

# DIRECT JUDICIAL COMMUNICATIONS AND THE INTERNATIONAL HAGUE NETWORK OF JUDGES UNDER THE HAGUE 1980 CHILD ABDUCTION CONVENTION

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## I. Introduction

An improved implementation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (hereinafter: the Hague 1980 Child Abduction Convention) in the region<sup>1</sup> calls upon the designation of judges<sup>2</sup> to the International Hague Network of Judges (IHNJ) and the use of direct judicial communications. Once 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 Hague 1996 Child Protection Convention) is in force in the region these mechanisms could also be useful in this context.

To assist States in this respect, the Permanent Bureau (Secretariat) of the Hague Conference on Private International Law with the assistance of Members of the IHNJ developed the “Emerging Guidance regarding the development of the International Hague Network of Judges and 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”<sup>3</sup> (hereinafter: the “Principles” or “Emerging Guidance and General Principles for Judicial Communications”).

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1 Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Hungary, Kosovo, Montenegro, Romania, Serbia, Slovenia, the former Yugoslav Republic of Macedonia,

2 As of 1 November 2014, Bulgaria, Hungary, Romania, Serbia and Slovenia have designated judges to the International Hague Network of Judges (IHNJ).

3 The Emerging Guidance and General Principles for Judicial Communications are available in English, French and Spanish on the website of the Hague Conference at [www.hcch.net](http://www.hcch.net) under the “Child Abduction Section” then “Judicial Communications”.

## 1. Background of the principles

The drawing up of the Emerging Guidance and General Principles for Judicial Communications began following the Fifth Meeting of the Special Commission to review the operation of the Hague 1980 Child Abduction Convention and the practical implementation of the Hague 1996 Child Protection Convention (30 October – 9 November 2006).<sup>4</sup> Among the Conclusions and Recommendations of this meeting, the section relating to judicial communications contains the recommendation that the future work of the Permanent Bureau would include exploring 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.<sup>5</sup>

With this in mind, the Permanent Bureau gathered together a group of experts in July 2008 to discuss a preliminary draft.<sup>6</sup> The draft was improved in the

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4 “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)”, adopted by the Special Commission (hereinafter, “Conclusions and Recommendations of the Fifth Meeting of the Special Commission”). Available on the website of the Hague Conference at [www.hcch.net](http://www.hcch.net) under “Child Abduction Section” then “Special Commission meetings on the practical operation of the Convention”.

5 Conclusion and Recommendation No 1.6.7 *e*). This follows a suggestion for a recommendation contained in P. Lortie, “Report on Judicial Communications in relation to international child protection”, Prel. Doc. No 8 of October 2006 drawn up for the attention 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* (The Hague, 30 October – 9 November 2006) (hereinafter, “Prel. Doc. No 8/2006 on Judicial Communications”), at para. 73 under 7 *w*). Available on the website of the Hague Conference at [www.hcch.net](http://www.hcch.net) under “Child Abduction Section” then “Special Commission meetings on the practical operation of the Convention” and “Preliminary Documents”.

6 The following experts met at the Permanent Bureau: The Honourable Justice Victoria Bennett (Australia), Judge Eberhard Carl (Germany), Senior Judge Francisco Javier Forcada Miranda (Spain), Judge Myriam de Hemptinne (Belgium), Judge Jónas Jóhannsson (Iceland), The Honourable Justice Judith Kreeger (United States of America), Judge Robine de Lange-Tegelaar (Netherlands), Judge Jorge Antonio Maurique (Brazil), The Honourable Justice Dionisio Núñez Verdín (Mexico), Judge Annette C. Olland (Netherlands), The Honourable Judge Ricardo C. Pérez Manrique (Uruguay), Judge Lubomir Ptáček (Czech Republic), Kathy Ruckman (United States of America), Andrea Schulz (Germany), Judge Mônica Jacqueline Sifuentes Pacheco de Medeiros (Brazil), Judge Graciela Tagle (Argentina), François Thomas (European Union), The Right Honourable Lord Justice Mathew Thorpe (United Kingdom, England and Wales) and Markus Zalewski (European Union).

light of comments made by the experts to provide a basis for further discussion and consultation at 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, Belgium, in January 2009.<sup>7</sup> The Joint EC-HCCH Conference underlined the continued development and refinement of the Draft General Principles for Judicial Communications in consultation with judges from all regions of the world and different legal traditions.<sup>8</sup> The draft was the subject of discussion at a number of judicial conferences which took place thereafter.<sup>9</sup>

In June 2010, the Permanent Bureau gathered together a group of experts drawn from the judiciary<sup>10</sup> to develop further the Emerging Guidance and General Principles for Judicial Communications. These Principles were submitted formally in March 2011 to Contracting States to the Hague 1980 Child Abduction Convention and the Hague 1996 Child Protection Convention for their comments and suggestions prior to the meeting of the Special Commission to review the operation of those two Conventions, which took place from 1 to 10 June 2011. The Special Commission gave its general endorsement to

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7 The Conclusions and Recommendations of the Joint EC-HCCH Judicial Conference are available on the website of the Hague Conference at [www.hcch.net](http://www.hcch.net) under “Child Abduction Section” then “Judicial Communications”. These Conclusions and Recommendations were adopted by consensus by more than 140 judges from more than 55 jurisdictions representing all continents.

8 See, *ibid.*, Conclusion and Recommendation No 16.

9 The Third Judicial Conference on Cross-Frontier Family Law Issues, St. Julian's, Malta, 24-26 March 2009; the International Family Justice Judicial Conference for Common Law and Commonwealth Jurisdictions, Cumberland Lodge, Windsor, United Kingdom, 4-8 August 2009; the International Hague Network of Judges Latin American Judges' Meeting, Montevideo, Uruguay, 4 December 2009; the International Judicial Conference on Cross-border Family Relocation, Washington, D.C., United States of America, 23-25 March 2010; and, the Inter-American Meeting of International Hague Network Judges and Central Authorities on International Child Abduction, Mexico, 23-25 February 2011.

10 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 Verdín (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.

the Emerging Guidance and General Principles for Judicial Communications. The current version of the Principles has been revised taking into account the discussions within the Special Commission and were endorsed in April 2012 by the Council on General and Policy (the governing body) of the Hague Conference on Private International Law.

## **II. The International Hague Network of Judges**

### **1. The birth of the IHNJ**

The IHNJ specialising in family matters was created 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 Hague 1980 Child Abduction Convention. It was felt that the development of such a network would facilitate communications and co-operation between judges at the international level and would assist in ensuring the effective operation of the Hague 1980 Child Abduction Convention. More than 15 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 Hague 1980 Child Abduction Convention. The IHNJ currently includes more than 95 judges from more than 70 States in all continents.<sup>11</sup>

### **2. Designation of Judges to the IHNJ**

States that have not designated a Network Judge are strongly encouraged to do so.<sup>12</sup> Judges designated to the Network with responsibility for international child protection matters should be sitting judges<sup>13</sup> with authority and present experience in that area.<sup>14</sup> It is important to note that competent authorities responsible for making such designations vary from State to State. Examples

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11 A complete list of Members of the International Hague Network of Judges is available on the website of the Hague Conference at [www.hcch.net](http://www.hcch.net) under “Child Abduction Section” then “International Hague Network of Judges”.

12 Principle 1.1, *op. cit.* n. 3.

13 These are judges that are currently carrying out judicial functions.

14 Principle 1.2, *op. cit.* n. 3.

of these competent authorities include judicial councils, supreme courts, chief justices, assemblies of judges or, sometimes, the Ministry of Justice or other relevant government department. Where possible, designations should be for as long a period as possible in order to provide stability to the Network while recognising the need to have new members join the Network on a regular basis.<sup>15</sup> It is established practice that judges who are no longer active should resign from the Network to be replaced by sitting judges with authority and present experience in that area. Designations should be made by way of a signed letter or the transmission of any official document from the competent authority responsible for the designation.<sup>16</sup>

### **3. The role of members of the IHNJ**

The role of a member of the IHNJ is to be primarily 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. The first communication function is of a general nature (*i.e.*, not case specific). It includes the sharing of general information from the IHNJ or the Permanent Bureau of the Hague Conference on Private International Law with his or her colleagues in the jurisdiction and vice versa. It may also encompass the sharing of general information with regard to the interpretation and operation of international instruments. The second communication function consists of direct judicial communications between two sitting judges with regard to specific cases. The objective of such communications is to address any lack of information of the competent judge, who, for example, may be seized of a return application under the Hague 1980 Child Abduction Convention and may have questions about the situation and legal implications in the State of the habitual residence of the child.

### **III. Direct judicial communications concerning specific cases**

Current practice shows that these communications mostly take place in child abduction cases under the Hague 1980 Child Abduction Convention. These cases show that these communications can be very useful for resolving some of the practical issues, for example, surrounding the safe return of a child (and accompanying parent, as necessary), including the establishment of urgent and / or provisional measures of protection and the provision of information

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15 *Ibid.*, Principle 1.6.

16 *Ibid.*, Principle 1.7.

about custody or access issues or possible measures for addressing domestic violence or abuse allegations, and they may result in immediate decisions or settlements between the parents before the court in the requested State. These communications will often result in considerable time savings and better use of available resources, all in the best interests of the child.

The role of the Hague Network Judge is to receive and, where necessary, channel incoming judicial communications and initiate or facilitate outgoing communications. The Hague Network Judge may be the judge involved in the communication itself, or he or she may facilitate the communication between the judges seized with the specific case. Such communications are different from Letters of Request used in the context of the cross-border taking of evidence. Such taking of evidence should follow the channels prescribed by law. When a judge is not in a position to provide assistance he or she may invite the other judge to contact the relevant authority.

## **1. Direct judicial communications subject matters**

Matters that may be the subject of direct judicial communications include, for example:

### **1.1. Scheduling the case in the foreign jurisdiction:**

- to make interim orders, e.g., support, measure of protection;**
- to ensure the availability of expedited hearings.**

Example: Justice Singer from the United Kingdom (England and Wales) was considering ordering the return of two children to the United States of America (California) in the context of an application under the Hague 1980 Child Abduction Convention.<sup>17</sup> Justice Singer engaged in direct judicial communications with the relevant California family law judge, who agreed to make efforts to ensure that child custody proceedings instituted in California would be given priority appropriate to the case if the child was returned. The California judge also agreed to make himself available at short notice, if needed, in order to make any immediate and necessary interim arrangements for the children prior to their arrival in his jurisdiction. As there was also an outstanding arrest warrant in California for the mother's breach of probation, Justice Singer also liaised with the appropriate Californian criminal judge, arranging for a recall of the warrant until the issues relating to the children were resolved.

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<sup>17</sup> *Re M and J* (Abduction: International Judicial Collaboration) 1 *FLR* (2000) 803.

### **1.2. Establishing whether protective measures are available for the child or other parent in the State to which the child would be returned and, in an appropriate case, ensuring the available protective measures are in place in that State before a return is ordered**

Example: Justice Moylan from the United Kingdom (England and Wales) was considering an application for the return of children to Malta under the Hague 1980 Child Abduction Convention.<sup>18</sup> Justice Moylan reported that the taking mother “raised very significant issues about domestic violence both in respect of her and in respect of the children.”<sup>19</sup> Justice Moylan, with agreement of the parties, initiated and carried out direct judicial communications to assist in establishing “what arrangements could be made in the other State to secure the protection of the children in the event that [the judge] ordered their return”.<sup>20</sup> A prompt response was received from the judge in Malta, which: a) identified the relevant agency concerned with child protection in Malta; b) “made clear that child protection measures could be initiated expeditiously when and if required”;<sup>21</sup> and c) made clear that other orders (of protection) could also be made expeditiously. Justice Moylan noted that the communication had provided him with the “necessary degree of what might best be described as comfort not only to me but also, perhaps more importantly, to the mother, that a proper protective structure was available so that she felt able to agree to return with the children.”<sup>22</sup>

### **1.3. Ascertaining whether the foreign court can accept and enforce undertakings offered by the parties in the initiating jurisdiction**

Example: A mother had travelled with her 2½ year old child to the United States of America without the consent of the father, who remained in Greece. The parents were married and had joint rights of custody. A judge in the United States of America (Connecticut) ordered, under the Hague

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18 This case was reported by Judge Andrew Moylan in *The Judges' Newsletter on International Child Protection* Vol. XV, Autumn 2009, at p. 17 (available on the website of the Hague Conference, [www.hcch.net](http://www.hcch.net), under “Specialised sections” then “Child Abduction Section”). Note that this case was subject to the “Brussels II a Regulation” (Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility) and was therefore also subject to Article 11(4) of that Regulation, which supplements Article 13(1) *b*) of the Hague 1980 Child Abduction Convention among Member States of the European Union where the Regulation is applicable.

19 *ibid.*, p. 19.

20 *Ibid.*

21 *Ibid.*

22 *Ibid.*

1980 Child Abduction Convention, the return of the child to Greece, subject to undertakings.<sup>23</sup> The court received undertakings from each party as well as from counsel for the child. The court in the United States of America affirmed that attempts would be made to arrange a conference call with the judge in Greece to ensure that the undertakings would be honoured there. The court noted that such an arrangement between judges could obviate the need of a bond to insure the fulfilment of any undertaking set by the court in Connecticut.

#### **1.4. Ascertaining whether the foreign court can issue a mirror order (i.e., same order in both jurisdictions)**

Example: The Constitutional Court of South Africa was deciding upon an appeal of an order made under the Hague 1980 Child Abduction Convention for the return of a child to Canada (British Columbia).<sup>24</sup> The mother, appealing the return order, raised substantiated concerns about domestic violence. The South African court required that the applicant act on a number of undertakings (including refraining from criminal or other legal charges towards the abducting parent, providing financial and other material support, co-operating with child services authorities, etc.) by obtaining an order from the appropriate court in British Columbia mirroring, “insofar that it is possible” the order by the requested court in South Africa. Such a “mirror order” then had to be communicated to the requested court. The South African court, by way of communications made by a Family Advocate, also ensured that enquiries were made to the foreign court, via the Central Authority in British Columbia, regarding a specific time-line as to when a custody determination in the State of habitual residence would be made. The court noted that it was “clearly in the interests of [the child] that certainty as to her custody and guardianship be settled at the earliest possible time.”<sup>25</sup>

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23 *Panazatou v. Pantazatos*, No. FA960713571S (Conn. Super. Ct. Sept. 24, 1997). The decision and a summary can be found at <http://www.incadat.com> Ref. HC/E/USs 97 [24/09/1997; Superior Court of Connecticut, Judicial District of Hartford (United States of America); First Instance].

24 *Sonderup v. Tondelli*, 2001 (1) SA 1171 (CC). The decision and a summary can be found at <http://www.incadat.com> Ref. HC/E/ZA 309 [12/04/2000; Constitutional Court of South Africa; Superior Appellate Court].

25 Although it is unclear if judicial communications were made directly between judges in this case, it is a clear instance of court-to-court communications, where direct judicial communications could be employed.



### **1.5. Confirming whether orders were made by the foreign court**

Example: Judge Kay of the Appeal Division of the Family Law Court of Australia (then member of the IHNJ) was a seized judge in the State of habitual residence of a child who had been returned from New Zealand under the Hague 1980 Child Abduction Convention.<sup>26</sup> Judge Kay established direct communications with Judge Mahony (then member of the IHNJ and Principal Judge of the Family Law Court of New Zealand). Judge Kay had cause to rule upon some conditions that had been imposed by a Judge of New Zealand for the return of a child to Australia. After having made the orders the New Zealand Judge had thought appropriate, Judge Kay wrote to Judge Mahony to draw his attention to some issues of jurisdiction he had identified in his reasons. These were indicative of the New Zealand Judge having possibly infringed upon aspects of the Australian court's jurisdiction.

### **1.6. Verifying whether findings about domestic violence were made by the foreign court**

Example: A mother removed two children from Ireland to the United States of America (Massachusetts), and her husband, possessing joint rights of custody, filed a return application under the Hague 1980 Child Abduction Convention.<sup>27</sup> A return order for the children to Ireland was issued by the court of first instance, and the mother appealed the decision, arguing a 13(1) *b*) grave risk of harm exception to return due to domestic violence. The appellate court overruled the first instance return order, indicating that the concern was not only whether the Irish authorities would issue protective orders upon return but rather whether the alleged abuser would violate them, as he had a history of fleeing criminal charges and had violated previous court orders in Ireland and in the United States of America. Protection orders in the context of domestic violence had previously been issued

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26 Reported by Judge Joseph Kay, in 'Memoirs of a Liaison Judge' III *The Judges' Newsletter* (Autumn 2001) *op. cit.* n. 8, at pp. 20-24.

27 *Walsh v. Walsh*, 221 F.3d 204; Fed: 1st Cir. (2000). The decision and a summary can be found at <http://www.incadat.com> Ref. HC/E/USf 326 [25/07/2000; United States Court of Appeals for the First Circuit; Appellate Court].

in Ireland, following repeated instances of physical abuse.<sup>28</sup>

### **1.7. Verifying whether a transfer of jurisdiction is appropriate**

Example: Articles 8 and 9 the Hague 1996 Child Protection Convention contain procedures whereby jurisdiction may be transferred from one Contracting State to another in circumstances where the judge normally exercises jurisdiction (*i.e.* in the country of the child's habitual residence). For example, under Article 8 of the 1996 Convention, by way of exception, an authority having jurisdiction under Article 5 or 6, if it considers that the authority of another Contracting State would be better placed in a particular case to assess the best interests of the child, may either: (i) request that other authority, directly or with the assistance of the Central Authority of its State, to assume jurisdiction to take such measures of protection as it considers to be necessary, or (ii) suspend consideration of the case and invite the parties to introduce such a request before the authority of that other State. Article 9 of the 1996 Convention sets out a parallel scheme for the foreign counterpart authorities to also request a transfer of jurisdiction if they think that they are better placed in a particular case to assess the child's best interests. The judicial co-operation system necessary to support these communications is laid-out in Articles 31 and following of the 1996 Convention.<sup>29</sup>

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28 Although it was not reported that direct judicial communications were used in this case, it is clear that the documented domestic violence and the existence of a protection order in the foreign jurisdiction were important in determining this case. Ascertaining the existence or nature of such an order in a foreign jurisdiction might form the object of direct judicial communications. Article 13(3) of the Hague 1980 Child Abduction Convention stipulates that “[i]n considering the circumstances referred to in this Article [Art. 13], the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.”

29 As the operation of the 1996 Hague Convention is still very young there is not yet any known case law on this matter under the Convention. However, see *Re Y (a child)* [2013] EWCA Civ 129 (United Kingdom, England and Wales) for an instance of judicial communications on the issue of enforceability of orders under Article 23 of the 1996 Convention. See also *LM (A Child)* [2013] EWHC 646 (Fam) (United Kingdom, England and Wales) for a case under the Brussels II a Regulation of the European Union concerning a transfer of jurisdiction and the desirability of direct judicial communications (subsequently endorsed in *HJ (A Child)* [2013] EWHC 1867 (Fam) and in *LA v ML & Ors* [2013] 2063 (Fam)), as Article 15 of Brussels II a is very similar to Arts 8 and 9 of the 1996 Hague Convention.

### **1.8. Ascertaining the application / interpretation of foreign law in order to assist in establishing whether removal or retention has been wrongful**

Example: A child of two Polish nationals, previously residing in Poland, had been removed by the mother to the United Kingdom (England and Wales).<sup>30</sup> A Polish court had ordered that the child live with the mother, while the father was granted contact. The father filed an application under the Hague 1980 Child Abduction Convention for the return of the child to Poland. Proceedings in the United Kingdom were delayed due to confusion around the issue of whether the father possessed custody rights in Poland, in order to meet the Article 3 requirements of the Convention. The United Kingdom (England and Wales) appeal court offered commentary that the case was an occasion where direct judicial communications might be employed to most quickly and effectively assist in resolving this issue, noting that an opinion from the Polish liaison judge “would not be binding, but [...] would perhaps help the parties and the court of trial to see the weight or want of weight, in the challenge to the plaintiff’s ability to cross the Article 3 threshold.”<sup>31</sup>

### **1.9. Ascertaining that the abducting parent would have due access to justice in the State where the child would be returned (e.g., where necessary, access to free legal representation, etc.)**

Example: Two children for which the married parents had joint rights of custody were taken by their mother from the United States of America (California) to Canada (Quebec), the mother’s State of origin.<sup>32</sup> An escalation of legal proceedings followed and the mother initiated custody proceedings in Quebec. A court in California then ordered the mother to return the children to California. The Quebec Court subsequently awarded the mother provisional custody, and the father contested the jurisdiction of the court. The California court awarded interim custody to the father. Finally,

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30 F (A Child) [2009] EWCA Civ 416; [2009] 2 FLR 1023.

31 *Ibid*, at para. 12. Thorpe J also clarified that “[e]ven the formal determination by a court in the requesting state of the status of the father’s rights according to the domestic law is not determinative, because in the end a question has to be decided according to the autonomous law of the Convention and not the domestic law of the requesting state. But in practice, in the majority of cases, a definitive ruling from the court of the requesting state under Art 15 will be determinative of the issue.”

32 *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 <http://www.incadat.com> Ref. HC/E/CA 369 [17/05/1996; Superior Court of Quebec; Terrebonne, Family Division (Canada); First Instance].

the father applied to the Superior Court of Quebec for the return of the children under the Hague 1980 Child Abduction Convention. Further to direct judicial communications, the return to California was ordered. The trial judge in Quebec made contact with the responsible judge in California to ascertain whether the mother would be at a disadvantage upon return for having refused to comply with the California order to return with the children. A judge of the California Supreme Court stated this would not be the case and offered to sign an additional order clarifying that his previous custody order was interim only (the latter was subsequently set out in full in the Canadian judgment).

#### **1.10. Whether a parent will be subject to civil / criminal sanctions when returning with a child to the State of habitual residence**

Example: A Hague 1980 Child Abduction Convention return application came before Judge Gillen in Northern Ireland regarding three children who had allegedly been abducted from the United States of America and taken to Northern Ireland by their mother.<sup>33</sup> The application was on behalf of the father, residing in the United States of America. The mother raised concerns as to what would happen if she returned to the United States of America with the children. After discussing the case with counsel for each party, Judge Gillen contacted, by telephone, Assistant Superior Judge McElyea in Georgia, United States of America. Judge Gillen received assurances from Judge McElyea that the mother would not be subject to any further civil sanction provided that the children were returned subject to a return order. Judge McElyea also shared her view (whilst not inviting reliance) that it was unlikely that the returning parent would be prosecuted by the Law Enforcement Agency without the initiation of the applicant-father, and provided the court with the name and contact details of the local sheriff. Judge McElyea also affirmed that she would try to afford a measure of urgency to the custody hearings upon return of the mother and children. The communications between the judges were conducted in the presence of counsel to the parties and the communications were summarized in written documents also circulated to counsel.

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33 Case reported in "Practical Mechanisms for Facilitating Direct International Judicial Communications in the Context of the Hague *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*: A Preliminary Report," drawn up by Philippe Lortie, First Secretary, Preliminary Document No 6 (and Appendices A and B) of August 2002 for the attention of the Special Commission of September / October 2002 (available on the Hague Conference website at [www.hcch.net](http://www.hcch.net) under "Specialised Sections" then "Child Abduction Section" and "Special Commission meetings on the practical operation of the Convention" then "Preliminary Documents").

### **1.11. Resolving issues of parallel proceedings and the taking of jurisdiction**

Example: In April 2007 the Canadian Judicial Council approved the concept of judicial networking and collaboration in cases where another jurisdiction is involved. The protocol encourages direct judicial communication with the foreign jurisdiction. The judicial communication is not for the purpose of considering the merits of the case. Rather it is simply to make the other court aware of the dual proceedings. The purpose was best expressed by Martinson J. in *Hoole v. Hoole*, 2008 B.C.S.C. 1248 (British Columbia Supreme Court (Canada)) as follows:

“There is a recognition that judicial communication should not be for the purpose of considering the merits of the case. Instead, it can provide judges with the relevant information needed to make necessary decisions, such as making informed decisions on jurisdiction, including the location of the place of habitual residence. It can also assist judges in obtaining information about the custody laws of the other jurisdiction, which is needed to determine whether a removal or retention was wrongful.”

### **2. Establishing an outgoing direct judicial communication in a specific case**

Upon request from one of the parties or on its own motion, a judge seized of an international child protection case may decide to make use of direct judicial communications. Doing so, the following steps should be followed with a view to establish a line of communications:

- 1) The judge seized of an international child protection case who wants to make use of direct judicial communications will first verify whether a Judge from his / her State has been designated to the IHNJ by consulting the list of Members available on the website of the Hague Conference at < [www.hcch.net](http://www.hcch.net) > under “Child Abduction Section” then “International Hague Network of Judges”.
- 2) The judge seized of an international child protection case will then send a request for direct judicial communications to the member of the IHNJ of his / her State using the most rapid and appropriate means of communication.
- 3) The International Hague Network Judge of his / her State will then forward the request to the International Hague Network Judge of the State where the other party to the dispute is located.

- 4) The International Hague Network Judge of the other State will locate the Court and the Judge already seized by the other party and will forward to him / her the request for direct judicial communications.
- 5) If there is no Judge seized, the International Hague Network Judge of the other State will determine who should respond to the request or will respond himself / herself to the request.
- 6) A Judge from the other State will then contact the Judge in the State of origin of the request.

When making direct judicial communications, one should follow Principles 6 to 9 (reproduced below) as set out in the Emerging Guidance and General Principles for Judicial Communications.<sup>34</sup> The Principles for Judicial Communications will provide transparency, certainty and predictability to such communications for both judges involved as well as for the parties and their representatives. Such Principles are meant to ensure that direct judicial communications are carried out in a way which respects the legal requirements in the respective jurisdictions and the fundamental principle of judicial independence in carrying out Network functions. The Principles are drafted in a flexible way to meet the various procedural requirements found in different legal systems and legal traditions.

## **V. Conclusion**

It is hoped that the region will follow the example of other regions by designating judges to the IHNJ and by embracing direct judicial communications. In Latin America all the States Parties to the Hague 1980 Child Abduction Convention where within the European Union only Croatia, Greece and Lithuania, out of the 28 Member States, have not yet designated a judge to the IHNJ.

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34 *Op. cit.* n. 3.