

**QUESTIONNAIRE RELATIF A L'OPPORTUNITE ET A LA FAISABILITE D'UN
PROTOCOLE A LA CONVENTION DE LA HAYE DU 25 OCTOBRE 1980 SUR LES
ASPECTS CIVILS DE L'ENLEVEMENT INTERNATIONAL D'ENFANTS**

établi par le Bureau Permanent

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**QUESTIONNAIRE ON THE DESIRABILITY AND FEASIBILITY OF A
PROTOCOL TO THE HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE
CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION**

drawn up by the Permanent Bureau

*Document préliminaire No 2 de décembre 2010 à l'intention de la
Commission spéciale de juin 2011 sur le fonctionnement pratique de la
Convention Enlèvement d'enfants de 1980 et de la
Convention Protection des enfants de 1996*

*Preliminary Document No 2 of December 2010 for the attention of the
Special Commission of June 2011 on the practical operation of the
1980 Hague Child Abduction Convention and the
1996 Hague Child Protection Convention*

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INTRODUCTION TO THE QUESTIONNAIRE

Mandate

The Council on General Affairs and Policy of the Hague Conference, at its meeting of April 2009

"... authorised the Permanent Bureau to engage in preliminary consultations concerning the desirability and feasibility of a protocol to the [*Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*] containing auxiliary rules to improve the operation of the Convention".¹

Furthermore, the Council on General Affairs and Policy requested the Permanent Bureau to prepare a report on the consultations for the Special Commission on the practical operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (hereinafter "the 1980 Hague Convention" or "the Convention") in 2011. The Council stated that the Report should also "take into account the extent to which the provisions of the 1996 Hague Convention supplement those of the 1980 Hague Convention."²

To assist in the preparation of this report, in April 2010 the Council on General Affairs and Policy authorised the Permanent Bureau to circulate a Questionnaire "to States Parties and Members later this year seeking general views as well as views in relation to the specific elements which might form part of a protocol"³ to the 1980 Hague Convention.

Objectives of the Questionnaire

In accordance with the mandate, this Questionnaire seeks general views on the desirability and feasibility of a protocol, as well as views on specific matters which might form part of a protocol.

It is not the objective of this Questionnaire to gather opinions on the precise rules or language that should appear in a protocol, but rather on the broad elements which might be covered by a protocol, as well as the feasibility of achieving consensus on those matters.⁴ The purpose at this stage is to gather opinions which will inform the discussion on whether the Hague Conference should embark on the formal process of developing a protocol. This is a matter which will be discussed in the Special Commission, but the final decision lies with the Council on General Affairs and Policy.⁵

The Permanent Bureau intends, except where expressly asked not to do so, to place all replies to the Questionnaire on the Hague Conference website (< www.hcch.net >).

¹ "Conclusions and Recommendations of the Council on General Affairs and Policy of the Conference (31 March – 2 April 2009)", p. 2, available on the Hague Conference website at < www.hcch.net >, under "Work in Progress", then "General Affairs".

² *Ibid.* References to "the 1996 Hague Convention" are to 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*.

³ "Conclusions and Recommendations of the Council on General Affairs and Policy of the Conference (7-9 April 2010)", p. 2, available on the Hague Conference website at < www.hcch.net >, under "Work in Progress", then "General Affairs".

⁴ In relation to the issue of feasibility it is relevant to point out that as a minimum all the States Parties to the 1980 Hague Convention, as well as all Members of the Hague Conference on Private International Law, would be invited to participate in the negotiations regarding a protocol, and that such negotiations would proceed to the furthest extent possible on a consensus basis.

⁵ See notes 1 and 3.

We would appreciate that replies be sent to the Permanent Bureau, if possible by e-mail, to < secretariat@hcch.net > no later than **15 March 2011**.

Any queries concerning this Questionnaire should be addressed to William Duncan, Deputy Secretary General (< wd@hcch.nl >) and / or Nicolas Sauvage, Legal Officer (< ns@hcch.nl >).

**QUESTIONNAIRE ON THE DESIRABILITY AND FEASIBILITY OF A
PROTOCOL TO THE HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE
CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION**

Name of State: Hong Kong Special Administrative Region of the People's Republic of China ("HKSAR")

For follow-up purposes

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PART I - POSSIBLE COMPONENTS OF A PROTOCOL

You are asked to give your views on each of the following possible components of a protocol. In doing so it would be helpful if you could indicate **for each of them**:

- Whether, in your opinion, provisions on these matters could serve a useful purpose; and
- How high a priority you would attach to the development of provisions on these matters.

1. Mediation, conciliation and other similar means to promote the amicable resolution of cases under the Convention⁶

- 1.1 Expressly authorising the use of mediation / conciliation / other means to promote the amicable resolution of cases under the Convention

Provision could serve a useful purpose. High priority is to be attached.

- 1.2 Addressing issues of substance and procedure surrounding the use of such means (*e.g.*, concerning matters such as confidentiality, the interrelationship between the mediation process and return proceedings, or the recognition and enforcement of agreements resulting from mediation)

Provision could serve a useful purpose. High priority is to be attached.

- 1.3 Others

⁶ See Arts 7(2) c) and 10 of the Convention. See also Part III of the "Conclusions and Recommendations of the Fifth Meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* and the practical implementation of the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* (30 October – 9 November 2006)" (hereinafter referred to as the "Conclusions and Recommendations of the 2006 Special Commission"), available on the Hague Conference website at < www.hcch.net > under "Child Abduction Section" then "Special Commission meetings". A Guide to Good Practice on Mediation under the 1980 Hague Child Abduction Convention is currently under preparation. A draft Guide will be submitted to the Special Commission meeting in June 2011. A "Preliminary Outline of the Guide to Good Practice on Mediation under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (for consultation with the expert group)" is available on the Hague Conference website at < www.hcch.net > under "Child Abduction Section" then "Cross-border family mediation". Co-ordination would be needed between the work on the Guide to Good Practice and the development of provisions on mediation in a protocol.

2. **Direct judicial communications**⁷

- 2.1 Providing a legal basis for the use of direct cross-border judicial communications in respect of cases brought under the Convention

It is the considered opinion of the judges in the HKSAR who are asked to determine cases under the 1980 Convention that it would most certainly be benefit if provision could be made (by way of a protocol or such other means) for direct crosss-border judicial communications, the protocol defining the scope of such communications and providing procedural safeguards necessary for their lawful use. In common law jurisdictions (of which HKSAR is one), there is a historical reticence in respect of direct cross-border judicial communications and such communications, when they do take place, are carefully scrutinised by the appellate courts.

However, while HKSAR would support an extension of the terms of the Convention to cover direct cross-border judicial communications, the experience of the HKSAR judges does not demand that the matter be given a high priority.

- 2.2 Defining the scope of such direct communications and setting out procedural safeguards for their use

Please see comments at 2.1

- 2.3 Providing an explicit basis for the International Hague Network of Judges

Please see comments at 2.1

- 2.4 Others

3. **Expeditious procedures**⁸

- 3.1 More explicit or stricter provisions to ensure that return applications are processed rapidly at first instance, on appeal and at the enforcement stage

Provision could serve a useful purpose. High priority is considered not necessary from our experience. The HKSAR jurisdiction is relatively small, effective case management and liaison with the court listing office by the few judges dealing with Convention applications ensures that return applications are processed rapidly.

- 3.2 Others

4. **The safe return of the child**⁹

⁷ See Part VI of the Conclusions and Recommendations of the 2006 Special Commission, *ibid.*

⁸ See Arts 2 and 11 of the Convention. See also para. 1.4.1 of the Conclusions and Recommendations of the 2006 Special Commission (*ibid.*), and Hague Conference on Private International Law, *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part II – Implementing Measures*, Jordan Publishing Limited, 2003, para. 6.3, available on the Hague Conference website at < www.hcch.net > under "Child Abduction Section" then "Guides to Good Practice".

- 4.1 Specifying measures (e.g., interim protective orders) which may be taken by either of the States involved to help ensure the safe return of the child and, where appropriate, an accompanying parent

Provision could serve a useful purpose. High priority is to be attached.

- 4.2 Providing for co-operation between courts or between Central Authorities in securing the safe return of the child and removing obstacles to return

Provision could serve a useful purpose. High priority is to be attached.

- 4.3 Providing for an exchange of information following the return of the child

Provision could serve a useful purpose. High priority is to be attached.

- 4.4 Others

⁹ See Art. 7(2) *h*) of the Convention. See also para. 1.1.12, Part VIII and Appendix of the Conclusions and Recommendations of the 2006 Special Commission (*op. cit.* note 6). See also Hague Conference on Private International Law, *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part I – Central Authority Practice*, Jordan Publishing Limited, 2003, in particular para. 6.3, available on the Hague Conference website at *ibid.* See also relevant provisions of the 1996 Hague Convention.

5. Allegations of domestic violence

- 5.1 Providing guidance on the manner in which such allegations should be handled in the context of proceedings for the return of a child

Provision could serve a useful purpose. High priority is to be attached.

- 5.2 Others

6. The views of the child¹⁰

- 6.1 Further provisions concerning the right of the child to be heard and to have his or her views taken into account in the course of return proceedings

Provision could serve a useful purpose. High priority is to be attached.

- 6.2 Others

7. Enforcement of return orders¹¹

- 7.1 Explicit provisions concerning enforcement procedures (e.g., limiting legal challenges, promoting voluntary compliance)

Provision could serve a useful purpose. High priority is to be attached.

- 7.2 Others

8. Access / contact¹²

- 8.1 Clarifying obligations under Article 21 of the Convention (e.g., the responsibilities of Central Authorities)

Provision could serve a useful purpose. High priority is to be attached.

- 8.2 Facilitating contact between the child and the left-behind parent during the return procedure

Provision could serve a useful purpose. High priority is to be attached.

- 8.3 Others

¹⁰ See Art. 13(2) of the Convention. See also Appendix of the Conclusions and Recommendations of the 2006 Special Commission (*op. cit.* note 6).

¹¹ See Part V of the Conclusions and Recommendations of the 2006 Special Commission (*op. cit.* note 6), and Hague Conference on Private International Law, *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part IV – Enforcement*, Bristol, Family Law (Jordan Publishing Limited), 2010, available on the Hague Conference website at *ibid.*

¹² See Arts 7(2) f) and 21 of the Convention. See also paras 1.7.1 to 1.7.3 of the Conclusions and Recommendations of the 2006 Special Commission (*op. cit.* note 6), and Hague Conference on Private International Law, *Transfrontier Contact Concerning Children – General Principles and Guide to Good Practice*, Jordan Publishing Limited, 2008, available on the Hague Conference website at *ibid.* See also relevant provisions of the 1996 Hague Convention.

9. Definitions or refined definitions¹³

9.1 Rights of custody

The definition is already provided for in the Convention and strengthened by case law/ case authorities. In our view, further provision could not serve much useful purpose.

9.2 Habitual residence

No definition is currently provided for in the Convention. Provision could be of benefit to ensure/maintain a consistent approach across State parties. Our experience however does not demand it being given a high priority.

9.3 Others

10. International relocation of a child¹⁴

10.1 Addressing the circumstances in which one parent may lawfully remove a child to live in a new country

Provision may serve a useful purpose but a high priority is considered not necessary as we are of the view that arrangements can primarily be made between parents upon mutual agreement taking account of the particular circumstances in each individual case. Where court proceedings are instituted, the agreement can also be enforced by a court order

10.2 Promoting agreement between parents in respect of relocation

Provision may serve a useful purpose but a high priority is not considered necessary as we do not have many cases of this nature.

10.3 Others

11. Reviewing of the operation of the Convention¹⁵

11.1 Providing an explicit legal basis for convening the Special Commission to review the practical operation of the Convention and to encourage the development of good practices under the Convention

Provision could serve a useful purpose. High priority is to be attached.

¹³ See in particular Art. 5 of the Convention. See also para. 1.7.3 of the Conclusions and Recommendations of the 2006 Special Commission (*op. cit.* note 6), and paras 8 to 11 of the "Overall Conclusions of the Special Commission of October 1989 on the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*", available on the Hague Conference website at < www.hcch.net > under "Child Abduction Section" then "Special Commission meetings".

¹⁴ See paras 1.7.4 and 1.7.5 of the Conclusions and Recommendations of the 2006 Special Commission (*op. cit.* note 6).

¹⁵ Five meetings of the Special Commission to review the practical operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* have been held, in 1989, 1993, 1997, 2001, and 2006. This Questionnaire is drawn up for the attention of the Sixth Meeting which is planned for June 2011 (first part) and January 2012 (second part). Conclusions and Recommendations of previous meetings are available on the Hague Conference website at < www.hcch.net > under "Child Abduction Section" then "Special Commission meetings".

- 11.2 Requiring the co-operation of Contracting States in gathering statistics and case law under the Convention and in completing country profiles

Provision could serve a useful purpose. High priority is to be attached.

- 11.3 Establishing a body competent to review States Parties' compliance with Convention obligations

Provision could serve a useful purpose. High priority is to be attached.

- 11.4 Others

12. Others

Please indicate any other matters which you think should be considered for inclusion in a protocol containing auxiliary rules to improve the operation of the Convention.

No extra matters at the moment.

PART II - THE GENERAL QUESTION

1. In the light of your views given above, and considering that decisions will need to be taken by consensus, should the Hague Conference on Private International Law embark on the formal process of developing a protocol to the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*? (Please indicate if you are in favour, opposed or undecided.)

We are in favour to have the formal process of developing the protocol which can enhance the smooth and effective operation of the Convention.

2. If in favour, what level of priority would you attach to this exercise?

High priority.