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RAPPORT ET CONCLUSIONS DE LA COMMISSION SPÉCIALE SUR LES OBLIGATIONS ALIMENTAIRES D'AVRIL 1999

Document établi par le Bureau Permanent

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REPORT ON AND CONCLUSIONS OF THE SPECIAL COMMISSION ON MAINTENANCE OBLIGATIONS OF APRIL 1999

Document drawn up by the Permanent Bureau

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Report on and Conclusions of the Special Commission on Maintenance Obligations of April 1999

drawn up by the Permanent Bureau

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INTRODUCTION

A Terms of reference, representation and chairmanship

1 In accordance with the Decision of the Eighteenth Session of the Hague Conference,[1] the Special Commission on Maintenance Obligations was convened at the Hague by the Secretary General for the period 13 to 16 April 1999, with instructions "*to examine the operation of the Hague Conventions on maintenance obligations and the* New York Convention of 20 June 1956 on the Recovery Abroad of Maintenance *and to examine…the desirability of revising those Hague Conventions, and the inclusion in a new instrument of judicial and administrative co-operation.*"

2 The Members of the Hague Conference, whether or not Parties to any of these Conventions, were invited, as well as the States Parties to the New York Convention which are not Members of the Hague Conference. Of this latter group, consisting of nineteen States, five States attended (Belarus, Bosnia and Herzegovina, New Zealand, the Holy See and Tunisia). Thirty-four Member States were represented. Observers were present from four intergovernmental organisations and from four non-governmental international organisations.

3 The Special Commission was opened by Mr Teun Struycken, Chairman of the Netherlands Standing Government Committee for the Codification of Private International Law. He proposed as Chairman Mr Fausto Pocar (Italy), who was elected unanimously by the Commission. The Permanent Bureau acted as Reporter.

B Preliminary documents and agenda

4 Three preliminary documents had been previously circulated to participants. Preliminary Document No 1, Questionnaire on Maintenance Obligations, drawn up by William Duncan, was sent out to National Organs in November 1998, and Preliminary Document No 3 contains extracts from the responses to that Questionnaire. Copies of the full responses were also available to participants for consultation during the Special Commission. Preliminary Document No 2 is a Note on the desirability of revising the Hague Conventions on Maintenance Obligations and including in a new instrument rules on judicial and administrative co-operation, drawn up by William Duncan. That Note contains an overview of the four Hague Conventions and the New York Convention, a review of their operation, comments on certain regional Conventions and bilateral arrangements, as well as discussion of the possibility of a new international instrument incorporating an integrated approach to the international enforcement of maintenance obligations. Annex II of that Note contains an updated List of Authorities

[1] Final Act of the Eighteenth Session, 19 October 1996, under Part B, 7.

provided for under the New York Convention of 20 June 1956 on the Recovery Abroad of Maintenance, drawn up following a decision of the Eighteenth Session of the Conference on the basis of information supplied by the depositary of the Convention and some of the States Parties to the Convention.

5 The Agenda adopted by the Special Commission, reflecting its mandate, was divided into two parts. Part I concerned the practical operation of the Conventions and focussed on a number of problem areas which had been indicated by the responses to the Questionnaire. Part II concentrated on reform - on the different possible approaches to remedying existing defects, on the question of the desirability of revising the Hague Conventions and on the possible elements and structure of any new instrument.

PART I – PRACTICAL OPERATION OF THE CONVENTIONS

A Establishing paternity

6 On the question of the law applicable, under the Hague Conventions of 1956 and 1973, to the determination of paternity, it remains the case that several countries, such as the Netherlands, Italy, Germany and Switzerland, accept that the applicable law is that which governs the maintenance obligation. Nevertheless, the issue remains uncertain in others such as France and Portugal, and in Spain in respect of the 1973 Convention. The conclusion of the Special Commission of 1995, which supported the former approach, appears not to have affected the situation.

7 On the question of the recognition and enforcement, under the Hague Conventions of 1958 and 1973 of foreign maintenance decisions which entail a finding of paternity, it is clear that in most countries no enquiry is made into the basis for that determination (for example, Italy, Germany, the Netherlands, Switzerland, Chile and Portugal). However, this is still not the case in Spain or Morocco, where recognition of a decision may be refused if it entails a determination of paternity.

> *It was agreed that, in a case where recognition is refused on the basis that the decision entails a finding of paternity, the refusing State should at least facilitate proceedings to establish paternity anew in that State.*

B Locating the defendant

8 The Questionnaire responses had revealed some serious problems with regard to the locating of defendants. In most countries the methods available to assist in locating maintenance debtors are inferior to those available to locate abducting parents. The methods available, and in particular the access afforded to information held (electronically or otherwise) by public bodies in relation, for example, to tax, social welfare or population registration, vary widely from country to country. In countries, such as Ireland and Australia, it is possible to obtain court orders requiring individuals

to supply information. In Norway and the United States, use is made of a register of employers and employees.

9 It was suggested that, as regards access to personal data, the arguments in favour of privacy were less compelling where maintenance of a child was concerned. Concerns with regard to privacy are addressed in some jurisdictions by providing that information obtained may only be used in relation to the maintenance claim.

It was concluded that, at least in some cases, there was a need for clearer and more extensive powers to secure information to assist in locating maintenance debtors.

C Legal aid and costs

10 There was a lengthy debate on legal aid and costs on several occasions during the meeting of the Special Commission, reflecting the importance which the experts attached to this subject. Responses to the Questionnaire had demonstrated widespread concern on the subject, and indicated divergent practices with regard to both Article 9 of the New York Convention and Article 15 of the *Hague Convention of 1973 on the Recognition and Enforcement of Decisions relating to Maintenance Obligations*. Several delegates expressed the view that the provision of adequate legal aid was a *sine qua non* of an effective international system. Some experts from States not Parties to the relevant Conventions cited the absence of adequate provisions on legal aid as a reason for non-ratification.

11 Several examples of lack of uniformity were given. In some countries the creditor may be required to make fresh applications for legal aid, whether at different instances of the proceedings (*e.g.* Germany) or after a set period of time (*e.g.* France). This may entail delay and additional translation problems. In some countries (*e.g.* Portugal) legal aid covers the costs of translating documents, whereas in others (*e.g.* Chile) it does not. There are divergences in the operation of means tests. Some States (*e.g.* Austria and Germany) adopt a child-centered approach, concentrating on the economic situation of the child as an individual, while others (*e.g.* France) take into account assets of the child's household. Yet others (*e.g.* Ireland and, to a large extent, Finland) do not apply a means test in international cases.

12 A wish was expressed by several experts for movement towards a more uniform approach to the provision of legal aid. Without greater harmony in this matter, the efficacy of any re-shaping of the international system of recovery would be diminished. There was a difference of opinion as to whether this process of harmonisation should begin now or only in the context of wider reforms in the Conventional structure. There was general, though not unanimous, agreement that it would be useful to try to identify at this point some general principles which could form a basis for progress. It was also suggested that any concerns that may exist about the cost implications of reform should be set against the savings entailed by more stream-lined procedures and enforcement

mechanisms, including the development of administrative approaches to the assessment and enforcement of maintenance which had occurred in some countries.

13 A Working Group, chaired by Mr Werner Schutz (Austria), was established to draw up suggested principles as a basis for further discussion of the issues. The Group's Working Document[2] was discussed during the final Meeting of the Session, but not adopted. In the light of the discussion it was felt that modifications were needed, and the Chairman indicated that the Permanent Bureau would draft conclusions which reflected that discussion. Those conclusions are as follows:

> *The provision of an adequate system of legal aid is essential if the international machinery for the recovery of maintenance is to operate effectively. There has been little change since the Special Commission of 1995 in the law and practice of States Parties to the New York Convention and the Hague Conventions of 1958 and 1973 on recognition and enforcement, with wide divergences still evident. A move towards more uniform and effective provision of legal aid is desirable, whether under the existing Conventional structures or in the context of a new instrument. In approaching reform, States Parties should, where appropriate, consider*
>
> *(a) whether a means test should be required as a qualification for legal aid in international cases,*
>
> *(b) the advantages, where a means test is applied, of focussing on the economic circumstances of the child as an individual in the assessment of means, and*
>
> *(c) the disadvantages to the applicant, in terms of time, cost and convenience, of any system which requires renewal of applications for legal aid.*

D Documents

14 Responses to the Questionnaire had indicated that, on the one hand, Receiving Agencies often experience difficulties in obtaining a complete dossier which is properly translated, and, on the other hand, that Transmitting Agencies often do not know precisely what is required by Receiving Agencies. The costs involved in the translation of documents had also appeared as a real source of concern. Discussion in the Special Commission concentrated on the possibilities of limiting the number of documents required in international cases, and on reducing the necessity for translations.

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[2] Working Document No 5 drawn up by the delegations of Austria, Croatia, Ireland and the Netherlands.

15 The question of limiting the number of documents required was discussed also during the Special Commission of 1995, and a consensus had been reached that photographs of the parties should not be required. However, it appeared that in some States the overall number of documents required had increased since 1995. It was pointed out that, in enforcement proceedings, national rules of procedure often unavoidably required several documents, for example, proof that the maintenance order was final or at least enforceable in the country of origin.

16 Various suggestions were made to reduce the number of documents to those that were essential. For example, the decree of divorce in respect of a child's parents should not be required when this has been made separately from a decision on child support. One suggestion was that in child support cases no documents should be required other than the maintenance order, the birth certificate of the child and, if the parents' marriage was not dissolved, the parents' marriage certificate.

17 As regards the translation of required documents, an expert from Portugal mentioned a new rule of civil procedure introduced in his jurisdiction in 1997 according to which the translation of official documents should not be required except where necessary. The Chairman observed that the need to translate official documents could be reduced in two ways. One way was to limit the translation requirement to cases where the receiving authority expressly requested it; a second option was to substitute a requirement that there be a certified translation of the relevant portion of the order. The Austrian Expert admitted his skepticism as the to possibility of limiting the translation requirement to a portion of the foreign judgment. In Austria the Constitution requires the use of the official language, German, at least when the requested authority is judicial, and this constitutional principal is regarded in Austrian jurisprudence to apply to judgments in their entirety. One expert proposed reinforcing the powers of transmitting authorities. They could be charged with guaranteeing the authenticity of the original judgment, thereby obviating the need to translate the entire judgment.

E Model forms

18 The value of model forms for the transmission and receipt of applications was re-emphasised. They facilitate the presentation of information and provide the opportunity to summarise and list documents. While they cannot act as substitutes for required documents, they may reduce the need for full translations of the original documents. The transmission of forms by e-mail was mentioned as a future possibility in some countries.

19 It was agreed that further work should be carried out on the draft model forms which had been developed during, but not adopted by, the Special Commission of 1995.[3] A Working Group, under the chairmanship of Mr Jim Morgan (Australia) was established for this purpose, and the model forms proposed by that Group[4] entitled "Request for Judicial and/or Administrative Assistance for the Recovery Abroad of Maintenance" and "Form for Acknowledgement of Receipt of an Application for the

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[3] See Annex I of Preliminary Document No 2, containing Working Document No 15 of the Special Commission on Maintenance Obligations (13-17 November 1995).

[4] Working Document No 9 of April 1999.

Recovery Abroad of Maintenance" were presented and discussed during the final meeting of the Special Commission.

20 Outlining the major differences between the proposed model forms and those developed at the previous Special Commission, Mr Morgan explained that the new model request form clearly envisages the provision of administrative assistance; that it is based on the principle that, where enforcement of an existing order is not possible, new proceedings are commenced in the requested State; that the references to legal aid and costs are new; that the list of documents is not an exhaustive one; and that there is no reference to translation, as this is for States Parties to determine. The attestation concerning the regularity as to form of the documents is designed to minimize the need for the Receiving Agency to enquire into the validity of the documents transmitted.

21 In the course of discussion of the proposed model forms, the hope was expressed that the list of documents would not encourage Agencies to ask for all the documents mentioned, but only those considered relevant and necessary. The suggestion was made that, where a Receiving Agency returns an application on the basis that the relief requested cannot be granted, the reasons for this should be given. Several other comments and suggestions concerning matters of detail were made.

> *It was accepted that adjustments to the proposed forms were necessary in the light of the discussion. It was agreed that this work should be carried out subsequent to the Special Commission by Mr Morgan, in consultation with members of the Working Group and the Permanent Bureau, and that the revised Model Forms should then be made available, possibly on the Hague Conference Website. This work was subsequently carried out, and the revised Model Forms appear in the Annex of this Report. They are also available on the Hague Conference website at www.hcch.net.*

F Public authorities

22 Differences of opinion, which had been apparent during the Special Commission of 1995, were again expressed concerning the scope *ratione personae* of the New York Convention, and specifically on the question whether State bodies or public authorities may make use of Convention procedures to make recovery from the maintenance debtor, especially when the purpose was to recoup advance payments made by those bodies or authorities to the maintenance creditor. In some States (*e.g.* Ireland) the definition of "maintenance creditor" is broad enough in implementing legislation to include anyone entitled to exercise the right of redress of, or to represent, the maintenance creditor. The Chairman reminded the Delegates of the conclusion of the Special Commission of 1995 that an application by a public body should be accompanied by a power of attorney furnished by the maintenance creditor, even where the creditor has already received an allowance. While there was no decision to depart from this recommendation, a concern was expressed that, if public bodies were accepted in general as entitled to make claims, receiving authorities might be less willing to process claims, given the priority which tends to be given to "urgent" cases. Another suggestion was that public authorities

might be dealt with under a separate Convention.

> *It was generally agreed that the role of public authorities within the international system for the recovery of maintenance was a matter of increasing importance, and that this matter would constitute an important element in any new or revised international instrument. The importance of achieving co-ordination on this issue between the New York Convention and the Hague Conventions on recognition and enforcement was also raised.*

G Recognition and enforcement

23 Responses to the Questionnaire suggested that the regime established by the Hague Conventions of 1958 and 1973 on recognition and enforcement were working reasonably well, with no operational difficulties, and three respondent States had indicated that they were considering ratification of the 1973 Convention. On the other hand, the reasons given for non-ratification by non-Party States included constitutional problems concerning the bases of indirect jurisdiction, the absence of complimentary provisions in the Convention for administrative assistance, and the absence of any need given the existence of equivalent regional or bilateral arrangements. Preliminary Document No 2 at pages 12-13 provides an overview of such problems as do exist with the Hague Conventions. The questions of legal aid, documentation, and locating the defendant are referred to above.

24 On the question of limitation periods (see Preliminary Document No 2, paragraph 15 *e*), the Chairman explained that problems in Italy had been resolved. The limitation period of ten years for *exequatar* actions had been set aside by a new Italian law which envisages the immediate effectiveness of foreign decisions.[5] Other national positions are set out in Preliminary Document No 3 at pages 51-57. The Chairman also reminded delegates that the Special Commission of 1995 had envisaged the application of the law of the State where enforcement is sought to the question of time limits relative to enforcement.

25 The Expert of the Czech Republic raised certain difficulties associated with the recognition and enforcement, under the Hague Convention of 1973, of foreign decisions where the maintenance debt is subject to automatic increase at a later date. He explained that attempts were being made to reverse the current position of the Czech courts on this issue. The Expert of Austria referred to a ruling of the Austrian Supreme Court regarding index-linked maintenance decisions which supports their enforcement provided that the index linking is evidenced by a detailed official document.

26 During the discussion, it was apparent that many States have indexation systems. Generally, these entail automatic indexation, that is, the indexation is applied to maintenance amounts without the necessity for court order. This is the case in the Netherlands, Finland, Norway, France and Sweden. In addition, Germany introduced indexation on 1 July 1998. (The German system is described in Preliminary Document No 2 at page 6, footnote 12.) In contrast, in Switzerland, only judges may apply indexation to maintenance orders. In Australia, there is a mixed system. While court maintenance orders are not index-linked, recently adopted child support legislation does

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[5] See further Preliminary Document No 3 at page 53 for the Italian response.

provide for index-linking. In general, States apply indexation to maintenance debts annually. However divergences were apparent as regards the bases for indexation. Many States rely on their consumer price index, while others have different bases for calculation of the applicable rate. In addition, the timing of indexation varies, *i.e.* the date from which the new maintenance debt applies. (*E.g.* Australia – 1 July; France – variable; Norway – 1 June; Sweden – 1 February.) In general, it appeared that few problems were encountered in the recognition and enforcement of orders entailing indexation provided that the indexation was clearly explained (Switzerland, Netherlands, Finland, Norway). An Expert from the United States stated that, while the United States did not have difficulty in principle in enforcing such orders, it was important that the authority in the requesting State calculate the new amount of the maintenance obligation.

The Chairman concluded that decisions which were subject to indexation should be recognised and enforced, provided that the indexation was clear on the face of the decision. Both the rate of indexation and the date from which it applies should be made clear.

27 As regards the modification of the original decision by the court addressed at the enforcement stage – otherwise than in a new procedure based on changed circumstances – the Special Commission of 1995 had concluded that this was not permissible. The responses to the Questionnaire (see Preliminary Document No 3 at pages 61 and 62) reveal that, while most States (with the exception of the United Kingdom) do not permit modification as such, many States do have techniques for taking account of changes in circumstances which have made it difficult or impossible for the debtor to pay the sum ordered. In some States execution will not be ordered if there is an inability to pay. In some other States "protected earnings" doctrines apply, designed to ensure that the debtor retains a minimum net income.

28 On the question of the entitlement of the debtor – as opposed to the creditor – to seek modification of the decision in the State where he or she has his or her habitual residence, most States deny this possibility – an approach which is reflected in the Brussels/Lugano Conventions. In certain Commonwealth countries (including Canada under certain bilateral treaties), a procedure operates whereby the debtor may apply for a provisional order for modification which, in order to be effective, requires confirmation by a court in the State of origin.

29 During the discussion, a divergence in the interpretation of Article 8 New York Convention became apparent. A number of States interpret Article 8 as applying also to applications for modification by the debtor (Austria, Morocco, Poland, Switzerland). In contrast, other experts did not accept that view, and based their interpretation of Article 8 on the overall purpose of the New York Convention, reflected in its other provisions, in particular Article 1(1), which is to assist maintenance creditors (Ireland, Croatia, Luxembourg, Commonwealth Secretariat, International Society on Family Law).

30 *The Chairman concluded by noting that, in general, States do not modify foreign maintenance decisions at the enforcement stage; that most States do not recognize the jurisdiction of the State of the debtor's residence to modify a maintenance decision; and that there is a divergence of practice under Article 8 of the New York Convention as to whether or not administrative assistance under the Convention may be afforded to applications for modification made by the debtor.*

H Transference and receipt of funds

31 Responses to the Questionnaire (see Preliminary Document No 3 at pages 26-33) show that in most States the authorities do not accept responsibility with regard either to the transfer or receipt of maintenance monies and that it is usually the creditor who bears the costs of conversion and transfer.

32 The Special Commission discussed a variety of methods of reducing transfer costs. For example, in Michigan a pilot project had been undertaken under which the foreign agency opened a bank account in Michigan, maintenance funds were paid into the account and the foreign agency used its ATM card to withdraw the money in its local currency, reducing charges to a minimum. In the Czech Republic, the debtor pays maintenance into the account of the Czech agency in the Czech Republic, and the agency bears the costs of transfer abroad, which are less than those charged to private persons.

The Chairman concluded that the establishment of bilateral clearing systems between authorities, as well as the opening of accounts abroad by the authorities, could considerably reduce charges.

I Cumulative application of the Conventions

33 The Special Commission of 1995 concluded that the New York Convention of 1956 and the Hague Conventions on recognition and enforcement of 1958 and 1973 should be operated on a complementary basis. In response to that recommendation, Norway and Iceland now apply the Conventions on this basis. However, practice in the United Kingdom has not changed since 1995, a matter considered to be serious by certain delegates. An Expert of the United Kingdom indicated that no final view had been reached on this matter, and anticipated early contact with the Permanent Bureau.

J Co-operation between authorities

34 It remains clear, both from the responses to the Questionnaire and from the discussion in the Special Commission, that a large number of States Parties to the New York Convention lack the capacity to fulfill even their most basic obligations under the Convention. It was suggested that part of the problem may derive from a lack of understanding in these States of how systems elsewhere operate, and the possibility

was canvassed of the Permanent Bureau preparing a document to explain basic procedures followed in each country.

It was agreed that all measures aimed at increasing available information should be encouraged.

K Immunity of staff of international organisations

35 The representative of United Nations reported that the Secretary General of the United Nations had announced in March 1999 that the UN would hence forth voluntarily deduct funds from the staff who were defaulting on maintenance payments. The UN was not bound to this course of action given the UN Convention of 1946 on privileges and immunities, and therefore decided to deal with this matter by way of voluntarily unilateral declarations. The Secretary General of the Hague Conference offered to the representative of the United Nations the assistance of the Permanent Bureau of the Hague Conference in relation to any matters of private international law arising in this connection. Some other experts gave examples of bilateral negotiations between their States and international organisations on the question of immunities and the enforcement of maintenance.

L Applicable law

36 Responses to the Questionnaire revealed that one State, Estonia, intended to join the eleven existing Parties to the *Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations.* Reasons for non-ratification by some other States are set out in Preliminary Document No 3, at pages 78-81.

37 The issues raised by the decision by the Netherlands Supreme Court of 21 February 1997[6] concerning the interpretation of Article 8 of the Hague Convention of 1973 were the subject of some discussion. The Court had ruled that Article 8 of the Hague Convention of 1973, in the light of its history and that of the Convention as a whole, was not incompatible with the admission of a choice by divorced spouses of the governing law, the law chosen being that of the country of their common habitual residence for a long period and of the forum. Dutch Law, chosen by the parties, was applied rather than Iranian Law which governed the divorce. The responses to the Questionnaire suggest that the national courts of other States Parties are for the most part unlikely to adopt the same approach (see Preliminary Document No 3 at pages 72-74). It was pointed out that differing emphases could be placed on the interpretation of the Supreme Court's decision – that it is an instance of the growing tendency to apply forum law, that it is an example, by way of exception of the application of the law of the country with which the spouses have their closest connection, and that it constitutes recognition of the importance of party autonomy in determining the applicable law.

38 On the question of the desirability of movement towards greater party autonomy, reference was made to the increasing role of party autonomy in related spheres of family law such as that of succession law. (See, for example, the *Hague Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons.*) The

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[6] Supreme Court (*Hoge Raad*), 21 February 1997, *RvdW*, 56C, see also Preliminary Document No 2 at paragraphs 29-32.

importance of safeguards against any undue influence was raised, as well as a possible conflict between a movement towards greater party autonomy on the one hand, and on the other hand, the shift in certain countries towards the calculation of maintenance payments by way of a simple administrative procedure focussed on the law of the forum. A firm view was expressed by the expert of one State Party to the 1973 Applicable Law Convention against the need for any revision of Article 8.

The Chairman noted that, while a divergence of opinion existed, support for the introduction of some form of party autonomy had increased since the Special Commission of 1995.

M Ratification of the Hague Conventions of 1973

39 *It was agreed unanimously that those States which are Parties to the 1956 or 1958 Hague Conventions, but have not yet become Party to corresponding Conventions of 1973, should be encouraged to do so.* Consequently, the Secretary General of the Hague Conference should address the Governments of the States concerned and invite them to follow the recommendation of the Special Commission.

N Miscellaneous

40 The Expert of Austria drew attention to a communication received from the Ministry of Foreign Affairs of Uruguay stating that no agency had been designated in that country to carry out the functions under the New York Convention of 1956 on the Recovery Abroad of Maintenance. This matter is to be brought to the attention of the Depositary.

PART II – REFORM AND REVISION

41 At various points during the course of the Special Commission concerns and frustrations were expressed in relation to the operational difficulties within the existing conventional structures, particularly with regard to the *New York Convention of 20 June 1956 on the Recovery Abroad of Maintenance*. There was disappointment that most of the problems which had been identified by the Special Commission of 1995 remained unresolved, and that the recommendations of that Special Commission appeared to have had little effect.

42 On the question of how reform of the system should be approached, two views were apparent, the first concentrating on achieving improvements within the existing conventional framework, the second the envisaging the need for a more radical overhaul of the existing framework. The first approach is that which was adopted by the Special Commission of 1995. It is based, in part, on a reluctance to add to the already complex web of instruments (multilateral, regional and bilateral), which at present regulate recovery of maintenance at the international level as well as on a view that many of the present operational problems derive, not so much from defects in the conventional structure as such, but rather from the unwillingness or inability of some States to take the measures necessary at national level to ensure that existing instruments work effectively. The second approach is based on the view that the existing conventional

structure no longer meets the needs of the international community, that its loose texture has contributed to many of the operational problems, and that an improved structure is needed which is tighter, more integrated, and which takes better account of the developments that have occurred at the national level to improve the efficiency with which support obligations are enforced.

43 The Special Commission debated these issues during its final four meetings. Some initial interventions expressed hesitation at the prospect of a new instrument, and alternative approaches were suggested, including the idea of a model law to help fill in the *lacunae* in the New York Convention, which might also flesh out the implications of Article 37, subsection 4 of the *UN Convention of 20 November 1989 on the Rights of the Child*, and might be based on the principle of the welfare of the child rather than on any requirement of reciprocity.

44 Other experts strongly supported the more radical second approach. The French Expert spoke of her disquiet at the outcome of the debate on the operation of the existing Conventions. She noted, in particular, that the Hague Conventions were not attracting many new ratifications, that the number of cases being processed through the international machinery was small in comparison to real needs, and that the problems revealed in 1995 had not been solved. After noting some of the specific operational problems discussed above, she concluded that the French Government favored the adoption of a new instrument which would be more solid and binding, designed to replace both the Hague Conventions and the New York Convention. Although the New York Convention represented an important advance in 1956, its provisions were now obsolete. She felt also that the legislative reforms being contemplated in many States would benefit from the negotiation of a new convention, that it would provide an opportunity to share opinions and expertise. She felt that the proliferation of instruments (multilateral, regional and bilateral), with their varying degrees of formality, is complicating the tasks of national authorities, whose work would be simplified by the development of a single instrument. Finally, she recommended that the work of unification, which should be carried out by the Hague Conference, should have two main aspects – the recognition and enforcement of decisions, be they administrative, judicial or provisional, and administrative co-operation, with provisions going far beyond those contained in the New York Convention.

45 This view was supported by several experts, while some others indicated that, whereas they had been initially skeptical of the idea of a new instrument, their attitudes were undergoing review in the light of discussion in the Special Commission. Some concern was expressed that the concentration on a new instrument should not be allowed to distract attention from the continuing and present need to ensure that the existing Conventions worked as well as possible.

46 The conclusions of the Special Commission on these matters were summarized in a draft recommendation, proposed by the Chairman. With certain minor amendments this recommendation, which calls on the Hague Conference to begin work on the elaboration of a new and comprehensive instrument, was unanimously adopted by the Special Commission, and is set out here in full.

The Special Commission on the operation of the Hague Conventions relating to maintenance obligations and of the New York Convention on the Recovery Abroad of Maintenance,

– *having examined the practical operation of these Conventions and having taken into account other regional and bilateral instruments and arrangements,*

– *recognising the need to modernise and improve the international system for the recovery of maintenance for children and other dependent persons,*

– *recommends that the Hague Conference should commence work on the elaboration of a new worldwide international instrument.*

The new instrument should

– *contain as an essential element provisions relating to administrative co-operation,*

– *be comprehensive in nature, building upon the best features of the existing Conventions, including in particular those concerning the recognition and enforcement of maintenance obligations,*

– *take account of future needs, the developments occurring in national and international systems of maintenance recovery and the opportunities provided by advances in information technology,*

– *be structured to combine the maximum efficiency with the flexibility necessary to achieve widespread ratification.*

The work should be carried out in co-operation with other relevant international organisations, in particular the United Nations.

The Hague Conference, while accomplishing this task, should continue to assist in promoting the effective operation of the existing Conventions and the ratification of the New York Convention and the two Hague Conventions of 1973.

The Special Commission recalls and emphasises the importance of the practical recommendations contained in the General Conclusions of the Special Commission of November 1995, which were drawn up by the Permanent Bureau (General Affairs, Prel. Doc. No 10, May 1996).

47 The Expert of Austria suggested the need for a more complete inventory of the key issues involved in the work on a new instrument. He mentioned, in particular, the issues of legal aid and the role of public authorities. It was agreed that the Report of the Special Commission would reflect the debates that had occurred and conclusions reached on these matters.

ANNEXES

Request for Judicial and/or Administrative Assistance for the Recovery Abroad of Maintenance

Convention on the Recovery Abroad of Maintenance
signed at New York on 20 June 1956

X01	Identity of the Transmitting Agency	Y01	Identity of the Receiving Agency
X02	address	Y02	address
X03	✍	Y03	✍
X04	telefax	Y04	telefax
X05	telex	Y05	telex
X06	e-mail	Y06	e-mail
			To be completed by the Receiving Agency:
X07	contact person	Y07	contact person
X07.1	language(s)	Y07.1	language(s)
X08	✍	Y08	✍
X09	telefax	Y09	telefax
X10	e-mail	Y10	e-mail

Transmitting Agency Reference No: _____

Particulars of Maintenance Claimant/Creditor and Respondent/Debtor:

Full name of Claimant/Creditor: _____
_____
_____
_____

Full name of Respondent/Debtor: _____
_____
_____
_____

Please tick appropriate boxes.

1 This request concerns:

a ✍ An application for the recovery of maintenance based on an order or other judicial or administrative act. The recognition and/or enforcement is sought by reason of:

✍ the *Convention concernant la reconnaissance et l'exécution des décisions en matière d'obligations alimentaires envers les enfants*, done at The Hague on 15 April 1958; or

✍ the *Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations*, done at The Hague on 2 October 1973;

✍ other multilateral or bilateral international instrument(s):

Name and date of the instrument(s): _____

_____

_____

✍ other basis (*e.g.* comity, co-operation)

Please specify: _____

_____

_____

b ✍ If recognition and/or enforcement of the order or other judicial or administrative act is not possible, or is refused, please take appropriate measures to recover maintenance for the applicant, including the institution in your country of an action for maintenance.

c ✍ No order or other judicial or administrative act exists. Please take appropriate measures to recover maintenance for the applicant, including the institution in your country of an action for maintenance.

d ✍ Variation of a maintenance order.

2 Legal aid/exemption from costs or expenses

a ✍ In the proceedings which established the maintenance obligation, the Claimant/Creditor benefited from legal aid or exemption from costs or expenses.

b ✍ According to the present situation, the Claimant/Creditor would qualify in the requesting State for legal aid or exemption from costs or expenses in maintenance proceedings.

3 Other matters to which the Transmitting Agency draws attention for the consideration of the Receiving Agency:

_____

_____

_____

_____

_____

4 Enclosed relevant documentation (translated where necessary into the language required by the Receiving Agency):

- ✍ 1 Petition/application for maintenance
- ✍ 2 Judicial or administrative maintenance decision
- ✍ 3 Certificate by Transmitting Agency that the decision is no longer subject to ordinary forms of review in the State of origin
- ✍ 4 Certificate that the decision is enforceable
- ✍ 5 Certificate of summons
- ✍ 6 Certificate of service of decision establishing maintenance liability
- ✍ 7 Acknowledgement of parentage
- ✍ 8 Birth certificate(s)
- ✍ 9 Marriage certificate
- ✍ 10 Power of Attorney
- ✍ 11 Current statement of amounts paid and amounts due
- ✍ 12 Family civil status certificate
- ✍ 13 Certificate of continuing schooling for each child for whom maintenance is payable
- ✍ 14 Information regarding transmission of payments collected
- ✍ 15 Most recent tax assessment or notice of non-liability
- ✍ 16 Information concerning the location of the Respondent/Debtor
- ✍ 17 Claimant's/Creditor's description of real/personal property belonging to the Respondent/Debtor

The documents included herewith are regular as to form, in accordance with the law of the State of the Claimant.

The Receiving Agency is requested to acknowledge receipt of this application (see form attached) and, within 60 days of its receipt, to inform the Transmitting Agency of the steps undertaken in respect of it. Thereafter the Receiving Agency is requested to keep the Transmitting Agency informed of the progress of the application, and of any changes in circumstances that may affect payments under the application.

The Transmitting Agency is requested to ~~promptly~~ inform the Receiving Agency of any variations in the level of maintenance liability that arises from a later decision or agreement between the parties, or from any other cause.

Date: _____

Signature: (Seal)

Acknowledgement of Receipt of an Application for the Recovery Abroad of Maintenance

Convention on the Recovery Abroad of Maintenance
signed at New York on 20 June 1956

Y01	Identity of the Receiving Agency	X01	Identity of the Transmitting Agency
Y02	address	X02	address
Y03	✍	X03	✍
Y04	telefax	X04	telefax
Y05	telex	X05	telex
Y06	e-mail	X06	e-mail
Y07	person to contact	X07	person to contact
Y07.1	language(s)	X07.1	language(s)
Y08	✍	X08	✍
Y09	telefax	X09	telefax
Y10	e-mail	X10	e-mail

The undersigned Receiving Agency has the honour to acknowledge receipt of your application, reference No _____ dated _____.

This application has been given reference No _____.

✍ The file is complete and is under consideration.

✍ Additional information and documentation as specified hereunder is required:
_____
_____

The early provision of this additional information would facilitate completion of the recognition and enforcement process.

✍ The application has been examined and is being returned because the relief requested cannot be granted in the requested State for the following reason(s):
_____
_____

The Receiving Agency requests that the Transmitting Agency inform it within 30 working days of any change in the status of the application.

Date: _____

Signature: (Seal)