law of your State / Organisation provide specifically, in respect of vulnerable persons, for maintenance obligations arising from:

✓ - a family relationship YES / NO
 ✓ - parentage YES / NO
 ✓ - marriage YES / NO
 - affinity YES / NO

5) Does your State / Organisation intend to extend the application of the whole or any part of the Convention to maintenance obligations arising from a family relationship, parentage, marriage or affinity which would include vulnerable persons?

✓ YES
 NO
 Not yet determined

6) If you replied YES to Question 5), please indicate the relationship(s), which would include vulnerable persons, to which you would extend the Convention:

- [] family
- [] parentage
- [] marriage
- [] affinity

7) If you replied YES to Question 5), please indicate the parts of the Convention to which you would extend the relationship(s) identified in Question 6):

- [] the whole Convention
- [] the whole Convention, with the exception of Chapters II and III
- [] other, please specify: _____

8) Please identify any special rules which may need to be added to the 2007 Child Support Convention, by way of a protocol, with regard to those maintenance obligations in respect of vulnerable persons which are capable of being brought within the scope of the Convention:

There would be a need to extend the rules on vulnerable children over the age of 21 years who require maintenance support where the need to be supported exists. The rule should cover persons whose physical disability renders them perpetually dependant to their parents due to the nature of their disability. This should include persons with mental health difficulty.

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

9) Does the law of your State / Organisation provide specifically for maintenance obligations which **do not** arise from a family relationship, parentage, marriage or affinity in respect of vulnerable persons?

- [] YES
- [] NO

10) Please identify any categories within your State / Organisation of maintenance obligations towards vulnerable persons which at the moment cannot be brought within the scope of the Convention:

Where parties to maintenance dispute paternity to a child to be supported/maintained rules must be developed within the Convention to regulate the submission to scientific paternity testing.

11) Please identify any special rules which may need to be added to the 2007 Child Support Convention, by way of a protocol, with regard to those maintenance obligations in respect of vulnerable persons which at the moment cannot be brought within the scope of the Convention:

The child support need to be extended to children above the age of 18 or 21 where the need exists more particularly if the child is still attending school at tertiary level or persons with disability over the age of 21 years as a result of their state of health.

General questions

12) Does your State / Organisation have bilateral, regional or international agreements in place that deal specifically with maintenance obligations in respect of vulnerable persons?

YES
 NO

13) If you replied YES to Question 12), please identify the categories of maintenance obligations towards vulnerable persons which fall within the scope of the bilateral, regional or international agreements referred to therein:

The Reciprocal Enforcement of the Maintenance Orders Act, 1963 provides for specific obligations to contracting states and non-contracting state.

14) Do you see the need for the development of a protocol to deal with the international recovery of maintenance in respect of vulnerable persons?

YES
 NO

15) Any other remarks:

The UN Convention on the Rights of the Child and the RSA's Constitution provides for a definition of a child as a person below the age of 18 years. If the Convention cannot be extended to cover persons over the age of 18, there might be a need to develop a separate legislation which addresses, spousal maintenance, ,maintenance pending litigations when divorce proceedings are instituted, persons with disability and cannot maintain themselves due to the nature of their disability and persons who are still pursuing qualification that will make them suitable for employment or entrance in the job market.

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Thank you!