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**Droit de visite/droit d'entretenir un contact transfrontière et la  
Convention de La Haye du 25 octobre 1980  
sur les aspects civils de l'enlèvement international d'enfants.  
Rapport Préliminaire.**

établi par William Duncan, Secrétaire général adjoint

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**Transfrontier Access/Contact and the Hague Convention of 25 October 1980  
on the Civil Aspects of International Child Abduction.  
A Preliminary Report.**

drawn up by William Duncan, Deputy Secretary General

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## INTRODUCTION

**1** The Special Commission on General Affairs and Policy of the Hague Conference on Private International Law (8-12 May 2000), on a proposal by the delegations of Australia, Spain, the United Kingdom and the United States of America (Work. Doc. No 3), agreed to request the Permanent Bureau:

*"To prepare by the Nineteenth Diplomatic Session of the Hague Conference a report on the desirability and potential usefulness of a protocol to the 1980 Hague Convention on the Civil Aspects of International Child Abduction that would provide in a more satisfactory and detailed manner than Article 21 of that Convention for the effective exercise of access/contact between children and their custodial and non-custodial parents in the context of international child abductions and parent re-locations, and as an alternative to return requests."*

**2** In further explanation of this proposal, and of the matters which might be considered within the study to be carried out by the Permanent Bureau, the Working Document states:

*"We believe that the attempt in Article 21 to begin to address this issue within the 1980 Convention provides a specific justification for charging the Permanent Bureau with examination of this problem in relation to improving the 1980 Convention, as well as the ways and degree to which the 1996 Convention might help to resolve these problems. However, while there are other ways in which the 1980 Convention and its implementation might be improved, we believe that the proposed study should be limited to this visitation/access issue and should not extend to other issues except to the extent they impact on Article 21. The Permanent Bureau study might include examination of available case law and commentary interpreting Article 21 and discussing the visitation/access problem, the legal issues involved and not addressed, how a protocol to the 1980 Convention might deal with these issues, the adequacy with which the 1966 Convention addresses the issues, the advantages of a protocol to the 1980 Convention, and what effect such a protocol might have on acceptance of the 1996 Convention."*

**3** The Permanent Bureau has begun the examination of the issues involved and expects the study to be completed before the end of 2001.

**4** The Special Commission on General Affairs and Policy of the Conference of May 2000 also requested the Secretary General to convene a fourth meeting 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*. That Special Commission is to meet at The Hague from 22-28 March 2001. The question of the operation of the 1980 Convention in relation to issues of access is a regular feature of that review, and the opportunity has been taken by the Permanent Bureau to ask Contracting States and others invited to attend the Special Commission a number of detailed questions concerning access/contact cases in the context of the 1980 Convention as part of the preparations for the Special Commission.<sup>1</sup>

**5** This Preliminary Report is drawn up for the information of the March 2001 Special Commission. Its purpose is to help identify some of the principal issues concerning contact which need to be addressed and to establish an agenda for further research and consultation. It is in effect a discussion document. The Report draws in part on responses to the Questionnaire, though some of the responses arrived too late to be considered at this stage. They will of course be taken fully into account in the final

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<sup>1</sup> See Preliminary Document No 1 "Information concerning the agenda and organisation of the Special Commission and Questionnaire concerning the practical operation of the Convention and views on possible recommendations", October 2000.

Report. The Report draws on a variety of other sources including case law, various reviews undertaken by governmental and non-governmental bodies in different countries, the conclusions and recommendations of various international judicial and other conferences and seminars, the academic literature, as well as contacts with a number of individuals. All of these sources will be listed in the final Report. At this preliminary stage there has been time to do no more than set out the bare issues.

**6** It should be explained that, in this Preliminary Report, the term "contact" is used in its broadest sense to refer to the concepts of access and visitation, and also to other forms of contact between an adult (usually a parent) and a child, by writing, telephone, e-mail, etc.

**THE DYNAMICS OF THE PROBLEM: THE RELATIONSHIP BETWEEN ABDUCTION AND CONTACT AND SOME TYPICAL CASES**

**7** The primary objective of the Hague Convention of 1980 is to secure the prompt return of children wrongfully removed to or retained across international boundaries. The Preamble and Article 1 of the Convention make it clear that the objectives of the Convention include securing "protection for rights of access" (*i.e.* in cross-border situations), and "effective respect" for such rights. The framers of the Convention recognised the close linkage between issues of international access/contact and the phenomenon of abduction. It was felt that abductions might be reduced by assisting non-custodial parents to secure appropriate contact with their children. At the same time, arrangements for access/contact are more likely to be made and respected where there exist strong provisions against the unlawful retention of a child by the parent who is exercising access/contact.

**8** It may be helpful to begin this preliminary account with a brief description of some of the typical fact situations giving rise to difficulties over the exercise of contact in transfrontier context.

- (a) In the context of applications for the return of a child under the 1980 Convention, the applicant may wish to establish contact with the child pending the decision on return. It has been suggested (see the text of Work. Doc. No 3 above) that in a case where delay occurs in determining the return application, denial of contact with the applicant parent may contribute to the alienation of the child from that parent, and may thereby increase the prospects of an Article 13 *b*) defense succeeding. In any event, preserving the continuity of the child's relationship with the applicant parent requires that the issue of contact be dealt with as quickly as possible.
- (b) When a return application is refused, for example on the basis of an Article 13 defense, the question immediately arises of the appropriate arrangements for contact between the child and the left behind parent.
- (c) There are those cases where a parent from abroad applies, outside the context of an abduction, for the enforcement of a contact order made in another jurisdiction. A typical case is where a court of the country where the child had his or her previous habitual residence permits the parent who is the primary carer to relocate to another jurisdiction together with the child, but at the same time makes a contact order with respect to the left behind parent. There is a connection between this type of case and the phenomenon of abduction. If no respect is given abroad to contact orders made in the context of relocation orders, this may affect the willingness of judges to allow relocation; and, if judges are unwilling to allow relocation, this may precipitate abductions by primary carers.
- (d) There are cases where a parent from abroad applies *de novo* for a contact order from the authorities of the State where the child lives. The importance of

facilitating the application derives principally from the interests which the child has in maintaining beneficial links with both parents. In addition, as the framers of the 1980 Convention recognised, the failure to support a reasonable application for contact by a non-custodial parent may itself fuel the temptation to abduct.

- (e) There are cases where modification of existing cross-frontier contact arrangements are sought either by the custodial parent or the parent exercising contact. These cases may range between modification sought in order to restrict or even terminate the exercise of contact, to those cases where changes in circumstances are thought to require practical adjustments to contact arrangements.
- (f) There are cases where the custodial or non-custodial parent claims that transfrontier contact terms have been breached, and seeks an order to restore the *status quo*. The extreme case is unlawful retention where, following a period of transfrontier visitation, the non-custodial parent refuses to return the child. The alleged infringement may be less dramatic. The parent exercising contact may unilaterally decide to alter some of the terms on which contact was agreed/ordered, for example, by extending the period of contact unilaterally or by not providing details of the child's movements as had been agreed. Equally the custodial parent may place obstacles in the way of agreed contact, as for example, by not allowing agreed telephone access, by not passing on correspondence, etc.

**9** In the above examples, the terms "custodial" and "non-custodial" parent are used. The cases may of course be more complicated where this distinction does not readily apply, for example, in some cases of joint custody where there may be an initial problem of determining whether the rights in question are access rights or rights of custody. The 1980 Convention itself, in Article 5, defines rights of custody as including not only "rights relating to the care of the person of the child", but also "the right to determine the child's place of residence". This has meant that in certain cases it has been possible for non-custodial parents (in the sense of parents who are not the primary carers) to avail of the return remedy provided by the Convention essentially to vindicate access rights. There are divergences in the case law with respect to the precise definition of rights of custody in this context. It is perhaps fair comment that the shortcomings in the Convention regime with regard to the protection of contact rights may have stimulated the use of the return application for this purpose and may in turn have had some influence on the general judicial tendency to give a broad scope to custody rights.

**10** Contact arrangements have to do with long-term relationships between individuals. A common feature of transfrontier contact disputes, which is shared with purely domestic contact cases, is their often chronic nature. Unless the parents can achieve a certain level of co-operation, disputes over the terms of contact tend to occur time and time again. This highlights the importance of legal structures, as well as alternative systems of dispute resolution, which enhance the prospects of achieving agreement between the adults themselves, as well as between the adults and the child. It also gives rise to resource issues. The provision of services, whether they be judicial or administrative, to assist in resolving frequently recurring transfrontier contact disputes can be a costly exercise.

## **JURISDICTIONAL MATTERS**

### *The issues*

**11** The first set of issues raised by the example cases concerns jurisdiction. Do there exist sufficiently clear rules concerning the competence of authorities to determine matters that may need to be litigated? Are approaches to the issues of jurisdiction uniform among Contracting States or may conflicts occur as a result of competing jurisdictional claims? Examples of specific questions are:

- (a) Does the authority seized with a return application have jurisdiction to make interim orders concerning contact?
- (b) Does an authority which has refused a return application have competence to determine issues of contact between the child and the left-behind parent? How does one deal with a potential conflict arising from the exercise of jurisdiction by the authorities of the State of the left-behind parent?
- (c) In the case of a *de novo* application for a contact order by a foreign applicant, what jurisdictional standards apply? Are they to be based primarily on the habitual residence or the presence of the child or on some other basis?
- (d) What are the jurisdictional standards applying to applications for modification of a contact order? To what extent, if at all, do the authorities which have made the original order retain jurisdiction following a change, for example, in the habitual residence of the child?
- (e) Do the authorities in a country which the child is to enter for the purpose of visitation with the non-custodial parent have jurisdiction to make any necessary advance orders to help in securing the conditions on which contact is to take place (for example, mirror orders or orders for the advance recognition of an existing contact order)?

#### *The existing framework*

**12** The 1980 Convention itself does not contain explicit jurisdictional standards, although it is implicit that the authorities of the State of the child's habitual residence exercise a general jurisdiction with regard to disputes concerning rights of custody. With regard to jurisdiction to make interim contact orders pending a decision on the return application, this is possible in a number of Contracting States. In some States (for example, Germany), the authority for this is derived from Article 21 of the Convention. Implementing legislation in some States (for example, Ireland) includes general powers in the court to give interim directions, pending a decision on return, for securing the interests of the child or preventing prejudice to an interested party. Also, when a return application is withdrawn on the basis of an agreement between the parties that the child should remain in the jurisdiction, but subject to agreed contact arrangements, it appears that a number of States (for example, Germany) accept that the court has jurisdiction to enter an agreed order on the issue of contact. It may be argued that this is reasonable in the light of Article 4, Article 7 c), Article 21 and Article 26, paragraph 4.

**13** Beyond these areas, jurisdictional rules with respect to transfrontier contact cases diverge widely from one country to another. In several European States (particularly those which are Parties to the *Hague Convention of 5 October 1961 concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Minors*), the primary basis of jurisdiction is the habitual residence of the child. Simple residence of the child may also be a basis in some countries, particularly when the case is one of urgency. The Brussels II Regulation gives a limited competence, also in contact matters, to a court which is exercising jurisdiction to grant a divorce, judicial separation or annulment under the Regulation. The provision is almost identical to that contained in 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*. In the United States, on the other hand, jurisdiction is in the "home state", *i.e.* the state where the child has been resident for six months before the initial filing of the action and was living with a parent or other person acting *in loco parentis*. The home state retains exclusive jurisdiction, even though the child and the custodial parent may have moved permanently to another jurisdiction, so long as one of the parties (for example, the non-custodial parent with contact rights) continues to live there. This concept of a continuing home state jurisdiction (which, it should be remembered, developed in the context of a multiple jurisdiction federal State under one

Constitution) is in direct contrast to the principle accepted by many Contracting States that jurisdiction follows changes in the habitual residence of the child. This may give rise, particularly in cases where modification of an existing order is sought, to the exercise of competing jurisdiction by authorities in two States. Finally, the issue of whether the authorities of a country which the child is to enter in the future for the purpose of visitation, but in which the child at present has no habitual residence or even presence, is a matter of some doubt in several jurisdictions.

**14** In summary, it may be said that the international picture with regard to jurisdiction to make or modify contact orders is a rather unsatisfactory one. There is a great deal of uncertainty on many issues, as well as the potential for competing jurisdictions.

#### *The Hague Convention of 1996*

**15** One of the objectives of the 1996 Convention, with regard to the protection of children generally in international situations, is to avoid conflicts between their legal systems in respect of jurisdiction.<sup>2</sup> This is achieved by providing rules which determine "the State whose authorities have jurisdiction to take measures of protection of the person or property of the child".<sup>3</sup>

**16** It should be explained first that the scope of the 1996 Convention clearly includes contact orders. The Convention deals with all measures directed towards the protection of the person or property of the child (Article 1), and covers specifically "rights of access including the right to take a child for a limited period of time to a place other than the child's habitual residence" (Article 3 *b*). It covers any measures taken by "an authority" (judicial or administrative) which establishes rights of access/contact or which limits or attaches safeguards to their exercise. The term "access" encompasses contacts at a distance which a parent is authorised to maintain with his or her child by correspondence, telephone or other means (see Lagarde Explanatory Report, paragraph 20). It applies to children up to the age of 18 years (Article 2). There is no definition, and therefore no explicit limitation, of the persons in favour of whom a contact/access order may be made. The matter is left to the applicable law, which will usually be the law of the forum (see Chapter III).

**17** With regard to jurisdiction, the primary rule of the Convention is that the judicial or administrative authorities of the State of the child's habitual residence have jurisdiction to determine issues relating to access/contact (Article 5). In the case of refugee children, or children whose habitual residence cannot be established, the authorities of the State where the child is present have jurisdiction (Article 6).

**18** Where a child's habitual residence changes, the authorities of the new habitual residence usually have jurisdiction (Article 5, paragraph 2).

**Example:** *Following the breakdown of their marriage, Mr and Mrs X obtain a divorce in Canada, the State of their matrimonial residence. Custody of their child is awarded to Mrs X with rights of access/contact to Mr X. Mrs X moves to and settles in Poland lawfully taking the child with her.*

Following the change of the child's habitual residence to Poland, the access provisions ordered in Canada will remain in force (and be enforceable in Poland) until such time as the authorities in Poland modify, replace or terminate them (Article 14).

**19** However, if a new habitual residence is established following the unlawful removal of a child, jurisdiction will remain with the authorities of the former habitual residence until certain conditions are satisfied (Article 7). In the meantime, the authorities of the

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<sup>2</sup> See Preamble.

<sup>3</sup> Article 1, paragraph *a*).

new habitual residence may only take urgent (Article 11) or provisional (Article 12) measures.

**Example:** Mr and Mrs X have their matrimonial home in New York. Their marriage breaks down and, without Mr X's consent or the benefit of a court order, Mrs X removes herself and their child to Sweden, the State of her former residence and nationality.

The New York authorities will continue to have jurisdiction to determine matters of contact/access, unless Mr X acquiesces in the removal (Article 7a), or until a year has passed, there is no application for the child's return pending and the child has become settled in the new environment (Article 7b). In the interim period, the Swedish authorities may take any urgent or provisional measures necessary, but these will lapse as soon as the New York authorities have taken measures required by the situation.

**20** In exceptional circumstances, and where it is in the best interests of the child, jurisdiction in respect of access/contact may be transferred with the agreement of the authorities of the child's habitual residence, to the authorities of another State, for example that of the child's nationality, or any State with which the child has a substantial connection (Articles 8 and 9).

**Example:** Mr X has his habitual residence in France and his wife has her habitual residence in the Netherlands. Mrs X has custody of their eleven-year-old son, who is also habitually resident in the Netherlands but who attends boarding school in France. An order made by the authorities in the Netherlands gives to Mr X limited contact rights with his son. With the consent of his wife, Mr X wishes to apply to the French authorities for more extensive contact arrangements. The Netherlands court is of the opinion that the French authorities are well positioned to make the best judgment on the particular arrangements.

In these circumstances, the Netherlands authorities may give their consent to a transfer of jurisdiction which may occur either at their own request, provided also that the French authorities consider that this is in the child's best interests (Article 8), or at the request of the French authorities (Article 9).

These provisions offer a structure for judicial co-operation which may be helpful in other contexts.

**Example:** A court in Argentina is considering making an order to allow a child habitually resident with his mother in Argentina to travel during school holidays to visit his father who is living in Brazil. The court has some concern that the father may use the opportunity to abduct the child to a third State. The court is prepared to make the contact order, but only if certain protective measures are put in place in advance by a court in Brazil.

Article 8 provides the mechanism for achieving this, and for establishing the jurisdiction of the Brazilian court despite the fact that the child is not habitually resident, nor even present, in Brazil.

**21** Authorities of a State exercising jurisdiction to decide upon the divorce (or legal separation or annulment) of the marriage of a child's parents may, with the consent of the parents, determine issues of custody and access, provided that one of the parents had his/her habitual residence in that State when proceedings were commenced and provided that one of the parents had parental responsibility in respect of the child concerned.

**Example:** Mr and Mrs X have two children, a twelve-year-old boy and a six-year-old girl. Following the breakdown of their marriage, and by agreement, Mr X is living in Germany with the boy and Mrs X is living in Denmark with the girl. Mrs X has applied to the Danish courts for a divorce by consent, and the parents are agreed the Danish court should be asked to determine all matters relating to the custody of and the access to the two children.

**22** The authorities of the State where the child is present have jurisdiction to take measures in cases of urgency (Article 11) or to take provisional measures with territorially limited effect (Article 12). One example is given in paragraph 10 above.

**Example:** *Mr and Mrs X were living in Norway. Mrs X has abducted their six-year-old son and is living in New South Wales. Mr X has applied for a return order. He has travelled to New South Wales for this purpose and pending the outcome of these proceedings has applied to the court there for an interim access/contact order.*

The New South Wales authorities have jurisdiction to make such an order on an urgency basis but any order made will lapse as soon as the Norwegian authorities have taken measures required by the situation.

## **ASSISTANCE TO FOREIGN APPLICANTS**

### *The issues*

**23** A foreign applicant, seeking to enforce an existing contact order or applying for a contact order *de novo*, whether or not under the umbrella of the 1980 Convention, faces a range of difficulties over and above those confronting an applicant in a purely domestic case. The difficulties arise from distance, from lack of familiarity with language, legal system and other relevant services, and from the probable absence of any personal or familial support network in the foreign country. Without appropriate support, the struggle by an applicant to obtain transfrontier contact can be very costly and often proves to be overwhelming. The issue therefore arises of the level of services which it is possible or appropriate for the authorities in the requested State to make available, bearing in mind that those services are provided not only for the benefit of the applicant but also in the interests of the child or children concerned. Some of the more specific issues are as follows:

- (a) What information should be provided (and in what languages)?
- (b) What legal advice should be made available?
- (c) What degree of assistance in accessing the legal system is appropriate and in particular should there be some level of free legal aid or assistance?
- (d) What facility should exist to promote an agreed outcome? (This matter is dealt with under a separate heading below.)
- (e) What supports should be provided for contact arrangements which are agreed or ordered, for example to facilitate supervised contact or to assist with travel arrangements for the child?

### *Practice under the 1980 Convention*

**24** Article 21 provides for application to be made to a Central Authority "to make arrangements for organising or securing the effective exercise of rights of access". The Central Authorities are bound by the Article 7 obligations of co-operation "to promote the peaceful enjoyment of access rights and the fulfillment of any conditions to which the exercise of those rights may be subject". They are bound to take steps "to remove, as far as possible, all obstacles to the exercise of such rights", and they may directly or indirectly initiate or assist in the institution of proceedings "with a view to organising or protecting those rights and securing respect for the conditions to which the exercise of those rights may be subject".

**25** As the Pérez-Vera Report points out (at paragraph 127), the precise ways in which the Central Authorities are required to co-operate under Article 21 (with the exception of

removing obstacles as far as possible), in securing the exercise of access rights is "left up to the co-operation among the Central Authorities", and the specific measures which Central Authorities are able to take "will depend on the circumstances of each case and on the capacity to act enjoyed by each Central Authority". Experience has shown that Chapter IV of the 1980 Convention has not always in practice provided an effective means by which rights of access/contact may be established, protected or regulated. The requirements of co-operation are very broadly defined leaving much to the discretion of Central Authorities, whose powers are often limited under their national laws. The responses to the Questionnaire confirm that this is an area in which practices vary widely.

**26** Perhaps the most important issue is whether the applicant is able realistically to access the legal process in the requested State. How is the Convention concept of "facilitating the institution of proceedings" given expression in the different Contracting States? What provisions exist for legal advice, assistance and representation? At one end of a fairly broad spectrum is the example of Australia, whose Central Authority itself has power to apply to the court for a variety of orders to secure the effective exercise of rights of access. As with return applications, there are in Australia no eligibility requirements for applicants. (It should be pointed out that, as is the case with return applications, the State Central Authority institutes proceedings on behalf of the Commonwealth Central Authority, and the lawyers do not take instructions directly from the left-behind parent, but take into account their views.) There are next a substantial number of countries where the Central Authority will not itself be involved in proceedings, but will help to arrange for a lawyer to act for and to advise the applicant. In many of these countries free legal aid is available. Generally speaking, the provision of legal aid is subject to a means and/or a merits test. This contrasts with return applications, in respect of which in a small number of countries (for example, the United Kingdom and Ireland) legal aid is available without any means testing. The application of means and merits tests sometimes results in the application for legal aid becoming a lengthy process, and this may lead to delays.

**27** There is another set of countries, typified by the United States, which do not offer free legal aid but try to identify a private attorney to handle cases on a full fee, reduced fee or *pro bono* basis. As is pointed out in the response of the United States, this process of identifying a private attorney can be a difficult one in contact cases, which are time consuming, especially where cases involve modification or creation of an access order rather than the simple enforcement of an existing order. This may present a formidable barrier to the applicant.

**28** There are of course variations from these standard examples. In Sweden, for example, legal aid is granted to non-resident foreign citizens in contact cases only if there are "special reasons". In Germany, the Central Authority arranges for a lawyer to represent the applicant, or in the event of recourse to legal aid, the Central Authority itself institutes court proceedings and applies for the assignment of counsel to conduct the case. In Manitoba, Canada, the Central Authority, though not representing the applicant, may monitor the progress of court proceedings and appear in the role of *amicus curiae*. Services may of course differ from one region to another within federal systems. For example, whereas most Provinces in Canada make legal aid available in contact cases, Ontario does not.

**29** With respect to the provision of other supports, the picture again is a varied one. Most Central Authorities will provide general information to the applicant, though this clearly varies in the amount of detail provided. For example, Manitoba, Canada, offers a free public information booklet describing all aspects of family law services available. Some Central Authorities (for example, Quebec, Canada) use websites to provide relevant information. With regard to practical facilities to assist in organising access, some countries offer support from social or youth/child welfare services, for example, where supervision of access is required or measures are needed to accustom a child to contact after a long period of separation. Some Central Authorities will contact the

international social services for assistance. In the United States, in some states, there exist supervised visitation centres for cases involving domestic violence. The extent to which Central Authorities will themselves become involved in arranging or funding supporting service is limited. An exceptional example is Australia where the Central Authority has in certain difficult cases arranged and funded supervised access, arranged and funded telephone access and acted as a post box for letters where the child's address cannot be disclosed. This is by no means a comprehensive picture, but it does illustrate the patchwork nature of the information and services made available to foreign applicants.

#### *Other instruments and draft instruments*

**30** The Hague Convention of 1996 does not significantly add to the provisions of the 1980 Convention in this respect. Article 30, paragraph 2, imposes an obligation on Central Authorities "in connection with the application of the Convention, to take appropriate steps to provide information as to the laws of, and services available in, their States relating to the protection of children". It also contains provisions relating to co-operation between Central Authorities which are described in more detail below. In particular, under Article 35, paragraph 1, the authorities of one Contracting State may request authorities in another to "assist in the implementation of measures of protection taken under this Convention, especially in securing the effective exercise of rights of access as well as of the right to maintain direct contacts on a regular basis". The Convention contains no additional provisions concerning the provision of legal aid or advice.

**31** In the Council of Europe Draft Convention On Contact Concerning Children,<sup>4</sup> there is a more explicit provision concerning exchange of information between Central Authorities. This is in Article 13, paragraph 2, which provides that Central Authorities "shall, with a view to facilitating the operation of this Convention, provide each other on request with information about their laws relating to parental responsibilities, including contact, and services available (including legal services, publicly funded or otherwise) as well as about any changes in that law and services". There is also a provision, in Article 14(3), requiring Central Authorities to "assist children, parents and other persons having family ties with the child to institute proceedings regarding transfrontier contact". It appears, however, that this is not intended to impose an obligation on the Central Authority itself to institute proceedings, nor to impose an obligation on States Parties to provide free legal aid for that purpose.

**32** The European Union Council Draft Regulation Concerning The Mutual Enforcement Of Judgments On Rights Of Access To Children<sup>5</sup> (described subsequently as Brussels II *bis*) provides for the mutual enforcement, without any special procedures being required, of a relatively narrow range of judgments respecting contact. With regard to assistance in instituting or facilitating the institution of proceedings to have sanctions applied for non-enforcement of a contact order, the Central Authorities' powers and responsibilities are described in discretionary terms similar to those employed in the 1980 Hague Convention. However, the fact that no special procedure will be needed on the part of the applicant to make the order enforceable will itself be of considerable assistance. The Draft Regulation also contains provisions for co-operation and the exchange of information between Central Authorities.

#### **PROMOTING AGREEMENT**

**33** Arrangements concerning contact which are agreed between the parties have several advantages over arrangements which are ordered by a court. They are more

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<sup>4</sup> The text referred to is that contained in the Report of the eleventh meeting of the Working Party on Custody and Access of the Council of Europe Committee of Experts on Family Law of 28 November 2000 - CJ-FA-GTI(2000) RAP 11.

<sup>5</sup> The latest draft available to the Permanent Bureau is that distributed on 8 December 2000.

likely to be adhered to by the parties; they establish a less conflictual framework for the exercise of contact and are therefore strongly in the interests of the child; and once a certain level of co-operation between the parents is established, the painful and expensive pattern of re-applications to the court for orders for modification, enforcement, etc is less likely to become established.

**34** The need to promote agreed solutions was recognised by the framers of the 1980 Convention, which in Article 7 c) requires Central Authorities to take all appropriate measures to secure the voluntary return of the child or to bring about an amicable resolution of the issues. In practice, in contact cases under the 1980 Convention, most Central Authorities try to achieve an agreed settlement as a first step (the survey of applications which were made in 1999 shows that 20% of applications under the 1980 Convention were resolved by voluntary agreement). This will typically involve at least a letter to the custodial parent, and may sometimes involve attempts to negotiate an amicable settlement. However, the precise supports given to the negotiating process differ from country to country. In a few jurisdictions, mandatory mediation applies to contact disputes, as well as to other family law cases. In some other States, mediation services are available though not mandatory. Mediation may be in-court or out-of-court. In a small minority of jurisdictions, conciliation / mediation services are provided free of charge. There is little evidence of mediation facilities which have been developed with the special requirements of international cases in mind. The services of the International Social Service may sometimes be invoked.

**35** The patchwork nature of the supports available to promote agreement in international contact cases is not surprising, and reflects the fact that domestic systems are at different stages of development, particularly with regard to the provision of mediation services. Whether the special requirements of promoting agreement in international cases would benefit from additional provisions within international instruments is a matter for discussion. The Hague Convention of 1996 contains a provision which is more explicit than that of the Hague Convention of 1980, but which still leaves much to the discretion of States Parties. Article 31 b) mandates Central Authorities, directly or indirectly, to "take appropriate steps ... to facilitate, by mediation, conciliation or similar means, agreed solutions ... in situations to which the Convention applies." It is notable that neither the draft Council of Europe Convention on Contact Concerning Children nor the draft Brussels II *bis* Regulation contains provisions imposing similar obligations on Central Authorities. With respect to the latter draft, the emphasis is on the mutual enforcement of orders and it may have been considered inappropriate to address in this context the question of promoting agreement. Nevertheless, as has been explained above, national enforcement procedures may in fact implicate this matter.

**36** The mediation project which the UK non-governmental organisation Reunite is about to embark on is worth noting. It is directed particularly towards those cases where a return order is sought primarily for the purpose of securing rights of access. The typical case is where the abductor is the primary carer of the child, and (usually) the father is relying on his joint rights of custody to apply for a return order, not so much because he wishes to have custody transferred to him, but because he views the return application as the best available means of preserving contact with his child. Cases of this sort seem to be an appropriate target for mediation in that for both parties there are strong incentives to reach agreement over the terms of access. The mother may be able to avoid the return order; the father for his part may be able to achieve his real wishes without the costs and delays involved in further litigation in his home country. Quite apart from this, the project may help in a more general way to identify the main issues which need to be addressed in developing an effective system of international mediation.

## **RECOGNITION AND ENFORCEMENT**

### *The issues*

**37** The recognition and enforcement of contact orders which have been made on a substantial jurisdictional basis is an important element in achieving some order within the international system. The absence of recognition principles may lead to re-litigation, to disadvantages for the left-behind or non-custodial parent, and it may act as a disincentive when a court is considering an application by the custodial parent for relocation. However, there are a very broad range of different circumstances that need to be taken into account in considering appropriate recognition and enforcement procedures and standards. On the one hand there is the relatively simple case where the court of the child's habitual residence has made a relocation order combined with contact provisions, and the custodial parent immediately following relocation refuses to comply with the access conditions. Here there is a strong case for a simple and speedy procedure for recognition and enforcement. Contrast this with a case in which the contact order was made several years ago by the authorities of the State in which the child had a former habitual residence. Assume that the contact provisions have worked reasonably well in the meantime and have been somewhat modified over time by agreement between the parents. However, circumstances have changed; the child has grown older and has begun to form his or her own views. A dispute then arises which the parents are unable to resolve, as in the past, by agreement. The issues here relating to enforcement of the original contact order are far more complicated. The swift and unreflective enforcement of an aging contact order may be inappropriate. There may be good reasons not to enforce the original order or at least to allow some modification of it, particularly where the requested State is the jurisdiction in which the child now has his or her established home. Cases of this kind point to the need for a careful balance between the principle of automatic recognition and questions concerning jurisdiction to modify a contact order. Put another way, it is important that recognition principles should be underpinned by clear and coherent jurisdictional standards.

#### *The existing situation*

**38** There exist certain regional instruments providing for recognition and enforcement of contact orders. In Europe, for example, there is the *Council of Europe Convention of 20 May 1980 on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children* (sometimes referred to as the Luxembourg Convention). This Convention contains no indirect principles of jurisdiction and has a relatively broad range of grounds of non-recognition. There is also the Brussels II Regulation<sup>6</sup> which provides for recognition of contact orders made in the context of divorce, etc. The Brussels II *bis* Draft Regulation, as mentioned above, provides for a system of enforcement for a limited range of contact orders without any special procedure being necessary. A 1931 Nordic Convention operates among Nordic countries.<sup>7</sup> As between States where no international instrument operates, practice varies. In many States, reciprocal arrangements are required for enforcement to be possible. In the United States under the UCCJEA,<sup>8</sup> a principle of reciprocity applies, by which a foreign contact order is enforceable in the US if made in factual circumstances in substantial conformity with the jurisdictional standards of the UCCJEA.

**39** The fact that enforcement may be sought in some countries within the context of the 1980 Convention, does not appear to affect the position. For example, in Australia, even though principles of comity result in considerable respect being given to foreign orders, they are not, in the absence of reciprocal arrangements, enforceable as such, though they may prompt the making of a mirror order by the Australian court.

#### *The Hague Convention of 1996*

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<sup>6</sup> Regulation (EC) No .../2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility for Children of Both Spouses.

<sup>7</sup> Nordic Convention of 6 February 1931 between Denmark, Finland, Iceland, Norway and Sweden.

<sup>8</sup> Uniform Child Custody Jurisdiction and Enforcement Act, 9(1A) U.L.A. 657 (1999), which has been adopted in 21 states and which is gradually replacing the Uniform Child Custody Jurisdiction Act (UCCJA), 9(1A) U.L.A. 271 which had been adopted in 50 states.

**40** Orders relating to access/contact made by an authority exercising jurisdiction under the Convention are entitled to be recognised by operation of law in all other Contracting States (Article 23, paragraph 1). The grounds for refusing recognition are narrowly drawn (Article 23, paragraph 2), and the recognising State is bound by the findings of fact on which jurisdiction was based in the State of origin (Article 25). Provision is made for advance determination of whether access/contact orders made in one State may or may not be recognised in another (Article 24). Enforcement of access/contact orders in the State addressed takes place, in accordance with the procedure provided for in the law of that State (Article 26, paragraph 1), as if those measures had been taken by the authorities of that State and to the extent provided by its law (Article 28). The procedure by which the order is declared enforceable or registered for enforcement must be simple and rapid (Article 26, paragraph 2).

#### **ENFORCEMENT UNDER NATIONAL LAW**

**41** Neither the automatic recognition of contact orders, nor indeed their enforcement "without the need for any special procedure", can guarantee a uniform approach to, or a uniform standard of, enforcement. The reason for this is that it is the national law of the State where enforcement is to take place which will be likely, finally, to determine what methods of enforcement are available, and on what conditions and according to what timeframe they may be applied. For example, Article 28 of the Hague Convention of 1996 provides that enforcement should take place in accordance with the law of the requested State to the extent provided by such law taking into consideration the best interests of the child. Article 2, paragraph 2, of the Brussels II *bis* Draft Regulation adopts a similar approach, applying to an enforceable contact order the same means of enforcement, and under the same conditions, as would be employed in respect of a similar order made in the requested State.

**42** It is clear that the approach to enforcement of contact orders under national law differs markedly from one country to another. The most important differences lie perhaps in the processes of enforcement and their time frames, rather than in the precise sanctions which may ultimately be applied for breach of a contact order. In some States, for example, non-compliance is met first with attempts at mediation; in others, by contrast, even a risk of non-compliance may result in a detailed court order. Opposition by the child to the contact arrangements produces different consequences in different States. In some, the opposition of a child may render enforcement impossible; in others, it may give rise to attempts to mediate. Rights of appeal against an enforcement order differ. In general, there are important differences in the opportunities afforded to the custodial parent to delay enforcement and, therefore, there are often considerable differences in the period of time that elapses between breach of a contact order and the application of a sanction.

**43** Whether it is possible, through an international instrument, to reduce some of these variations is a matter which may be worth discussing. It is noticeable that this is not a matter which is addressed by either the draft Council of Europe Convention or the Brussels II *bis* Draft Regulation.

#### **UNLAWFUL RETENTION**

**44** The primary remedy provided by the Hague Convention of 1980 – the return order – provides strong support for access/contact arrangements. The wrongful retention of a child in breach of custody rights is placed on the same level as wrongful removal of the child (Article 1). An order for the return of the child "forthwith" applies (under Article 12). The Convention thus contains the primary sanction against the most serious abuse of rights of access/contact across international frontiers, namely the unlawful retention of the child following a period of agreed or court ordered access. At the same

time the existence of this sanction supports the child's right of contact by creating a situation in which a custodial parent or a court may feel more secure in agreeing to or approving arrangements for overseas contact with the non-custodial parent. The order for return in the case of unlawful retention is subject to the same carefully balanced defenses as apply to unlawful removal.

**45** Under Article 13 of the present draft of the Brussels II *bis* Regulation, where a child is retained in the jurisdiction where access is exercised beyond the period ordered by the court, a return order will be available as it is under the Hague Convention of 1980, but with one important difference. The parent who is accused of unlawful retention will not be able to challenge a return order on the grounds set out in Article 13 of the 1980 Convention. This rule will apply only to cases where the period of access in question was ordered in the context of divorce (or similar) proceedings within the scope of the Brussels II Regulation. As such, the present draft of the Brussels II *bis* Regulation will only apply to children habitually resident in one of the States Parties, that is within a European Union State.

**46** This proposal raises a number of important concerns. One issue for present purposes is the question of whether it is wise in principle to exclude Article 13 defenses from cases of unlawful retention. Might there not be some cases in which an immediate and unconditional return order would place the child at risk, for example if the reason for retention was to enable the child to avail of necessary and urgent medical treatment? Should a return order be made against the strong objections of a mature young person of fifteen years of age? Should it not be possible for the "retaining" parent to argue that there was a clear agreement between the parties that the period of contact should be extended, even though this is at variance with the terms of the court order? These are matters which are currently under discussion within the European Union.

#### **CO-OPERATION BETWEEN AUTHORITIES**

**47** Matters of co-operation have already been referred to under the heading of "Assistance to Foreign Applicants". What has not been discussed is the need for co-operation between authorities in relation to specific cases, in particular by the exchange of information. A summary of the provisions of the Hague Convention of 1996 on co-operation will help to illustrate the issues involved.

**48** The Central Authorities provided for by the Hague Convention of 1996 have a general obligation to co-operate with each other to achieve the objects of the Convention, and they are required to provide information on their respective laws and services relating to child protection, which of course includes laws and services pertaining to matters of access/contact (Article 30). They have a duty, either directly or through public authorities or other bodies, to facilitate by mediation, conciliation or other means, agreed solutions to disputes concerning access in situations to which the Convention applies. They also have a duty upon request to assist in discovering the whereabouts in their several jurisdictions of any child in need of protection (Article 31).

**49** In a particular case, for example when contact issues are giving rise to difficulties, the authorities of the State where the child is habitually resident may be requested by the authorities of any other State having a substantial connection with the child to provide a report on the child's situation, and to take measures for the child's protection.

**Example:** *Mrs X has custody of her five-year-old daughter and is living in Hungary. Mr X, who lives in South Africa and has the right under an order made there to contact his daughter regularly by telephone, has found it impossible to do so.*

The South African authorities may, in this case, contact the Hungarian authorities to seek a report on the child's situation (Article 32 *a*) and if necessary, may ask for assistance in enforcing the order or otherwise securing the effective exercise of

the father's contact rights (Article 35).

**50** Where an authority having jurisdiction under the Convention (usually the authority of the child's habitual residence) is considering making an appropriate contact order, it may request the authorities of any other Contracting State which has information relevant to the matter to communicate such information to it.

**Example:** *Ten-year-old Mark is living with his custodial mother in Finland. His father, who lives in Scotland, has applied to the Finnish authorities to permit Mark to visit him during his school holidays.*

The Finnish authorities may call on the assistance of the Scottish authorities to provide information concerning the living conditions etc. of Mark's father in order to assess the merits of his application for contact/access.

**51** In order to assist a parent in one State who is seeking to obtain or maintain access to a child in another State, the authorities of the State in which that parent resides may make a preliminary finding on the suitability of that parent to exercise access and on the conditions of its exercise. The authorities having jurisdiction to make the decision on access must admit and consider such finding and may adjourn proceedings to await such a finding (Article 35).

**Example:** *Mr Y and Ms X were living in England with their ten-year-old daughter. The marriage broke down two years ago. The English court awarded custody to Ms X and, on the basis that she would be returning to her native Hong Kong, ordered that the daughter should spend at least two weeks of each school holiday with her father in England. The mother is now claiming that continuing contact with the father is having an adverse effect on the girl, and that the father has during periods of contact, displayed abusive behaviour towards the girl.*

In this case, the father may seek from the English court a preliminary ruling on his suitability which the Hong Kong authorities would be bound to take into account before deciding whether to restrict or terminate his access rights. This rule recognises the legitimate interest which the authorities of the father's residence have in the question of his fitness to exercise contact in that country. The rule also helps to remove inhibitions that the court of the parents' common residence may have when asked by one parent for permission to relocate with the child to another country.

**52** In the case of a child who is exposed to serious danger, and in respect of whom protective measures have been taken or are under consideration, there is an obligation to inform the authorities of any Contracting State to which the child has moved, or has been moved, of that danger, and of the measures taken or under consideration (Article 36).

**Example:** *Joan, a seven-year-old girl who is resident in Belgium and is in the custody of her mother, has been physically abused by her father. An order of the Belgian court permits contact between Joan and her father subject to strict supervision. The Belgian authority receives information that Joan is now on holiday with her father in Luxembourg.*

The Convention places an obligation on the Belgian authorities to inform the Luxembourg authorities of the danger to which Joan is exposed and of the measures of protection taken by them.

**53** The broad range of provisions for co-operation contained in the Hague Convention of 1996 with respect to individual cases has no parallel in any other international instrument.

## **SPEED**

**54** In most systems the special provisions, when they exist, to accelerate the progress of return applications under the 1980 Convention do not apply to access applications. In general, international contact cases are subject to the same procedures as apply to purely domestic cases and, as such, they may be accorded some degree of priority. The survey of applications made in 1999 confirms that access cases processed under the 1980 Convention take on average longer to process to the stage of a judicial determination than do return applications. In 60% of cases the period was more than 6 months. Some respondents to the questionnaire have called for the introduction of fast-track or expedited procedures for international contact cases.

## **PRIOR GUARANTEES**

**55** Responses to the questionnaire reveal a wide range of measures available to courts under their national laws to help guarantee, in advance, adherence to the terms and conditions of contact orders. These include:

- (1) the surrender of passport or travel documents,
- (2) the deposit of a monetary bond or surety,
- (3) supervision of contact by a professional or a family member,
- (4) various other restrictions attached to contact; for example, forbidding overnight visits or extended visits, restricting the locations where visitation may occur, etc.,
- (5) requiring that the requesting parent report regularly to the police or some other authority during a period of contact,
- (6) requiring that the requesting parent provide the custodial parent with a detailed itinerary and contact details, etc.
- (7) requesting that foreign consulates / embassies should not issue new passports / travel documents for the child,
- (8) requiring that a mirror order should be made in the country where contact is to be exercised.

**56** Where the child is to travel to another jurisdiction for the exercise of contact, advance assurance that the terms and conditions of contact will be respected in that jurisdiction is obviously a matter of great importance. Recognition by operation of law of contact orders, as is provided for by the Hague Convention of 1996 and some other instruments is part of the solution. To avoid the risks arising from the possible existence of grounds for refusal of recognition, it may also be important to have a facility for obtaining an advance declaration that the order will be recognised. This facility is provided for in Article 24 of the Hague Convention of 1996, and an obligation to provide such a facility constitutes a key provision (Article 15, paragraph 2) in the draft Council of Europe Convention on Contact Concerning Children. Another possibility is that of obtaining a mirror order in the country to which the child is to travel, though this can raise jurisdictional issues, which are referred to above.

**57** One of the objectives of the Council of Europe draft Convention on Contact Concerning Children is to fix, in particular in cases of transfrontier contact, appropriate safeguards and guarantees to ensure the proper exercise of such contact. The draft Convention contains a provision (Article 10) listing in some detail safeguards and guarantees for ensuring that the terms and conditions of contact orders are carried out, and it requires States Parties to specify at least two categories of safeguards and guarantees which will be available in their national laws.

## **OTHER MATTERS**

**58** A number of other matters, which will be given fuller treatment in the final report, should be mentioned here. One is the weight to be attached to the wishes, the views and the possible objections of the child, as well as the question of the most appropriate methods to be used in ascertaining the child's views. These are clearly matters of great importance, as well as matters on which legal systems differ. The differences exist, as has been suggested above, not only in the context of determining contact arrangements, but also with respect to their enforcement.

**59** There is then the question of the different approaches in domestic law to the substantive issues surrounding contact. Harmonisation of substantive law is not the role of the Hague Conference, but it is as well to be aware of differences and of their impact on the possibilities for international co-operation. Responses to the question asking whether there exists a presumption in favour of access by the non-custodial parent confirm that significant differences in national systems do exist. While most systems

now accept the importance for the child of maintaining a continuing relationship with both parents, differences in the application of this principle tend to reveal themselves particularly when issues of domestic violence or abuse arise or where the child raises objections to contact. It is part of the strategy adopted in the Council of Europe draft Convention on Contact Concerning Children that a harmonisation of substantive law will lead to a more favourable climate for international co-operation and mutual enforcement. One of the objects of the draft Convention (Article 1, paragraph *a*) is to determine general principles to be applied when making or amending contact orders.

**60** Mention should also be made of the various attempts to alleviate the problems of international access through bilateral meetings at the governmental level (for example, between Germany and the US) and through joint commissions (for example, *la Commission parlementaire franco-allemande de médiation*).

#### **SOME ISSUES OF POLICY**

**61** The objective of this preliminary review has been to describe some of the factors which may be relevant to the development of a more effective international system for securing the effective exercise of rights of access. By way of summary, and in order to frame an agenda for further consultation and study, it may be helpful to attempt to summarise some of the issues of policy that have been raised.

- (1) There is a need for more order and precision in the rules determining the jurisdiction of authorities to make or to modify contact orders. The absence of adequate provisions for the recognition and enforcement of contact orders is another serious gap in the system. The Hague Convention of 1996 provides a possible solution to both of these problems. Its ratification is being considered, as the responses to the questionnaire show, by a large number of countries. Is there any reason why this should not be the appropriate solution? If it is true that some States may be inhibited from ratifying the 1996 Convention because of its broad scope (as was suggested in the original proposal for this study), should consideration be given to a Protocol to the 1980 Convention which incorporates, with respect only to matters falling within the scope of the 1980 Convention (or perhaps with respect to matters of custody and contact more generally), the jurisdiction and recognition and enforcement provisions of the 1996 Convention?
- (2) The practical obstacles which confront a foreign applicant in securing effective contact with his or her child can be formidable. There exist substantial differences in the levels of support for foreign applicants offered by the different Contracting States to the 1980 Convention. Reciprocity for the most part does not exist. This applies to the information made available, the level of support given to the achievement of agreed arrangements between the parties, as well as to the practical facilities made available to support particular contact arrangements. The ability of the applicant practically to access the legal system is a key consideration and raises the issue of provision for free legal aid and advice. The question arises whether States will be willing to accept wider obligations with regard to these matters. In particular, should Central Authorities be given more specific duties and powers? Should provisions concerning legal assistance be strengthened?
- (3) Legal procedures for determining contact applications can be slow, and the processes for enforcing contact orders vary widely. The question arises whether the same or similar requirements of expedition should apply to the processing of international contact applications as apply to return applications. In this context, careful thought needs to be given to achieving the correct balance between speed and the need to encourage an agreed outcome.
- (4) What can be achieved by international agreement with regard to national enforcement processes? Without looking for uniformity, are there any general

principles applying to the enforcement process which could be the subject of agreement?

- (5) Co-operation, for example, between Central Authorities, with regard to the exchange of information in respect of particular contact cases is practised to some extent but tends to be unstructured. The more explicit provisions of the 1996 Hague Convention, and in particular those contained in Article 35, help to fill this lacuna.
- (6) With regard to cases of unlawful retention following a period of contact, the question arises, in the light of proposals currently being discussed within the European Union, whether the provisions of the 1980 Convention are satisfactory or whether they need to be tightened, particularly with regard to the defenses which are currently available.

**62** Finally, it is important, in considering what improvements may be achieved by the Hague Conference, to bear in mind the important work being carried out by other international and regional organisations, such as the Organization of American States, Council of Europe and the European Union. The objective should be to avoid conflict and any unnecessary duplication.

#### **FUTURE WORK**

**63** The Special Commission of March 2001 has on its agenda discussion of some of the matters raised in this Preliminary Report. This discussion may include reactions to the policy questions presented here, but it is perhaps too early for final conclusions to be reached, particularly on the question of whether a Protocol to the Hague Convention of 1980 may be necessary.

**64** The Permanent Bureau would like to suggest the following possible programme of work:

- (a) further consultation with Member States of the Hague Conference as well as other States Parties to the 1980 Convention, based on this Preliminary Report together with the Report which will be drawn up by the Permanent Bureau on the conclusions of the Special Commission of March 2001.
- (b) completion of the final Report
- (c) organisation of a Special Commission in about 12 months time devoted to the subject of transfrontier contact.

**65** It will be for the Commission on General Affairs and Policy of the Conference, which is to meet in June 2001 as Part I of the Nineteenth Session of the Hague Conference, to decide finally on the Conference's programme of work. Views and recommendation proceeding from the March Special Commission will obviously be an important consideration.