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**DOCUMENT DE CONSULTATION SUR LE DROIT DE VISITE ET LE DROIT
D'ENTREtenir UN CONTACT TRANSFRONTIÈRE**

établi par William Duncan
Secrétaire général adjoint

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CONSULTATION PAPER ON TRANSFRONTIER ACCESS/CONTACT

drawn up by William Duncan
Deputy Secretary General

*Document préliminaire No 1 de janvier 2002
à l'intention de la Commission spéciale du septembre / octobre 2002*

*Preliminary Document No 1 of January 2002
for the attention of the Special Commission of September / October 2002*

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Consultation Paper on Transfrontier Access/Contact

drawn up by William Duncan, Deputy Secretary General

This Consultation Paper is addressed in the first instance to Member States of the Hague Conference on Private International Law and to States Parties to the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*. Responses are also being invited from the international Governmental and non-Governmental Organisations, which participated in the March 2001 Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*.

We kindly request that responses to this Consultation Paper be sent to the Permanent Bureau, if possible in electronic form, by 27 March 2002.

Introduction

1. The Special Commission to review the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, held at The Hague from 22-28 March 2001 reached the following conclusion concerning transfrontier access/contact between parents and children:

"The Special Commission recognises the deficiencies of the Convention in achieving the objective of securing protection for rights of access in transfrontier situations. This is regarded by Contracting States as a serious problem requiring urgent attention in the interests of the children and parents concerned."

2. In reaching this conclusion the Special Commission had before it the Preliminary Report on "Transfrontier access/contact", Preliminary Document No 4 of March 2001 drawn up by William Duncan, Deputy Secretary General (see Annex I). This Preliminary Report had been prepared in partial response to the request to the Permanent Bureau by the Special Commission on General Affairs and Policy of the Hague Conference (8-12 May 2000).

"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."

3. The Permanent Bureau is currently proceeding to the completion of its Report on transfrontier access/contact. We are requesting your responses to this Consultation Paper, and to the particular questions set out below at paragraph 7, in order to give more focus to that Final Report. We would also like to obtain, in a preliminary way, views on the approaches or techniques, which are thought most likely to offer effective solutions to those aspects of transfrontier access/contact, which are causing concern. For this purpose, some brief comments are included about possible approaches and techniques.

4. Already States and international organisations have responded to a number of specific questions concerning current practices and problems in this area (Information concerning the agenda and organisation of the Special Commission and Questionnaire concerning the practical operation of the Convention and views on possible recommendations, Preliminary Document No 1 of October 2000 for the attention of the Special Commission of March 2001, the relevant part of which is included in Annex II). Many of the responses to these questions are reflected in the Preliminary Report on access/contact (see above). If there is anything to be added to the answers already received from States (see Preliminary Document No 2 of February 2001 – Responses to the Questionnaire on the practical operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*), and in particular if there have been any important developments since March 2001, the Permanent Bureau would be grateful to receive information about these. However, the main objective of this consultation paper is to seek opinions with a view to determining what should be the future strategic approach of the Hague Conference to the serious and urgent problems surrounding transfrontier access/contact.

Some policy issues

5. This paper should be read in conjunction with the Preliminary Report (Annex I). The Preliminary Report attempted to delineate some of the principal areas of concern, and summarised some of the issues of policy as follows:

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(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 Europe¹ and the European Union². The objective should be to avoid conflict and any unnecessary duplication.*

Some possible approaches and their implications

6. Some possible techniques for amending or reinforcing the 1980 Convention, are set out below, together with brief comments on their implications.

a) A binding instrument - a Protocol to the 1980 Convention

A Protocol to amend or to supplement the 1980 Convention would involve participation in negotiations of all the existing States parties to the 1980 Convention, as well as other Member States of the Hague Conference on Private International Law. Any such Protocol would not bind a Party to the 1980 Convention, which does not become a Party to the Protocol. As between a State, which becomes a Party to the Protocol and one which does not, the un-amended Convention would continue to apply (See Article 40 of the *Vienna Convention on the Law of Treaties* 1969). Negotiations for a Protocol are likely to take some time. The process of adherence to the Protocol by individual States Parties will take much longer. It is also possible that some States Parties may wish to seize the rare

¹ It may be noted that the European Committee on Legal Co-operation (CDCJ) of the Council of Europe approved the Council of Europe draft convention on Contact Concerning Children on 6 December 2001. The text of the Council of Europe draft convention and its explanatory report, which are available on the Council of Europe's website at www.legal.coe.int, is to be considered by the Parliamentary Assembly, after which it will be transmitted to the Committee of Ministers for final adoption probably in the first semester of 2002. See also paragraphs 31, 43, 57 and 59 of the Preliminary Report.

² Discussions are continuing within the European Union on the draft Council Regulation on the Mutual Enforcement of Judgments on Rights of Access to Children (11692/01). The Commission has also proposed a broader Council Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Matters of Parental Responsibility. See footnote 3 below.

opportunity afforded by negotiations on a Protocol, to raise, in addition to issues surrounding contact/access, other Articles within the 1980 Convention which in their view require to be amended or supplemented.

Matters, which a Protocol might include (the list is not comprehensive and is offered by way of example rather than suggestion), are as follows:

1. Clarification of the obligations of States Parties under Article 21 of the 1980 Convention, in particular whether the Convention itself provides a basis for commencing access proceedings before the courts and if so in what circumstances and under what conditions.
2. A more detailed statement of the obligations of Central Authorities with respect to applications concerning access.
3. Clarification of whether the Convention provisions concerning speed of proceedings (Articles 2 and 11) and those relating to costs and expenses (Article 26) apply or should be extended to access applications.
4. Rules for the recognition and enforcement of foreign access orders.
5. Clarification of the dividing line between access/contact rights and custody rights.

It should be added that some of the matters which fall under 1 and 4 above implicate the Hague Convention of 1996. In other words, some of the problems find their solution in whole or in part in the provisions of that Convention (on this matter, see the comments in the Preliminary Report). This obviously raises the question of whether a Protocol to the 1980 Convention is necessary in the areas covered by the 1996 Convention, and whether it would not be better policy to encourage ratification of or accession to that Convention.³ In any event, it would obviously be important in devising any Protocol to the 1980 Convention, to avoid conflict with the 1996 Convention.

b) Recommendations

The employment of recommendations has been a feature of Special Commissions on the operation of the 1980 Convention. The Special Commission of March 2001 agreed no less than 57 recommendations (see the Conclusions and Recommendations of the Fourth 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 (22–28 March 2001), some of which are included in Annex III). Recommendations cannot of course amend the 1980 Convention. Recommendations have usually been geared towards making more effective the operation of existing Convention provisions, or suggesting a particular approach to the interpretation of existing Convention principles. There is no doubt that recommendations of Special Commissions have had some influence on the manner in which the 1980 Convention has been implemented in certain countries, as well as on the interpretation of and practices adopted under the Convention. On the other hand, there is no guarantee of universal adherence to recommendations. They are not legally binding and the mutual confidence which arises from a guarantee of reciprocity is lacking.

The list of matters, which might be the subject of recommendations, is perhaps wider than in the case of a Protocol. For example, in addition to the matters set out in subparagraph a) above, recommendations might cover:

- The provision of information and facilities to assist foreign applicants in securing and exercising access/contact.

³ Following ratification by Slovakia, the 1996 Hague Convention entered into force on 1 January 2002. It may also be noted that the European Commission is preparing a proposal with a view to approval of the 1996 Convention by the 15 EU States, on their own behalves and on behalf of the EU (see *the Proposal for a Council Regulation on jurisdiction and the recognition and enforcement of judgments in matters of parental responsibility* (presented by the Commission), in: Brussels, 6.9.2001 COM(2001) 505 final, 2001/0204 (CNS)). The EU States have expressed their satisfaction with the 1996 Convention.

- Mechanisms for promoting agreement on access/contact.
- Promoting the use of guarantees (on the part of the parent exercising contact or of the custodial parent).
- Some issues surrounding enforcement under national law.
- Removing obstacles to the exercise of access/contact (e.g. those which arise from the criminal process).
- Passport and immigration matters.

c) A Good Practice Guide

The March 2001 Special Commission reached the following conclusion with regard to the promotion of good practices under the 1980 Convention:

"1.16 Contracting States to the Convention should co-operate with each other and with the Permanent Bureau to develop a good practice guide, which expands on Article 7 of the Convention. This guide would be a practical, "how-to" guide, to help implement the Convention. It would concentrate on operational issues and be targeted particularly at new Contracting States. It would not be binding nor infringe upon the independence of the judiciary. The methodology should be left to the Permanent Bureau."

Already the Permanent Bureau has begun work on the development of the Good Practice Guide. In the first instance, work is proceeding on two areas – matters which may need to be addressed when implementing the Convention within national systems, and Central Authority practices. These areas will involve some reference to matters of access/contact, and it is possible that later sections of the Good Practice Guide could focus more specifically on access/contact.

However, there are obvious limitations within this approach. First the Good Practice Guide will not be binding. Its objective will be to draw to the attention of States Parties arrangements, practices and procedures which have been found in practice to be useful in implementing and operating the 1980 Convention successfully in different jurisdictions. In some matters it will be appropriate to indicate more than one possible approach: in others one approach may be recommended, e.g. where it has already been endorsed by a Special Commission. The matters to be covered by a Good Practice Guide include those mentioned above under b). A guide could in fact cover much broader ground than a set of Recommendations, including options and precedents, which may be instructive rather than persuasive.

d) Model Agreements

Another possible technique is the drawing up of a Model Agreement or Agreements, to provide a basis for improving co-operation between two or more States in matters of access/contact. The idea here would be to offer a structure, which could provide a basis for further (usually bilateral) negotiations between States Parties. Already some States Parties to the 1980 Convention have engaged in bilateral discussions with a view to improving co-operation in matters of access/contact (see paragraph 60 of the Preliminary Report). In the case of the Franco-German discussions this has led to the establishment of an institutional structure, *la Commission parlementaire franco-allemande de médiation*, designed to offer assistance in particularly difficult and chronic cross-frontier access/contact cases. Many of the matters mentioned above (see sub-paragraphs a) and b)) might be addressed, or at least headlined, in such a Model Agreement. In particular, a model agreement might be useful for the following purposes:

- To establish reciprocal arrangements with regard to the provision of information and assistance (including legal aid) to applicants for access/contact from the reciprocating State.
- To establish an inter-State structure for reviewing and mediating in particularly intractable or chronic cases.
- To provide for the exchange of information concerning laws and facilities available in the respective States.
- To resolve any mutual problems arising from the use of the criminal process or from immigration rules or procedures.

The idea of a Model Agreement may also be helpful in relation to the problems of cross-frontier access/contact where they concern States which are not Parties to the 1980 Convention. Already there exist a number of bilateral agreements involving on the one hand a State Party to the 1980 Convention and on the other one of the Islamic States (see Preliminary Document No 5 of March 2001, Checklist of issues raised and recommendations made in response to the Questionnaire concerning the practical operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* for the attention of the Special Commission of March 2001, page 30). The experience already gained under these agreements would of course assist in the process of establishing an effective model. Some scepticism has been expressed about the effectiveness of some of these bilateral arrangements. It is possible that the development and use of an internationally agreed model could add some weight to purely bilateral arrangements. No doubt any model adopted in this context would be different from one applicable between States Parties to the 1980 Convention.

The Questions

7. (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?
- (2) 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?
- (3) Have there been any important developments in your country concerning cross-frontier access/contact since March 2001, which you would like to bring to the attention of the Permanent Bureau? (Please refer to Annex II.)
- (4) Are there any other comments you wish to make on the matters raised in this Consultation Paper?

Final Remarks

8. The Permanent Bureau is well aware of the resource limitations under which National Organs, Central Authorities and International Organisations operate. We are also conscious of the very considerable assistance given by States, as well as International Governmental and non-Governmental Organisations, towards the preparation for the March 2001 Special Commission. We do not therefore expect lengthy answers to the questions posed above. As expressed already, our main concern is to gain preliminary views from respondents in order to give more focus to the Final Report on Transfrontier Access/Contact, which is to be completed by the Permanent Bureau during the early part of this year.

- Annex I -** Preliminary Report on Transfrontier Access/Contact and the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (Prel. Doc. No 4 of March 2001).
- Annex II -** The questions concerning access/contact contained in Preliminary Document No 1:
- (1) The role and functioning of Central Authorities, paragraphs 7 a), b), c), d) and e) and 10.
- (4) Procedures for securing cross-frontier access/contact between parent and child, paragraphs 1 to 12.
- Annex III -** Conclusions and Recommendations of the Fourth 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* (22–28 March 2001), April 2001.