

March 12, 2002

Professor William Duncan
Deputy Secretary General
Hague Conference on Private International Law
Permanent Bureau
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Dear William:

On behalf of the International Centre for Missing and Exploited Children (ICMEC), I would like to thank you for providing us with an update on the Permanent Bureau's progress following the Fourth Meeting of the Special Commission last March. In addition, we appreciate you giving ICMEC the opportunity to review and comment on the consultation paper on transfrontier access/contact and the questionnaire concerning direct international judicial communications in Hague child abduction cases. These materials provided an excellent basis for a constructive discussion at our recent Board of Directors meeting in Florida. Please find below ICMEC's observations on the process and content of future work on access under the Hague Convention, as well as our general suggestions concerning the development of an international judicial liaison network.

Consultation Paper on Transfrontier Access/Contact

- 1. Which are the issues connected with transfrontier access/contact which in practice cause your country most concern and which may benefit from further discussion within a multilateral setting?**

ICMEC recommends the following:

- Each country should operate under a presumption of access and continued relationship of both parents. It is our understanding that some countries do not have either the requisite laws or the cultural belief that children benefit by having access to BOTH parents despite the breakdown of the marital relationship. Countries must reform both their laws and their political will in order to support on-going relationships with both parents. This is especially true in the international context when the continued relationship between a child and a parent who may be distant geographically and, in some cases, culturally, will depend upon the support of the laws and administrative systems of both countries in order to maintain this relationship.
- Each country must have an expedited process both for recognizing existing contact orders of another State and creating contact orders under the Hague Convention. Because the distance involved in international contact cases results in fewer opportunities for children to visit and have

access to the parent residing in another country, these cases deserve to be handled on an expedited basis. If the distance parent is unable to enforce their access, they may not have another opportunity to do so for many months. The unique circumstances of these cases justifies institution of an expedited process applying to international cases even when the internal law of a country may not allow for expedited proceedings in a domestic case.

- Contact orders must be enforceable. The responding parent should not be able to simply object to a visit. The parent seeking access should have an expedited process for enforcing this existing order; it would be especially helpful to have a system that the parent is able to utilize without needing to employ or obtain legal representation.
- Support development of an international mediation system to enable parents to agree on terms of contact.

1. In respect of the issues you have identified, do you have any views on the technique or techniques (a Protocol to the 1980 Convention, non-binding Recommendations, a Good Practice Guide, Model Agreement or any other approach) which appears or appear to you at this stage most likely to effect improvements?

ICMEC recommends the following:

- ICMEC supports Good Practice Guides in the area of access as an immediate first step. Guides enable issues to be more fully explored and allow more expansive guidance to be given. In addition, guides do not conflict with a possible Protocol. In fact, the work put into creation of the guides would be necessary to flesh out any requirements included in an access Protocol as well. ICMEC, therefore, supports immediate work on a Good Practice Guide for access and remains interested in the idea of a Protocol to the Convention as well.
- If a Protocol is pursued, ICMEC supports limiting it to the recognition and enforcement sections of the 1996 Protection Convention. It is hoped that by limiting the Protocol to the previously approved provisions of the 1996 Convention, the Protocol would not be opened up to a myriad of other issues. ICMEC supports the goals of the 1996 Convention, particularly the need for rules to recognize and enforce orders concerning custody, visitation, parental responsibility, guardianship and child placement orders, limiting the destination State's jurisdiction to emergency situations, and the need to make such orders enforceable.
- ICMEC is concerned, however, about certain exceptions to recognition and the enforcement article, namely
 - If the order was made without notice to the child and an opportunity to be heard in violation of the fundamental principles of the requested state's procedures;
 - If contrary to public policy of the state taking into account the best interest of the child;
 - Allowing enforcement to take place in accordance with the law of the requested State taking into consideration the best interest of the child.

ICMEC's concern about these provisions is that they are not sufficiently narrow and are subject to the same problem as the Hague Convention—that of allowing the exception to overtake the rule. States are currently struggling over enforcing return orders, both because the appropriate legislation does not exist and because of deference paid to an objecting child. These exceptions

allow the requested State to conduct their own analysis of the child's "best interest." Without guidance on narrow interpretation of these provisions, they are likely to undo the recognition and enforcement philosophy of the 1996 Convention itself.

Adoption of a Protocol containing the jurisdiction, recognition and enforcement provisions of the 1996 Convention would need to include strong guidance on appropriately narrow interpretations of these provisions.

**Questionnaire Concerning Practical Mechanisms for Facilitation Direct International
Judicial Communications**

General

1. **Have you any general comments or suggestions concerning the development of the international judicial liaison network?**

ICMEC recommends the following:

- ICMEC supports the idea of a network of judges who communicate with the Permanent Bureau and act as liaisons with their State's judiciary. ICMEC also supports each country analyzing their individual laws regarding direct judicial communication so that a protocol allowing this to occur in individual Hague Abduction cases can be created. The protocol for direct communication in individual cases should be championed to the judges handling individual cases by the liaison judge.
2. **Would your country support the holding of more judicial and other seminars, both national and international, on issues concerning the 1980 Hague Convention?**

ICMEC supports the holding of more judicial and other seminars on issues concerning the 1980 Hague Convention.

If you have questions or concerns about any of the above ICMEC responses, please do not hesitate to contact me anytime. ICMEC's ultimate goal is to be as helpful as possible to the Permanent Bureau as you move forward on the issues of access and direct international judicial communications. We welcome your suggestions as to how ICMEC can provide the most assistance to you, and we look forward to supporting you as you advance these important issues.

Sincerely,

Ernie Allen
President and CEO