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CONVENTION DE LA HAYE DU 25 OCTOBRE 1980 SUR LES ASPECTS CIVILS DE L'ENLÈVEMENT INTERNATIONAL D'ENFANTS

Préparatifs en vue d'une quatrième réunion de la Commission spéciale sur le fonctionnement de la Convention et description des travaux entrepris par le Bureau Permanent en support à la Convention

Note établie par le Bureau Permanent

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HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

Preparations for a fourth Special Commission meeting to review the operation of the Convention and a description of the work currently undertaken by the Permanent Bureau in support of the Convention

Note drawn up by the Permanent Bureau

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Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction

Preparations for a fourth Special Commission meeting to review the operation of the Convention and a description of the work currently undertaken by the Permanent Bureau in support of the Convention

INTRODUCTION

1 The first two Special Commissions to review the operation of the 1980 Convention were held in 1989[1] and 1993.[2] The third Special Commission took place from 17-21 March 1997.[3] At that time, there were forty-five States Parties to the Convention of which thirty-five were represented at the Special Commission. In addition, thirteen States which were not at the time Parties to the Convention (seven Member States of the Hague Conference and six other States participating as observers) attended the Special Commission. Four intergovernmental and seven non-governmental international organisations attended as observers.

2 Since 1997 a further fifteen States have become Parties to the Convention, three by ratification (or analogous procedure) (Belgium, China, (Hong Kong Special Administrative Region only), and the Czech Republic) and twelve by accession (Belarus, Brazil, Costa Rica, Fiji, Georgia, Malta, Moldova, Paraguay, South Africa, Turkmenistan, Uruguay and Uzbekistan). Ratification by Turkey, which signed the Convention on 21 January 1998, is imminent. At the same time as this process of globalisation, the Convention has become the subject of close scrutiny in several of the States Parties. Commissions and enquiries of various kinds have been established at national level.[4] Academic research and writing on the Convention has proliferated.[5]

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[1] Overall Conclusions of the Special Commission of October 1989 on the operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, *International Legal Materials*, Vol. XXIX, March 1990, p. 219.

[2] Report of the second Special Commission meeting to review the operation of the Hague Convention on the Civil Aspects of International Child Abduction, *International Legal Materials*, Vol. XXXIII, January 1994, p. 225.

[3] See *Report of the third Special Commission meeting to review the operation of the Hague Convention on the Civil Aspects of International Child Abduction*, drawn up by the Permanent Bureau, August 1997.

[4] See for example, A Report to the Attorney General on International Parental Kidnapping. *Report of Subcommittee on International Child Abduction of the Federal Agency Task Force on Missing and Exploited Children and the Policy Group on International Parental Kidnapping* (USA, April 1999); Government of Canada, *Government's Response to the Fourth Report of the Standing Committee on Foreign Affairs and International Trade (International Child Abduction: Issues for Reform)*, November 1998.

[5] See generally the works listed on the Hague Conference Bibliography of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, available on www.hcch.net/e/conventions/bibl28e.html. See in particular: P.R. Beaumont & P.E. McEleavy, *The Hague Convention on International Child Abduction,* Oxford University Press 1999; S. Detrick & P. Vlaardingerbroek (eds), *Globalisation of Child Law. The Role of the Hague Conventions*, Nijhoff, The Hague, 1999; J. Doek, H. van Loon, P. Vlaardingerbroek (eds), *Children on the Move. How to Implement their Right to Family Life*, Nijhoff, The Hague, 1996; N. Lowe & D. Douglas (eds), *Families Across Frontiers*, Nijhoff, The Hague 1996; A. Bucher, *Droit international privé suisse. Tome II: Personnes, Famille, Successions,* Genève/Cologny, 1991, p. 298; *Jurisprudence suisse en matière de droit international privé des personnes, de la famille et des successions*; *Revue suisse de droit international et de droit européen*, 1996, No 2, p. 191 (spéc. p. 206 et s.); A. Grammaticaki-Alexiou, *International Child Abduction According to the Hague Convention of 1980,* Sakkoulas Publications, Thessaloniki, 1996 (in Greek, with English summary at p. 321); A.-M. Hutchinson, R. Roberts & H. Setright, *International Parental Child Abduction,* Jordan Publishing Ltd., Bristol 1998; J. Kropholler, Stellungnahme des Max-Planck-Instituts für ausländisches und internationales Privatrecht, *Rabels Zeitschrift für ausländisches und internationales*

Privatrecht, 1996, Heft 3, p. 485.

There are now more non-governmental organisations with a special interest in international child abduction.[1] The operation of the Convention has also generated a good deal of publicity in several States, as well as a certain degree of political activity in some.[2]

3 The primary purpose of this Note is to consider plans for a fourth Special Commission meeting to review the operation of the Convention. No mandate has yet been given for the holding of a fourth Special Commission meeting. It is clear, however, that the next Special Commission is already the subject of keen anticipation. The Permanent Bureau has in fact for some time been consulting informally with many Central Authorities, judges, government officials, non-governmental organisations and individuals on how best to approach the next Special Commission. The view is widely held that the Special Commission should be geared as far as possible towards achieving a set of firm recommendations with respect to certain aspects of the Convention and its procedures which are key to its successful operation. This Note will outline a possible agenda for the Special Commission as well as the preparations that are foreseen as being necessary to its success. Appended to this Note as an annex is a paper, drawn up by William Duncan and presented at a recent colloquium at New York University, which summarises the activities which the Permanent Bureau is currently undertaking to support the operation of the 1980 Convention, many of which are associated with preparations for the next Special Commission.

OUTLINE OF A POSSIBLE AGENDA FOR THE SPECIAL COMMISSION

4 The draft Agenda set out below is tentative in nature. It is offered at this stage to provide some general guidance as to the issues on which discussions at the Special Commission are likely to be focused. This may be of some assistance to national authorities and others who may already be considering preparatory steps, including the holding of conferences, consultative meetings, etc. The Agenda will of course be subject to change in the light of comments and observations received by the Permanent Bureau. The draft Agenda concentrates on those aspects of the operation of the Convention which experience has shown are key to its successful operation,

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[1] For example, the European Network on Parental Child Abduction which includes Reunite (UK), Bortrovade Barns Forening (Sweden), Com. of Missing Children (Germany), Fondation Pour l'Enfance (France), Missing Children International (Belgium), Child Focus (Belgium), CSMEE (France), ICPAC (Ireland, SOS International Child Kidnapping (France). The Network's first conference was held in London on 15 April 1999, and the International Centre for Missing and Exploited Children (ICMEC), launched in Washington, DC, in April 1999.

[2] See for example, *Déclaration Commune des Ministres Français et Allemand de la Justice sur les Conflits Familiaux des Couples Mixtes Franco-Allemand*, Avignon, le 6 mai 1998; Government Resolution by the House of Representatives (the Senate concurring) Urging Compliance with the Hague Convention on the Civil Aspects of Child Abduction, 23 March 2000, 106th Congress, 2nd Session, H.Con.Res.293; Seminar on the application of the Hague Convention on the Civil Aspects of Child Abduction, organised by the Belgian Senate, 29 March 2000.

especially those in respect of which there are significant difficulties or differences of approach among States Parties.

5 With this in mind, six principal agenda items are suggested, together with an illustrative (non-exhaustive) list of sub-headings, as follows:

(1) The role and functioning of Central Authorities

a resources and capacities;
b the role played by Central Authorities at different stages in the Hague process;
c information and statistics.

(2) Judicial proceedings, including appeals, and enforcement issues

a courts organisation;
b provision of legal representation;
c speed of Hague procedures, including appeals;
d manner of taking evidence, especially in relation to the Article 13 defences;
e procedures for hearing the child and determining whether the child objects to return;
f methods and speed of enforcement;
g interpretation of key concepts such as habitual residence, rights of custody, acquiescence, etc.

(3) Issues surrounding the safe return of the child (and the custodial parent, where relevant)

a safe harbour orders, mirror orders and undertakings, including questions of international jurisdiction and the enforcement of orders;
b criminal proceedings and immigration issues;
c direct judicial communications – their feasibility and limits;
(*d* the role of Central Authorities. See Item 1 above.).

(4) Procedures for securing cross-frontier access/contact between parent and child
a the role of Central Authorities and other intermediaries;
b promoting agreement by mediation, etc;
c jurisdiction, recognition and enforcement in respect of cross-frontier contact.

(5) Securing State compliance with Convention obligations

a the accession process;
b monitoring/reviewing State practice;
c frequency and form of Special Commissions.

(6) Miscellaneous and general

a the role of the Permanent Bureau;
b the International Child Abduction Database (INCADAT);
c judicial (and other) training and networking;

d encouraging further ratifications and accessions;
e non-Hague States and bilateral arrangements.

PREPARATIONS FOR THE SPECIAL COMMISSION

6 The Special Commission is likely to be well attended. With sixty States Parties to the Convention and a high level of interest in the Special Commission, the number of participants will probably be well in excess of the approximately 125 who attended the Special Commission of 1997. Discussion will need to be carefully structured. As far as possible the description of existing State practice will need to be obtained in writing and circulated in advance of the Special Commission so that discussion within the Commission itself may focus on policy and possible recommendations. In addition to the gathering of statistical information (see Annex 1), the Permanent Bureau will be addressing to the States Parties well in advance of the Special Commission two requests for information. The first will seek a description of current practices in relation to the Agenda items, as well as the principal difficulties being encountered in
the operation of the Convention. The second will address areas in which it appears likely that recommendations may be proposed. States will be asked to indicate those matters on which they think the Special Commission should make recommendations. Also attitudes towards a number of possible recommendations will be tested in a preliminary way.

7 The object of this exercise is to try to identify in advance of the Special Commission possible areas of agreement. Without such a preliminary testing of the water, it may be difficult in practical terms for a large Special Commission to arrive at firm recommendations on a wide range of issues within a period of one week. A report will be drawn up on the basis of the responses to the requests for information and this report will be circulated in advance of the Special Commission. Depending on the nature of the responses, it may be possible to include in that report certain draft or outline recommendations or options.

8 The Permanent Bureau is also considering the most appropriate methods by which to solicit input and opinions from non-governmental international organisations. Probably this will be done by means of a questionnaire constructed around the draft Agenda for the Special Commission, together with an invitation to comment on issues which are viewed as important by the non-governmental organisations themselves.

9 A number of conferences, colloquia and judicial seminars concerning the operation of the Convention have been or are being organised during the current year. Examples are the New York University School of Law Symposium entitled "Celebrating twenty years: the past and promise of the 1980 *Hague Convention on the Civil Aspects of International Child Abduction",* held on 25 February 2000, a seminar on the application of the *Hague Convention on the Civil Aspects of International Child Abduction*, organised by the Senate of Belgium, Brussels 29 March 2000, a judicial conference involving judges from France, Germany, the Netherlands and Italy, organised with the assistance of the Permanent Bureau of the Hague Conference, to be held in the Netherlands, 3-6 June 2000, a judicial seminar involving certain common law jurisdictions organised by the State Department of the US, to be held in Washington, DC, 18-23 September 2000. The information and ideas emerging

from these and other meetings will be of great assistance in preparing for the next Special Commission. If there are plans for other similar meetings, the Permanent Bureau would appreciate receiving information about them, and will be glad to offer what assistance it can to their organisers. **With a view to facilitating easy and widespread exchanges of information on this and other topics a special e-mail discussion list has been set up under conv28sc4@hcch.net.**

DURATION AND DATE OF THE SPECIAL COMMISSION. PARTICIPATION.

10 It is envisaged that a minimum of six days will be needed if the Special Commission is to have time to arrive at a set of agreed recommendations. The possible dates, should the Special Commission on general affairs and policy of the Conference so approve, are in March or June 2001. Which of these two dates is chosen will depend on decisions taken by the Special Commission on general affairs and policy in relation to other Conference business.

11 It will be seen from the draft Agenda that a substantial number of items (most of items 2 and 3) are connected with judicial procedures and the role of judges. This is a matter which States may wish to take into consideration when making preparations for the Special Commission, and when selecting delegates. Certainly it will be helpful to the Special Commission to have the benefit of judicial experience as well as the input of persons who have responsibility for policy with regard to court organisation, practice and procedure, including enforcement procedures.

12 It has been suggested informally to the Permanent Bureau that, by way of a departure from normal practice at Special Commissions, the attendance of relevant Government Ministers, Secretaries of State or their equivalents should be foreseen during part of the proceedings. The justification for this is the high degree of interest in the outcome of the Special Commission which exists at the political level and the importance of securing a commitment at the highest level to implement the recommendations which emerge from the Special Commission. If there appears to be broad support for this idea, arrangements will be made to issue appropriate invitations, probably for the final day of the Special Commission.

ANNEXES

ANNEXE 1 – Texte soumis au symposium de New York

ANNEXE 2 – Le projet de La Haye sur la coopération internationale et la protection des enfants – aperçu des objectifs

ANNEXE 3 – La base de données sur l'enlèvement international d'enfants de la Conférence de La Haye de droit international privé

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ANNEX 1 – Paper submitted to the New York Symposium

ANNEX 2 – The Hague Project for International Co-operation and the Protection of Children - Outline of objectives

ANNEX 3 – The Hague Conference on Private International Law - International Child Abduction Database

ANNEX 1

New York University School of Law Symposium
of 25 February 2000
on
Celebrating 20 years: the past and promise of the 1980 Hague Convention on the Civil Aspects of International Child Abduction

ACTION IN SUPPORT OF THE HAGUE CONVENTION. A VIEW FROM THE PERMANENT BUREAU

by Professor William Duncan, First Secretary
Hague Conference on Private International Law

This paper examines some current and planned activities, and some more general strategies, the objectives of which are to lend support to and improve the operation of the 1980 Hague Convention on the Civil Aspects of International Child Abduction. The perspective is from the viewpoint of the Permanent Bureau of the Hague Conference on Private International Law, and there is some concentration on initiatives in which the Bureau is involved. Nevertheless, it has to be emphasised from the outset that what success the Convention has enjoyed has been built on the combined efforts and commitment of a multitude of actors around the world – Central Authority personnel, judges, academics, lawyers and other professionals, non-governmental organisations, the victims of abduction, and many other individuals who have devoted themselves to the search for solutions to this sad human phenomenon. The contribution of the Permanent Bureau would be of little consequence in the absence of this mountainous international effort.

THE CHALLENGES

Four major areas of concern, to which the activities and strategies described in this paper are mainly addressed, may be summarised as follows. First there are the issues surrounding the way in which Convention applications are processed and decisions arrived at and enforced in particular Contracting States. The charges levelled are lack of speed and rigour in applying the Convention, as well as the over use of defences particularly under Article 13. Second, and by contrast, there is some concern that the Convention, when applied with rigour, is too drastic a remedy for some of the situations to which it has commonly come to be applied. The case particularly in point is that in which the abductor is the primary caretaker, usually a mother with joint custody, and in which the father is using the return application essentially as a means to safeguard his visitation rights. Third, the provisions of the Convention relating to visitation/access/contact (hereafter termed "contact") are generally recognised to be insufficient. Fourth, globalisation of the Convention has raised the question whether acceding States are always adequately prepared and equipped to fulfil their Convention obligations.

CASE LAW AND INCADAT

In the absence of a single court to give authoritative rulings on the interpretation of the 1980 Convention, there is the challenge of achieving a reasonable level of consistency in interpretation of the Convention by national courts in the sixty States Parties. Alternative methods of encouraging uniform interpretation have to be found. Resort to the Explanatory Report by Elisa Pérez-Vera Report in several jurisdictions has been helpful. The courts in many jurisdictions have also accepted that, in interpreting Convention terms such as "rights of custody", they should not adopt a narrow approach based on the domestic law of a particular system, but should search for an autonomous Convention meaning. Citation of foreign judgments is frequent in certain jurisdictions. Resort has even been made, as an interpretative aid, to the reports of the Special Commissions held by the Hague Conference on the operation of the Convention (all now included on the Hague Conference webiste at ~~http://www.hcch.net~~). The Permanent Bureau has also over the years played a role in spreading information about notable decisions.

A prerequisite of uniform interpretation is ready access to the many judgments which have now been delivered in the different national courts. To help fulfil this need the Permanent Bureau will be launching its international child abduction database (INCADAT) this May during the course of the Special Commission on General affairs and Policy of the Hague Conference on Private International Law. INCADAT will contain summaries in English and French, initially of about 300 leading decisions from around the world.

In the second phase of this project it is intended to increase the number of judgments held on INCADAT to embrace most of the 1500 or so judgments which are known to exist. At the same time INCADAT will be keeping up with current caselaw. The summaries of cases on INCADAT are in a standard form and are searchable by way of key concepts (such as habitual residence, rights of custody, acquiescence), or by reference to a number of fields (such as country, date, court, article of disposition, etc).[1] The summaries will be followed, wherever possible, by the full text of the judgments or judgments in their original language (see Appendix 3 for further details of INCADAT).

It is not an easy task to collect[2] and summarise caselaw from 60 jurisdictions, and the Permanent Bureau is dependent on the help given to it by Central Authorities and many individuals. The project has been an expensive one, for which the Hague Conference has no budget from its Member States. It has been decided not to require a charge for the use of INCADAT. It will be available free of charge on the Internet but voluntary contributions will be encouraged. Initial support has already been given by the Norwegian Government and certain foundations in the Netherlands. It is to be hoped that support will be forthcoming from the governments of States Parties to the Convention.

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[1] It will be possible, for example, to search for cases decided by the German or French courts between specified dates in which a concept such as habitual residence was discussed.

[2] A tribute is due to William Hilton whose website, ~~www.hiltonhouse.com~~, has for several years made available to the public many leading Hague judgments.

JUDICIAL TRAINING

Awareness among the judiciary within the Contracting States of the provisions and the underlying objectives of the 1980 Convention is one of the keys to its successful operation. Generally speaking the Convention has tended to work better where jurisdiction has been concentrated in a relatively small number of judges, who are able to develop a degree of expertise with Convention cases. A good deal of work has been done in developing training or familiarisation programmes for the judiciary on Hague matters. Apart from national judicial training programmes, several non-governmental organisations have been active. For example, the International Bar Association has organised seminars in several jurisdictions. Reunite, the English charity, has a particular interest in developing programmes for new Hague countries, and is currently planning events within the southern African region and in the Caribbean. Regional organisations have also been involved. The European Union through its TAIEX programme supports training initiatives in some of its applicant countries in Eastern Europe. Among the programmes sponsored by governments there was the important bilateral Anglo-German judicial meeting held in England in 1997, and the US State Department is to host a major conference in September of this year.

The Permanent Bureau of the Hague Conference has been involved in many of these initiatives, participating in them and sometimes assisting in their planning. An international judicial conference was organised by the Permanent Bureau, with the support of the European Union Grotius Programme, at "De Ruwenberg" in the Netherlands in the summer of 1998, which involved about 40 judges from Hague States. The Permanent Bureau will be facilitating a judicial conference involving judges from Germany, France, Italy and the Netherlands, to be held in the Netherlands in June of this year. The Permanent Bureau will be assisting in further TAIEX seminars to be held in Poland in the very near future. The Permanent Bureau is also planning for much greater judicial involvement in the next Special Commission to review the operation of the Convention (see below).

These events are of great importance. They help to spread knowledge about the Convention; they are a means of propagating good practice from one jurisdiction to another; they help to create a climate of confidence and mutual understanding between the judiciary in different countries. Sometimes the results can be very concrete. For example, one recommendation coming out of the "de Ruwenberg" seminar was for the establishment of a network of judges in Hague countries to act as points of liaison, in co-operation with their Central Authorities, between judges in other Hague jurisdictions, as well as other judges dealing with Hague cases in their own jurisdictions. This idea, intended to assist direct judicial communications between judges in different States, will, we hope, be developed further in the run up to the next Special Commission, where its feasibility and parameters are likely to be further discussed.

The Permanent Bureau would like to engage in even more activities in relation to judicial training, especially for the benefit of newly acceding States. The Hague Conference does not have a budget for activities of this kind and is therefore in the

process of raising funding under the aegis of the Hague project for international co-operation and protection of children (details of which are included in Appendix 2).

RESEARCH AND STATISTICS

Criticism and review of practice under the Convention should be based on a firm foundation of facts. There is a need to gather from all sixty Contracting States reliable and comparable basic data concerning the number and nature of cases being processed, as well as information on certain key aspects of the national procedures, particularly relating to speed and enforcement.

The Permanent Bureau has in the past collected standardised statistics, especially in the context of the Special Commissions to review the operation of the Convention, and some Central Authorities have been conscientious in continuing to provide these statistics on an annual basis in between reviews. However, receipt of statistics from some Central Authorities has been erratic, making it difficult to identify trends and make comparisons.

The Permanent Bureau is acting on two fronts to improve this situation. First, the standard forms for the annual collection of statistics from Central Authorities have been modified. In addition to seeking data relating to the number and outcome of applications, as well as the reasons for these outcomes, the new forms include questions relating to the average time in which cases decided judicially are completed and the number of cases in which enforcement problems occur. The new forms are currently being piloted and will be circulated to Central Authorities generally in the near future. It is our hope that all Central Authorities will be willing to provide the data sought on an annual basis, and that we will as a result obtain a clearer comparative picture of the operation of the Convention in the different Contracting States. Reliable data of this nature, when presented on a comparative basis, is one of the best ways of highlighting both good practices as well as deficiencies in the practices of individual States.

Secondly, the Permanent Bureau is, in co-operation with the Centre for International Family Law Studies at Cardiff Law School, University of Wales, conducting a more detailed survey among Central Authorities of all cases dealt with in the year 1999, as part of the preparation for the next Special Commission to review the operation of the Convention which is to be held in The Hague in the first part of the year 2001. The idea is to gather further and better particulars concerning the profile of the parties involved in each case and more details concerning the reasons for particular outcomes and the time taken for certain crucial stages in the application process to be completed. A report analysing this data will be drawn up by Professor Nigel Lowe, in consultation with the Permanent Bureau, for use by the next Special Commission.

The gathering of detailed statistics and data of this type imposes on Central Authorities considerable additional work. The exercise is, however, essential for the process of objective review of the Convention's operation and in helping to bring about improvements in practice. Governments should take this into account in the resourcing of their Central Authorities. And yet again it should be borne in mind that the Permanent Bureau is given no budget by its Member States or by States Parties to the Convention for this type of essential exercise.

THE NEXT SPECIAL COMMISSION

Planning is already underway for the next (the fourth) Special Commission to review the operation of the 1980 Convention, which will take place in The Hague in the first half of the year 2001. It is planned to divide the Special Commission into two parts. In the first part there will be discussion of co-operation issues mainly, but not exclusively, concerning the Central Authorities. The second part will concentrate more on the judicial process and enforcement problems. We hope to have a greater judicial involvement in this part of the Special Commission than has been the case in the three previous Special Commissions, and also to have present other officials responsible for questions of court practice and procedure. There is likely to be concentration on some of the key elements within the judicial process which have been found in practice to influence the speed and efficiency with which Hague proceedings are conducted. The agenda is likely to include discussion, for example, of the following:

- how to ensure the prompt hearing of a case following the filing of an application;
- how to tighten up appeal procedures,
- rules concerning the admission of (especially oral) evidence;
- the manner of eliciting children's views;
- the question of legal aid and assistance;
- the enforcement process.

Some more substantive issues will also obviously be discussed. Among these are the weight to be attached to the objections of children at different ages, the circumstances which justify the application of Article 13 b defences, and the interpretation of some of the key concepts, such as habitual residence, rights of custody and acquiescence.

There is likely to be a good deal of concentration on the problems associated with relocation and the issues surrounding the return of a child who has been abducted by the primary caretaker. In this context especially issues surrounding direct judicial communication will fall to be discussed. Our hope is that, with careful preparation, the Special Commission will be able to arrive at a series of firm recommendations, especially on questions of practice and procedure – not quite a protocol, but a set of principles of good practice which will carry great weight.

ABDUCTION BY THE CHILD'S PRIMARY CARETAKER

Every legal instrument operates in a changing environment. A major challenge faced by the 1980 Convention has been the change in the typical abduction situation. The stereo-typical case envisaged when the Convention was drafted was abduction by the non-custodial father; in many jurisdictions the more common case is now abduction by a mother who is the primary caretaker, in circumstances where she enjoys joint custody with the father, but wishes to re-locate often to a country with which she has previously been substantially connected. This has required fresh thinking by the courts and by practitioners, especially on the problems of ensuring that the child can be returned to the habitual residence in the company of the mother under reasonably safe and secure conditions. One radical reaction to this new set of circumstances has been to question whether it is appropriate at all for the courts to employ the Convention's drastic return remedy to cases in which the applicant's principal concern may

simply be to protect contact rights. The use of the Convention in such a case, it is argued, results in a disruptive sequence of events for the child who is returned to the habitual residence only to be transferred back later following the mother's successful application for leave to relocate. On the other hand, not to apply the Convention would be to reward the abducting parent and to send a strong signal of encouragement to other custodial parents contemplating unilateral action.

Within the Convention framework there are at least two possible approaches towards resolving some of the problems involved in these cases. The first is to consider ways in which, without compromising the Convention's procedures, the parties might be encouraged to settle the issues by agreement. If it is true that the applicant father's real concern is to protect visitation rights, he may well be persuaded that agreement is a less costly and swifter alternative to a return order followed by a plenary hearing for the courts of the habitual residence. At the same time, the abducting mother may feel that her consent to contact arrangements is a small price to pay for an agreement in her favour on custody and relocation. Where such agreement is a possibility, it makes sense to provide a mechanism to encourage it, even in the context of return proceedings. With this in view, the organisation Reunite intends in the near future to conduct a pilot mediation project, in the context of Hague proceedings. It should be stressed that this will be organised in a way to avoid compromising the Hague process. Mediation will be tested not as a substitute for, but as an adjunct to, Hague proceedings.

The second approach is to concentrate on ensuring that the return of the child together with the primary caretaker occurs in safe and secure conditions and that a full hearing on the questions of custody, relocation and visitation takes place without undue delay in the State of the child's habitual residence. This involves examination of such matters as undertakings and their enforcement, mirror orders, safe harbour orders, immigration problems, judicial co-operation, as well as mechanisms for direct judicial communications. Important developments, including a great deal of innovative thinking by judges, practitioners and administrative officials, are occurring in all of these areas.

The potential role of the 1996 Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children

It is worth pointing out the valuable role which the Hague Convention of 1996 may play in this context. I will mention three points in particular.

First, the rules of the 1996 Convention on jurisdiction and enforcement in respect of measures of protection of children offer considerable help in ensuring that return of the child can take place in conditions of safety. Under the urgency provision of Article 11, a court considering a return application has jurisdiction to make orders concerning the protection of the child following return and pending the taking of necessary measures in the child's habitual residence. Such orders are recognised in other Contracting States by operation of law and are fully enforceable, including in the child's habitual residence, until such time as the authorities there have acted. Even ex parte orders, if taken on an emergency basis, are entitled to recognition in other Contracting States. (See Article 23 *c*).

Second, the 1996 Convention requires States Parties to provide a procedure for determining in advance whether a measure of protection taken in another Contracting State is or is not entitled to recognition. Under a system of recognition by operation of law, this procedure should only need to be used sparingly. It does, however, offer an additional guarantee of recognition where this is needed.

Third, the 1996 Convention makes it abundantly clear that the courts of the State in which the child has his or her habitual residence maintain a general and priority jurisdiction to take measures of protection, including the making of safe harbour orders, despite the child's temporary absence. Whether jurisdiction may exist to make a safe harbour or a mirror order in a jurisdiction in which the child is not present, has now become a matter of some practical importance. The issue is more difficult where the order is sought in a State in which the child is neither present nor has his habitual residence (as, for example, where the abducted child is returned to a State other than the habitual residence). In this case, the transfer mechanism of Articles 8 and 9 of the 1996 Convention, whereby jurisdiction may, with the agreement of the authorities of the habitual residence, be transferred to a State with which the child has a substantial connection, may prove useful. An alternative suggested in a recent English decision is for the court to exercise a kind of proleptic jurisdiction, making a conditional order which cannot become effective until the child actually enters the jurisdiction.

VISITATION/CONTACT/ACCESS

The Preamble and Article 1 of the 1980 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 links between issues of international contact and the phenomenon of abduction. It was felt that abductions might be reduced by assisting parents to gain proper access to their children. At the same time, arrangements for 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 contact.

It is important not to forget that the Convention's primary remedy provides strong support for 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) in either case. The Convention thus contains the primary sanction against the most serious abuse of rights of contact across international frontiers – the order for the return of the child if the child is unlawfully retained 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.

Article 21 of the Convention provides for application to be made to a Central Authority "to make arrangements for organising or securing the effective exercise of rights of access". Central Authorities are also bound by the Article 7 obligations of co-operation "to promote the peaceful enjoyment of access rights and the fulfilment of any

conditions to which the exercise of those rights may be subject". However, experience has shown that Chapter IV of the 1980 Convention has not always in practice provided an effective means by which rights of 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. Explicit duties on Central Authorities are lacking, and the Convention places no obligation with respect to the recognition of foreign contact orders. Thus, while Article 21 provides a basic structure and the potential for improving the effective exercise and control of international contact, its lack of specificity and the absence of provisions for enforcement have in practise in some countries reduced its effectiveness and led to differing interpretations.

This, therefore, is an area in which substantial improvements are needed. The effective protection of contact rights is not only important in terms of the child's right to maintain continuing links with both parents (see UNCRC Article 9), it is also an essential background to decisions on relocation. Put simply, fathers will be less likely to agree and courts will be less likely to permit the relocation of a custodial mother where there is no reasonable assurance that the father's visitation rights will be respected in the country to which the mother is to move.

The effective exercise of contact rights, where disagreement persists between parents, is not easy to achieve whether on the domestic or the international plane. The Council of Europe is currently engaged in drafting a Convention, which will supplement those Conventions already in existence. The strategy which it adopts is to set out uniform principles of substance, founded on the child's fundamental right to continuing contact with both parents, applicable by the authorities in all States Parties, allied to certain safeguards and guarantees designed to ensure that the terms of contact are respected, as well as an improved structure for co-operation between Central Authorities.

The role of the Hague Convention of 1996

Once again, this is an area in which the Convention of 1996 has much to offer. First it remedies the major lacuna in the 1980 Convention by providing for the recognition by operation of law, and the enforcement, of contact orders. Again, the provisions of the Convention allowing for an advance decision on recognition of a contact order may be an additional help in certain exceptional cases. In the context of relocation cases, the Convention does not provide the same kind of guarantees for the non-custodial parent as are offered under the "home State" doctrine favoured in the United States and reflected in the UCCJEA, which preserves jurisdiction in the court which has made the relocation decision. This is because of the view at The Hague that general jurisdiction in child protection should for the most part follow the habitual residence of the child. Thus, when relocation occurs and the child becomes habitually resident in the new State, the courts of that State thenceforth have jurisdiction to modify, replace or even terminate contact arrangements.

However, this is less alarming than might at first appear. First, the shift in jurisdiction does not occur in the case of abduction. Second, the order made in the "home State" is entitled to recognition by operation of law and, to be enforced, in the child's new

habitual residence until such time as the authorities there decide that change is needed. In other words, if the mother seeks to set aside or limit the father's contact rights, the court's starting point is the existence of an enforceable order in the father's favour. There is no reason why the court in which modification is sought should not apply the same safeguards against abuse as it would to a purely domestic case in which one parent is seeking to modify the terms of an existing enforceable order. Thirdly, the father has the benefit of Article 35 of the Convention which allows him, in order to obtain or maintain contact, to seek from his "home State" a preliminary finding as to his suitability to exercise access and as to the conditions on access. Such a finding must be admitted and considered by the court of the child's habitual residence before making its decision.

GLOBALISATION, NON-COMPLIANCE AND THE ROLE OF THE PERMANENT BUREAU

The pace of ratifications of and accessions to the Convention has been remarkable. Most of those States entitled to ratify the Convention have done so, and ratification by Turkey is imminent. Half of the accessions have occurred within the last five years. Considering that these include jurisdictions as far apart as South Africa, Turkmenistan, Brazil and Hong Kong, the global character of the Convention becomes apparent.

This process of globalisation has brought its own set of challenges. Ensuring that new Contracting States have the capacity to undertake Convention obligations has always been a matter of concern to the Permanent Bureau, and our advice and support has always been available to new Contracting States. Work is sometimes necessary at the very basic level of ensuring that there exists a functioning Central Authority, with known contact details and a capacity to communicate.

It is notable that existing States are more often now taking advantage of the procedure provided for by Article 38 of the Convention and, before making a declaration of acceptance, making enquiries through diplomatic channels concerning the capacity of the acceding State to fulfil its responsibilities. The question has arisen whether the Permanent Bureau should play a more active role within the Article 38 procedure by enquiring into and providing existing Contracting States with information concerning the facilities and procedures put in place by newly acceding States. There is no doubt that the Permanent Bureau could play this role if mandated to do so by States Parties. It would be relatively simple to devise a questionnaire for newly acceding States and to advise existing States Parties of the responses given or not given. This is a matter which could well be discussed at the next Special Commission to review the operation of the Convention.

Some consideration may need to be given to the effect of this kind of activity on the positive role, based on encouragement and support, which has typified the relationship between the Permanent Bureau and the Contracting States. The activities of the Permanent Bureau in helping to secure national compliance with Convention obligations have been persistent but low key, conditioned by the absence of any Convention mandate to act in a policing role, by the lack of a budget to support this kind of work, and by some experience of achieving more by persuasion than threat. This is not to say that the Permanent Bureau remains passive when a State appears to be in breach of Convention obligations in a systematic way, whether it be through

a failure to establish a functioning Central Authority, a flaw in the implementing legislation, a mistranslation of the Convention, or in any other way. Indeed, it is regarded as a duty by the Permanent Bureau to bring such situations to the attention of the States concerned and, through diplomatic and other channels, to point to the impact on other States and on the individuals concerned who have relied on solemn obligations undertaken by States at the international level.

THE FUNCTIONS AND RESOURCES OF THE PERMANENT BUREAU

Some further observations on the role and capacities of the Permanent Bureau are pertinent. The present activities of the Permanent Bureau in supporting the 1980 Convention fall, in summary form, into the following categories:

a assisting in the maintenance of good communications between Central Authorities, by inter alia seeking and disseminating (through the Hague Conference website and other means) reliable contact data;

b giving informal advice and assistance to Central Authorities and others on matters of interpretation and procedure under the Convention;

c drawing the attention of States Parties to, and offering advice about, situations in which serious obstacles have arisen to the proper functioning of the Convention;

d offering advice and referrals in individual cases;

e advising Contracting States in relation to implementation of the Convention;

f organising and supporting training conferences and seminars for judges, Central Authority personnel and practitioners;

g gathering statistics;

h maintaining INCADAT;

i undertaking preparation and research for the regular periodic reviews of the Convention;

j the publication of a judicial newsletter as a step towards building an international judicial network;

k encouraging wider ratification of the Convention;

l preparing an *amicus curiae* brief.

None of these functions derive from a mandate in the Convention itself. They have over the years accrued to the Permanent Bureau in an almost organic way, in response to clear needs and often encouraged by the Special Commissions which meet from time to time to review the operation of the Convention. These are all activities which need to be performed by a centralised body which has the confidence of all the Contracting States. They are vital to the life of an international Convention

which lacks the centralised system of interpretation and enforcement familiar within national systems.

No annual budgetary provision is made by the Member States of the Hague Conference or the States Parties to the Convention for the performance of these functions. The annual budget of the Conference is related to a base which was established many years before the growth in activities surrounding the 1980 Convention (and, indeed, similar Conventions, such as the 1993 Convention, etc). The Permanent Bureau continues to be staffed by only four lawyers and eight administrative and secretarial staff, the same compliment as 35 years ago. With more than 30 active Conventions to monitor, in addition to the work carried out in relation to the development of new Conventions, the Permanent Bureau is stretched to the limits of its capacity. Without additional support, the Permanent Bureau will find it difficult to sustain, let alone to improve, the service which it provides in support of the 1980 Convention. Already the Permanent Bureau has itself raised independent funding to support its work with the various children's conventions, under the aegis of the Hague Project. This is an important development but it is not a solution to the longer term structural problem. The case for additional State funding for the Permanent Bureau's activities in support of the 1980 and other children's Conventions is compelling.

CONCLUDING REMARKS

The continuing process of globalisation of the Convention is a reason for extra vigilance, but it is also a source of satisfaction. It suggests that the Convention is still seen by many States as offering a balanced and practical solution to real needs. It is reassuring also that the fundamental principles and mechanisms at the core of the Convention have withstood challenges based on the provisions of national constitutions and of the UN Convention on the Rights of the Child (for example, in Australia, Argentina, Germany and Ireland). Indeed, in a very significant recent judgment of the European Court of Human Rights (Ignaccolo-Zenide v. Romania, 25 January 2000), the fundamental right of the child to contact with both parents was reaffirmed as being protected under Article 8 of the European Convention on Human Rights; the State's obligation to take positive measures to give effect to that right was underlined; and, in the case of a State Party to the Hague Convention, the court ruled that its obligations in this respect are to be interpreted in the light of that Convention. This judgment offers a strong endorsement of the Hague Convention's fundamental principles. It is also provides an important stimulus to improving the efficiency with which return orders are enforced within European States.

A thorough review of the operation of the 1980 Convention twenty years after its birth is appropriate. In carrying out such a review it is important to define carefully the criteria by which to judge the Convention's performance. Efforts to adapt the Convention to new circumstances and to improve its efficiency are certainly needed by States Parties, by Central Authorities, by judges, by practitioners by non-governmental organisations, as well as by the Permanent Bureau. At the same time, it is a mistake to attach to the Convention all the same expectations that are sometimes pinned to national legislation. Ensuring effective co-operation and uniform application at the international level is inherently more difficult and, in the absence of one overarching authority, requires action at a multitude of levels. While acknowledging the stresses and strains to which the Convention is subject, as well as its sometimes tragic failures, it is wise always to consider the broad question of whether the predicament of abducted children would be better or worse without it.

ANNEX 2

THE HAGUE PROJECT FOR INTERNATIONAL CO-OPERATION AND THE PROTECTION OF CHILDREN
OUTLINE OF OBJECTIVES

The Hague Conference on Private International Law has been a pioneer in developing systems of international co-operation, at the administrative and judicial levels, for the protection of children who are caught up in cross-frontier situations in which the person or property of the child may be at risk. The principal method used to achieve this goal is the negotiation and drafting of multilateral treaties which are called Hague Conventions. Three Conventions have been adopted by The Hague Conference specifically addressing international child abduction, intercountry adoption, and parental responsibility and measures for the protection of children: the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*; the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*; and 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*.

Traditionally, the Permanent Bureau of the Hague Conference develops and monitors Hague Conventions, assists effective communications between countries, organises Special Commissions to review the practical operation of the Conventions, and promotes knowledge of, and good practices under, the Conventions. However, much more needs to be done, especially in respect of those States which require support to enable them to meet their obligations of child protection under the Conventions.

To ameliorate this situation, the Permanent Bureau of the Hague Conference has recently launched *The Hague Project for International Co-operation and the Protection of Children*. The goal of this Project is to make information about the operation of the Conventions more easily accessible. This will be accomplished through the following planned activities.

1. The establishment of a database of judicial decisions taken under the Hague *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, to be made available on the Hague Conference website: *http:www.hcch.net*;
2. The development of training programmes for the personnel of Central and other authorities appointed to carry out responsibilities under the Conventions;
3. The convening of meetings and programmes of judicial training, for the purpose of familiarising judges with the operation of the Conventions;
4. The promotion of research into the basic operation of the Conventions, with initial emphasis on the establishment of a sound statistical basis;
5. The conducting of local and regional meetings to promote knowledge and understanding of the Hague Conventions;
6. The investigation into new or improved co-operative structures that may enhance the international protection of children, such as mediation, international placement of children outside adoption and parent/child contact.

The normal budget which is provided by the 47 Member States of the Conference does not make provision for developmental activities of this kind. The Permanent Bureau is therefore seeking supplementary funding for certain key projects which go beyond, but are closely related to, its usual activities in the field of international child protection. This Project is being created to promote better mutual understanding and communication among the judiciary of different countries, and to add to international co-operation as it takes on an increasingly global character.

ANNEX 3

THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW INTERNATIONAL CHILD ABDUCTION DATABASE

The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, is a multi-lateral treaty which seeks to protect children from the harmful effects of abduction and retention across international boundaries by providing a procedure to bring about the prompt return of these children to the country of their habitual residence.

In the late Spring of 1999 the Hague Conference on Private International Law commenced work on a database of significant case law arising out of the 1980 Hague Convention. It is the hope of the Hague Conference that this database will be freely available, and that it will serve to facilitate the uniform interpretation of the Child Abduction Convention across all of the 60 Contracting States. Judges, Central Authorities, practitioners, academics and other interested persons will be able to access the on-line database free of charge. The available information will be invaluable to those charged with making critical judicial decisions, and it will made a unique contribution to the development of mutual understanding and best practice, which is essential for the effective operation of international instruments of this kind.

All cases entered on the database will be available in a text format which may be printed or downloaded by users. In addition there will be a summary of each case. The summaries of the decisions, which will be set out on a standard form in English and French, will provide the basis for any search of the database. They will highlight the full name of the case, the date of the judgment, the judges involved, the name of the court, the level of that court, (whether first instance, appellate, or superior appellate), the States involved, the Articles of the Convention or implementing legislation referred to, and those relied on, as well as the ruling of the court. The summaries will also contain a brief synopsis of the facts of the case and of the order made. The key element of each summary will be the section dealing with the legal basis of the judgment. For ease of use, this section will be divided into fifteen different categories: Aims of the Convention, Removal and Retention, Rights of Custody, Habitual Residence, Consent, Acquiescence, Article 13(1)(b), Undertakings, Article 20, The Objections of a Child to a Return, Article 12(2), Rights of Access, Interpretation of the Convention, Role of the Central Authorities and Procedural Matters. These categories correspond with the main provisions and concepts within the Convention. Finally, the summary standard form will contain a section entitled 'References' where users will be referred to other judgments where a similar or contrasting view has been upheld and also to academic or other relevant commentaries. The summaries will be followed by the full text of the decision in its original language.

Three different levels of search will be available to users: simple, advanced and keyword search. A simple search will allow a user to identify cases by case name, level of court and requested State. The advanced level will allow a user to search by any of the sections, identified above, which are contained within the summary standard form. For example, a user might click on the 'Legal Basis' section and scroll

down to category 10 to identify all the cases where a consideration was given to the objections of a child to a return. A user may however make a more refined search by specifying only those decisions which were made by superior appellate courts, or indeed decisions where the requested State was, for example, France. Finally, users will be able to search the summaries by means of the keywords contained within level three.

It is the aim of the Permanent Bureau that phase one of the Child Abduction Database will be launched in April 2000. At this stage the Database will contain an up to date collection of the most important English, Scottish, American, French, Irish, Australian, New Zealand and Canadian decisions together with some of the leading decisions in jurisdictions such as Germany, Spain and Israel. This will amount to approximately 300 cases. Phase two, which will see the addition of further leading decisions will be completed in 2001.

The Child Abduction Database represents an innovative step in the realms of private international law. International instruments like the 1980 Convention pose considerable challenges in terms of their uniform interpretation. There exists no supra-national court to lay down on a regular basis authoritative rulings binding on State courts. Additionally, the Convention operates in a great spectrum of legal systems with differing legal cultures and a variety of approaches to legal practice and procedure. The ideal of uniformity requires as a minimum that the courts and other authorities responsible for putting the Convention into effect have ready access to reliable information about what is happening in other States. This is the need which the database is designed to fulfil and, as such, it may well offer a helpful model for use in relation to other international instruments, including other Hague Conventions.

The Permanent Bureau of the Hague Conference has been raising funds for this purpose and has already received support from the Government of Norway and from three Dutch Foundations, the Levi Lassen Foundation, VSB Fonds Den Haag en Omstreken and the Bernard van Leer Foundation. Further sources of funding are being explored in the context of the Hague Project for International Co-operation and the Protection of Children.

For more information about the Hague Conference on Private International Law, please visit ~~http://www.hcch.net~~.