

**COÛTS ET FRAIS JUDICIAIRES ET ADMINISTRATIFS, COMPRENANT ASSISTANCE
ET AIDE JURIDIQUE, EN VERTU DE LA NOUVELLE CONVENTION SUR
LE RECOUVREMENT INTERNATIONAL DES ALIMENTS ENVERS
LES ENFANTS ET D'AUTRES MEMBRES DE LA FAMILLE**

*Rapport établi par William Duncan, Secrétaire général adjoint
avec l'assistance de Caroline Harnois, Collaboratrice juridique*

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**ADMINISTRATIVE AND LEGAL COSTS AND EXPENSES UNDER THE NEW CONVENTION ON
THE INTERNATIONAL RECOVERY OF CHILD SUPPORT AND OTHER FORMS OF FAMILY
MAINTENANCE, INCLUDING LEGAL AID AND ASSISTANCE**

*Report drawn up by William Duncan, Deputy Secretary General
with the assistance of Caroline Harnois, Legal Officer*

*Document préliminaire No 10 de mai 2004
à l'intention de la Commission spéciale de juin 2004
sur le recouvrement international des aliments
envers les enfants et d'autres membres de la famille*

*Preliminary Document No 10 of May 2004
for the attention of the Special Commission of June 2004
on the International Recovery of Child Support
and other Forms of Family Maintenance*

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PART I – PREVIOUS WORKING DOCUMENTS AND REPORTS

A. *Legal Aid*

1. **Preliminary Document No 2 of January 1999**¹

- *Paragraph 15 f):*

Article 15 of the *Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations*, which concerns the provision of legal aid in recognition or enforcement proceedings, was thought to be progressive in 1972, in that it does not require the applicant to be a National of a Contracting State, and it entitles him or her to the “most extensive benefits” which the law of the State addressed knows, even though she / he was not granted complete legal aid or exemption from costs and expenses in the State of origin.² However, the provision may now be seen as somewhat limited in that it imposes no obligation on a State to provide legal aid or exemption for costs or expenses at the stage of recognition or enforcement either: (a) where the maintenance creditor had no such entitlements in the State of origin, or (b) where none is provided for by the State addressed. Given the reduced circumstances of most maintenance creditors the provision of adequate legal aid at the enforcement stage is a matter of great importance. As the Special Commission of November 1995 showed, it is not easy to reach agreement on the issues surrounding legal assistance and there is great diversity in existing practices. In those countries where legal aid is available, it may be calculated in different ways and it may be subject to different limitations. For example, when maintenance for a child is concerned, the amount of assistance may or may not be calculated solely in relation to the assets of the child.³

- *Paragraph 45(v):*

Practices regarding payment of costs and the provision of legal aid vary. Article 9 of the New York Convention lays down (1) a principle of equal treatment between claimants and residents or nationals of the State where proceedings are pending in relation to the payment of costs and charges and exemptions therefrom, (2) a requirement that claimants may not be required as aliens or non-residents to furnish a bond or provide other security for costs, and (3) a rule that fees may not be charged by the transmitting and receiving agencies. The issue of legal assistance as such is not addressed. There are different views as to the extent of the responsibilities in this regard of the transmitting and receiving agencies. A strict interpretation confines their responsibility to the free provision only of those services which they are obliged to provide under the Convention. It should be recalled in this regard that, under Article 6, the receiving agency is itself authorised, *inter alia*, to institute and prosecute an action for maintenance. There is concern among some agencies in relation to the actual and potential costs which they do or may incur under the Convention, and in relation to the unequal burdens which result from divergent State practice.

¹ 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, First Secretary, Prel. Doc. No 2 of January 1999 for the attention of the Special Commission of April 1999. Available at: < <http://www.hcch.net> > under “Work in Progress”, “Maintenance”.

² See Acts and Documents of the Twelfth Session, 1972, Tome IV, Maintenance Obligations, Explanatory Report by Michel Verwilghen, paragraph 82.

³ See General Conclusions of the Special Commission of November 1995 on the operation of the Hague Convention relating to maintenance obligations and of the New York Convention of 20 June 1956 on the Recovery Abroad of Maintenance, drawn up by the Permanent Bureau, Prel. Doc. No 10, May 1996, paragraphs 7-12.

2. Report and Conclusions of the Special Commission on Maintenance Obligations of April 1999⁴

- Part I, Section C - Legal aid and costs

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.

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.

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.

A Working Group, chaired by Mr Werner Schütz (Austria), was established to draw up suggested principles as a basis for further discussion of the issues. The Group's Working Document⁵ 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:

⁴ Report and Conclusions of the Special Commission on Maintenance Obligations of April 1999, drawn up by the Permanent Bureau. Available at: < <http://www.hcch.net> > under "Work in Progress", "Maintenance".

⁵ Work. Doc. No 5 drawn up by the delegations of Austria, Croatia, Ireland and the Netherlands.

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.*

B. *Costs and Expenses*

3. **Preliminary Document No 3 of April 2003⁶**

- *Chapter II D g) Costs*

The point has already been made that any system devised should be cost effective. There are two perspectives here. First, costs for the applicant should not be such as to inhibit use of the process. Second, the cost of services to Contracting States should not be disproportionate to their benefits in terms of achieving support for dependants and in consequence reducing burdens on taxpayers.

Cost factors have already been in part addressed in preceding paragraphs⁷ in the context of achieving a more efficient and less burdensome process, and in reducing procedural requirements to a necessary minimum. The particular question that arises here is whether the services provided by authorities in carrying out their Convention obligations should be charged for or supplied free of charge.

The United Nations Convention in Article 9.3 provides that "transmitting and receiving agencies should not charge any fees in respect of services rendered under the Convention". Article 26 of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* similarly provides that "each Central Authority should bear its own costs in applying this Convention", and it prohibits Central Authorities and other public services of Contracting States from imposing "any charges in relation to applications submitted under this Convention". However, the 1980 Convention allows a

⁶ Prel. Doc. No 3 of April 2003, Towards a New Global Instrument on the International Recovery of Child Support and Other Forms of Family Maintenance, Report drawn up by William Duncan, Deputy Secretary General, for the attention of the Special Commission of May 2003 on the International Recovery of Child Support and Other Forms of Family Maintenance. Available at: < <http://www.hcch.net> > under "Work in Progress", "Maintenance".

⁷ Paragraphs 15-50 of Prel. Doc. No 3 of April 2003.

reservation in relation to costs “resulting from the participation of legal counsel or advisors or from court proceedings”, and permits the authorities to recover certain categories of costs from an abducting parent or a parent who is preventing the exercise of rights of access.

A somewhat different approach is adopted in the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children* which, in Article 38, provides –

“1 Without prejudice to the possibility of imposing reasonable charges for the provision of services, Central Authorities and other public authorities of Contracting States shall bear their own costs in applying the provisions of this Chapter.

2 Any Contracting State may enter into agreements with one or more other Contracting States concerning the allocation of charges.”⁸

In devising an approach to the question of costs in the context of the international recovery of maintenance, the following considerations will need to be taken into account –

- ?? applicants for maintenance generally have very limited resources and even small financial barriers may inhibit use by them of services;
- ?? the question of costs is linked to the extent of the services which Contracting States will be required to make available;
- ?? if public authorities are to have access to administrative services under the Convention, to assist in the recovery of maintenance on behalf of the creditor or to recoup monies already paid to the creditor, the idea that all services should be supplied cost free may meet with some resistance;
- ?? if debtors are to have access to administrative services under the Convention to assist, for example, in obtaining a modification of an existing order, this may also have implications for the cost structure;
- ?? the possibility of making charges against the debtor for certain services or of recovering some costs from maintenance paid (*i.e.* in cases where the maintenance exceeds subsistence level) should perhaps be borne in mind;
- ?? finally, the issue of costs or administrative services is inextricably linked to the question of costs for legal services. In some countries, as has already been pointed out,⁹ the assessment and recovery of maintenance is primarily an administrative process, while in other countries it is judicial. Issues of reciprocity will arise if, in a country providing an administrative system, services are provided free of charge, while in a country relying on the judicial process equivalent legal assistance is not granted.

⁸ The Hague Convention of 1993 provides in Article 32(2) that “only costs and expenses, including reasonable professional fees of persons involved in the adoption, may be charged or paid”. The context, however, is rather different. The charging of actual costs to applicants for intercountry adoption is widely practised; the Convention’s provisions are designed to prevent the making of improper financial gains.

⁹ See above at paragraph 14.

4. Preliminary Document No 4 of April 2003¹⁰

- Chapter II, Section D) The cost issues in relation to the establishment of parentage

Among States responding to the 2002 Questionnaire, the average costs of DNA testing covering both parents and one child ranges from €300¹¹ to €1500¹² in a domestic situation. In the case of international situations there may be extra costs involved. In some States, DNA testing is paid for by the State.¹³ Generally the party against whom the finding was made will pay the costs.¹⁴ In some States, the applicant pays for the test in advance; if the test is positive the presumed parent will pay the costs of the test.¹⁵ In Australia, the party contesting parentage has to pay first; if parentage is not established *vis-à-vis* this party, the State will pay the costs of DNA testing.¹⁶ This procedure is aimed at discouraging false denials of parentage. In a few States the applicant will have to pay for the test.¹⁷ In a small number of States, the court will invite or order the parties to come to an arrangement.¹⁸ Finally, in one jurisdiction, the decision as to who will pay the costs of the test will be left to the discretion of the court.¹⁹

Except where the State covers the costs of the test,²⁰ legal aid is usually available and will cover the costs of DNA testing.²¹ In almost all the responding States the treatment of costs in relation to DNA testing is the same with regard to residents and non-residents.²² In some cases, this treatment would be available only on a reciprocity basis.²³

¹⁰ Prel. Doc. No 4 of April 2003, Parentage and International Child Support, Responses to the 2002 Questionnaire and an Analysis of the Issues, Report drawn up by Philippe Lortie, First Secretary, for the attention of the Special Commission of May 2003 on the International Recovery of Child Support and other Forms of Family Maintenance. Available at: < http://www.hcch.net/doc/maint_pd04e.pdf >

¹¹ Lowest cost according to Canada's answer to Question 18 of the 2002 Questionnaire.

¹² Highest cost according to Germany's answer to Question 18 of the 2002 Questionnaire.

¹³ This is the case in States where child support rests on an administrative process such as in Denmark, Finland and Norway. In Croatia and in the United States of America, the competent authority will support the costs with the possibility to seek reimbursement from the presumed parent if the test is positive.

¹⁴ This would include Croatia, the United States of America and also Australia, Czech Republic, Estonia, France, Japan, Panama, Romania and the United Kingdom.

¹⁵ That is the case in States such as France, Japan, Panama and the United Kingdom.

¹⁶ The Czech Republic has a similar rule, except that the presumed parent does not have to pay the costs in advance.

¹⁷ This is the rule in Chile and in New Zealand, in the latter case the rule only operates for applications under the *New York Convention of 1956 on the Recovery Abroad of Maintenance*.

¹⁸ That is the case for the Netherlands and Canada. However, in Canada the court will make an arrangement between the parties only if the parties cannot come to an understanding on their own.

¹⁹ That is the case of China (Hong Kong Special Administrative Region).

²⁰ See, *supra*, note 13.

²¹ Only the Netherlands has indicated that DNA tests would not be covered by legal aid.

²² In Croatia, France and Japan non-residents cannot benefit from legal aid. In Croatia there is a special provision on the coverage of judiciary costs by the applicant if it is a foreign national. In France legal aid is granted to French nationals, EU citizens and foreigners residing in France. Unfortunately, in their responses to Question 18 of the 2002 Questionnaire, Canada, Germany, Luxembourg, and Romania have not indicated whether there is any distinction between residents and non-residents in this matter.

²³ Finland, the Slovak Republic and the United States of America provide for such reciprocity in bilateral arrangements.

- Chapter V, Section B) Paragraph 45 and Section D) Paragraph 52

Finally, a co-operation provision could be included to the effect that residents and non-residents should be treated equally, either on a reciprocal basis or not, with regard to the use of DNA testing and the treatment of its associated costs.

5. Preliminary Document No 7 of April 2004²⁴

- Article 25 - Administrative costs²⁵

[The provision of assistance under the Convention shall be without cost to the applicant, except as provided in Articles ???.²⁶]

The provision of assistance under the Convention by one Central Authority shall be without cost to any other Central Authority, except as provided in Articles ???.²⁷

²⁴ Working Draft of a Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, prepared by the Drafting Committee, which met at The Hague from 12-16 January 2004, Prel. Doc. No 7 of April 2004 for the attention of the Special Commission of June 2004 on the International Recovery of Child Support and other Forms of Family Maintenance. Available at: < <http://www.hcch.net> > under "Work in Progress", "Maintenance".

²⁵ This does not concern the issue of legal aid, which remains to be considered.

²⁶ This is a statement of a general principle (see Working Document No 1, paragraph 9a) (i)) to which there are likely to be several exceptions. Possible exceptions include:

- Recovery of costs from the maintenance debtor
- Charges in respect of public authorities seeking reimbursement
- Charges for cases other than child-support
- Charges for specific services such as assistance in establishing parentage
- Special arrangements on a bilateral or regional basis

See Work. Doc. No 1, paragraph 9 a) and c).

Among the questions of principle which remain outstanding are:

- Should the services be provided free of charge in all cases?
- Should services be provided free of charge at least in child support cases?
- Should provision of services be mandatory in all cases, but subject to the possibility of charges being made?
- Should provision of services be mandatory in child support cases, but subject to the possibility of charges being made?
- Should a differentiation be made between the debtor and the creditor as an applicant?
- Should any means test be based on the means of the parent or the child?
- Should any means test be based on the law of the requested State or of the requesting State?

See Work. Doc. No 1, paragraph 9.

²⁷ See Work. Doc. No 1, paragraph 9 a). There may be a need to provide for bilateral or regional arrangements.

PART II – RESPONSES TO THE QUESTIONNAIRES²⁸

A. *Principal eligibility requirements*

(a) *Eligibility *ratione personae**

6. In most cases, legal aid is only granted in respect of proceedings in the State's own territory. Individuals involved in a dispute in a State other than their own, need therefore to look to that State for legal aid. However, some States attach nationality or residence requirements to legal aid, or require applicants to be present on their territory which will lead to the situation where persons in cross-border disputes may find themselves not entitled to legal aid in their state of nationality or habitual residence, nor in the foreign state.

7. According to the responses to the Questionnaires, different criteria may apply to the resident claimant for child support and the claimant for child support residing abroad. Also, among these categories, answers will vary whether the maintenance process is judicial, administrative, or hybrid.

(i) *Resident claimant for child support*

8. In countries where the process is totally administrative, legal aid is often considered as unnecessary since it is the public responsibility to determine and enforce child support and full administrative assistance and advice are provided to the resident claimant (e.g. Norway, Denmark). Similarly, in some States a child is theoretically speaking eligible to legal aid only under special circumstances or for special reasons. However, this can be explained by the fact that a child who is eligible for maintenance can usually also obtain payment from the Social Insurance Office which also provides administrative assistance. Legal aid can therefore be perceived as unnecessary (e.g. Sweden). In some other countries, the process is administrative in that an administrative board helps the resident claimant to conclude an agreement with the respondent. When the Parties are not able to reach such an agreement, the claimant can bring the case in front of a judge and transform the process into a judicial one (e.g. Finland). In other States, the child support scheme is administrative and non-adversarial and there is no requirement for legal representation. Public funded legal aid will therefore be available or granted only in limited circumstances when maintenance is fixed by a court rather than an institution such as a child support agency (e.g. United Kingdom - England and Wales).

²⁸ Questionnaire on Maintenance Obligations, drawn up by William Duncan, First Secretary, Prel. Doc. No 1 of November 1998 for the attention of the Special Commission of April 1999, available at: < <http://www.hcch.net> > under "Work in Progress", "Maintenance"., and Information Note and Questionnaire concerning a New Global Instrument on the International Recovery of Child Support and Other Forms of Family Maintenance, drawn up by William Duncan, Deputy Secretary General, Prel. Doc. No 1 of June 2002 for the attention of the Special Commission on Maintenance Obligations, available at: < <http://www.hcch.net> > under "Work in Progress", "Maintenance". Responses to the 1998 Questionnaire were received from 32 States, namely Australia, Austria, Belarus, Belgium, Chile, Czech Republic, Estonia, France, Finland, Germany, Hungary, Ireland, Israel, Italy, Japan, Latvia, Luxembourg, Mexico, Monaco, Morocco, Netherlands, New Zealand, Norway, Poland, Romania, Slovakia, Sri Lanka, Switzerland, Sweden, United Kingdom, England and Wales and Scotland, and United States of America. Regarding the 2002 Questionnaire, responses were received from 33 States and 3 international organisations, namely Australia, Austria, Bulgaria, Canada, Chile, China (Hong Kong Special Administrative Region), Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Israel, Japan, Luxembourg, Malta, Morocco, the Netherlands, New Zealand, Norway, Panama, Philippines, Poland, Portugal, Romania, Slovakia, Spain, Switzerland, Sweden, United Kingdom (England and Wales, and Scotland), United States of America, the Instituto Interamericano del Niño, the International Academy of Matrimonial Lawyers, and the United Nations.

9. Some other States process through both administrative and judicial channels depending on the circumstances of the case. For example, in one State, agencies provide comprehensive enforcement services to applicants for child support, including locating parents, establishing paternity and providing legal and administrative assistance services that are part of the establishment and enforcement process. However, private legal aid may also be available depending on the case (e.g. United States of America). In another country, the legal representative of the child can obtain State aid in order to recover maintenance. This aid is provided by a designated office and includes administrative assistance and legal aid in cases where the office starts the proceedings against the debtor (Switzerland). In another State, the resident claimant can receive free legal assistance and advice from the administrative authorities and, if he has insufficient economic resources, can benefit from free process support granted by the Supreme Court or the Law Faculty of the University (Panama).

10. The services offered through judicial process also vary. They usually include legal aid and advice, representation in and out of court by a private or state lawyer or a public institution. However, several other forms are also possible. In several States, the assistance consists of or includes an exemption from fees. For example, in one country, in addition to free legal assistance, the parties will be exempted from court fees in child maintenance cases. However, they will be exempt from court fees in other claims only if certain conditions are fulfilled. In another example, because public local administrative authorities have the obligation of providing child assistance for preventing situations in which security and development of children could be compromised, free legal assistance will be granted and the Prosecutor can introduce the proceedings himself (Romania). In another State, a party with insufficient financial means is exempt from the payment of judicial costs and entitled to an exemption from court fees and advance payment of the costs of witness, experts, investigators, court announcements as well as legal aid (Croatia). In another country, the court has the power to charge the advocate's fees to the State, either partially or totally, when a person is insolvent (Estonia).

11. In other cases, the assistance provided can cover a broad range of services. For example, in one country, when a parent requests it by written application, the youth welfare offices become the advisor of the resident child in asserting and disposing support claims. The appointment of the advisor has the effect that the parental custody is not restricted by support and the advisor is given the status of a curator. The advisor may hence represent the child inside and outside the court. However, the advice will no longer be provided if the child moves abroad after the support starts to apply. A child may also request legal aid in asserting support claims in accordance with general provisions. Legal aid may also be granted for the court proceeding fees (maintenance action, coercive execution proceedings) (Germany).

12. This lack of uniformity concerning the type of assistance offered at the international level is reflected also in some multi-unit countries. Answered in the Questionnaires have indicated that legal and administrative assistance varies but can include the assistance of a duty counsel or a government lawyer, legal aid, mediation, family law information centres and enforcement programs, depending on the resources available in the province where the maintenance claim is made or enforced (e.g. Canada).

(ii) *Claimant for child support residing abroad*

13. Even more disparity is found in the case of the claimant for child support living abroad. Two opposite models exist. In some countries, the same services will be offered to both resident and non-resident (e.g. Chile, Czech Republic). Sometimes, in addition to the same services, the non-resident claimant will also receive information and assistance from the Central Authority (e.g. Estonia). On the other hand, in some countries the non-resident claimant is not admitted to any kind of free assistance (e.g. Japan), or will be entitled to receive such free assistance only if the proceeding were introduced in the country in question (e.g. China - Special Administrative Region of Hong Kong). In another case, the assistance or advice will no longer be provided if the child moves abroad after the support starts to apply (Germany).

14. Between these extremes, most States make a distinction between countries with which they have a reciprocating agreement and countries with which they do not. As a general rule, a claimant residing in a State Party to the New York Convention will usually be able to receive assistance and advice and be represented free of charge in court in another State Party (e.g. as it is the case in Croatia, Luxembourg, the Netherlands, Switzerland). The same general rule applies for the countries bound by international Conventions (France) and those with reciprocating agreements (e.g. Canada, United Kingdom -Scotland, United States of America). The case will be taken in charge by the authorities of the country where the support or the enforcement is sought and the services offered will then include assistance of a duty counsel or a government lawyer (e.g. Canada) and legal aid (e.g. Canada, France). Even when a reciprocating agreement or international convention does not bind two States, some non-residents will still be entitled to assistance. For example, a non-resident but national of a State Member of the European Union will be assimilated to a resident for purposes of assistance in another European Union State.

15. Some States will offer assistance to a non-resident claimant but through different channels to those reserved for resident claimants. For example, a child residing abroad is not entitled to receive assistance from the Child or Youth Welfare but can request legal aid under general provisions and, if granted, will be represented by an attorney-in-law (e.g. Austria, Germany). This assistance will be provided to assert rights in the country where it is granted and not to assert or implement rights abroad (e.g. Germany).

16. In some States, where maintenance is dealt with through an administrative process, no distinction seems to be made between a resident and a non-resident claimant and therefore the application will be processed in the same way and subject to the same conditions and procedures (e.g. Norway, Sweden). However, in one State (Australia), international claims for maintenance are processed through the Attorney General's Department with no means test and therefore assistance is available to all parents in Australia, resident or not. In some States (e.g. the Netherlands), the foreign claimant is represented by the Central Authority and as a result, international claimants are privileged compared to nationals.

17. In another State, no distinction is made between a resident and a non-resident, rather between a national, and a non-national, and equal treatment of foreigners is subject to reciprocity (Slovakia).

18. In other countries, when no reciprocating agreement or international convention binds the countries, only a limited amount of administrative assistance (e.g. Canada) or information will be usually provided to the non-resident applicant (e.g. New Zealand).

(b) Substantive eligibility

19. In most countries it is not sufficient for an applicant to fulfil the *ratione personae* criteria in order to obtain legal aid in another State. Applicants must also prove that they are substantively eligible, namely that they meet the specific conditions of eligibility envisaged by that State's legislation, in particular with regard to their financial circumstances and the merits of the case for which legal aid is required; and that the granting of legal aid is available for the type of procedure in which they are involved.

20. There are divergences in the operation of means tests. Some States (e.g. Austria and Germany) adopt a child-centred 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.

21. For a resident applicant, the granting of legal assistance is generally subject to the means test and / or the merits test. The means test is usually based on the monthly or annual income of the parents but in some cases it is rather child centred (see above). This has the advantage of granting the child quasi automatically free legal assistance and aid. Sometimes, the property of a claimant will also be taken into consideration. A request will usually satisfy the merits test if it has sufficient chance of success and is not manifestly unreasonable.

22. In some European countries, a series of conditions is applicable. An upper limit is often placed on the legal aid granted but it is possible to depart from this upper limit in exceptional cases. A condition of nationality also applies. Under this condition, the claimant has to be a national of the country where the support or enforcement is sought, a national of a Member State of the European Union or of a reciprocating country. A condition of residence is alternatively applicable. Finally, there is a merits test (France).

23. In some other States no firm limit is fixed concerning the maximum resources a claimant may have in order to be entitled to assistance. Therefore, it is the duty of the claimant to prove what property and financial situation he has (e.g. Czech Republic). In another country, the criteria is the essential well-being of an applicant or his family and therefore the assistance is granted when a party is unable to cover the costs without detriment to such well-being (Croatia). Other States require that to be eligible the claimant must be insolvent (Estonia) or indigent (Japan).

24. In the case of an applicant residing abroad, two situations usually exist. In general, the States distinguish between States Party to the New York Convention and other international Conventions or States with which they have a reciprocating agreement and the other States. When there is reciprocity, usually assistance and legal aid will be granted without any test. However, some countries will add a condition even when there is reciprocity. For example, authorities in reciprocating countries will be required to provide a certificate of entitlement stating that a claimant is qualified for complete or partial legal aid or exemption from costs in proceedings. In this case, the certificate is

necessary in order for him to receive free assistance in the country where the claim or the enforcement is sought with no inquiry to his financial situation and no need to pay any contribution (*e.g.* United Kingdom - Scotland). In cases where there is no reciprocity, non-residents are usually entitled to receive legal aid and assistance under the general rules of the internal law and subject to the means and merits test.

25. It emerges from the responses to the Questionnaire that financial thresholds applied by most of the States to determine whether applicants qualify for legal aid do not take into account the differences of income levels between the different States. Consequently, an applicant residing in a State in which the cost of living is higher than in the state where the procedure is to take place may be deterred from instituting cross-border litigation for fear that he will not be eligible for legal aid in this other State. One possible solution is that of developing a means-test centred on the child situation, such as in Austria. This has the advantage of granting the child quasi automatically free legal assistance and aid.

- (c) Are the rules and procedures concerning legal or administrative aid or assistance different for applications for maintenance for a spouse or other family member?

26. The rules and procedures applicable to applications for maintenance will usually be the same for child, spouse and other members of the family. However, children will sometimes benefit from special provisions on protection and interests of children that provide them with more advantageous treatment.

27. In some States, administrative assistance will be provided free of charge by institutions or organs, such as the Centre for International Legal Protection of Children and Youth (Slovakia), the Child Support Agency (United Kingdom – England and Wales) or the State Child Support Agency (United States of America), which deal only with applications for children. In some other States, an administrative organ such as a welfare centre will institute on behalf of the child a request for establishing or modifying the maintenance obligation if the child lives with a third person or with a parent who does not exercise the right for unjustified reasons (*e.g.* Croatia). These institutions do not usually have an equivalent for the spouse or the other family members.

28. In other States, while there is no cost for the determination of child maintenance since these cases are being dealt with through an administrative procedure, the parties will have to pay their costs, their attorney and sometimes the other party's attorney when contesting the obligation of paying spousal maintenance after the divorce (*e.g.* Denmark). Another advantage for a child or his parents will sometimes be exemption from paying fees, such as the court fees, in claims for child support (*e.g.* Slovakia). Once again, these advantages are not always available for the spouse or the other family members.

29. In the States where the members of the family other than the children and spouses are allowed to claim support, they will usually have the possibility to do so following the same rules and procedures as in child and spouse maintenance cases. However, some States limit the possibility of assistance to judicial assistance to a claimant residing in a State Party to the New York Convention, and within its limits (*e.g.* Switzerland).

30. In one specific country, the administrative system provides full assistance free of charge to a spouse as well as a child or his parents with the exception that there is a fee payable to the State by both parents for determination or modification of child support. However this fee does not apply in spouse support cases (Norway). From the answers to the Questionnaire, this seems to be one of the only exceptions to general rules of applying the same procedures or favouring the child.

31. It is worth noting that the Council of the European Union's new Directive 202/08/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes applies to natural persons involved in cross-border disputes with no distinction between children, spouses or other family members.

PART III – EXISTING INSTRUMENTS

32. *Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations*

- *Article 15*

A maintenance creditor, who, in the State of origin, has benefited from complete or partial legal aid or exemption from costs or expenses, shall be entitled, in any proceedings for recognition or enforcement, to benefit from the most favourable legal aid or the most extensive exemption from costs or expenses provided for by the law of the State addressed.

- *Article 16*

No security, bond or deposit, however described, shall be required to guarantee the payment of costs and expenses in the proceedings to which the Convention refers.

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

- *Article 26*

Each Central Authority shall bear its own costs in applying this Convention.

Central Authorities and other public services of Contracting States shall not impose any charges in relation to applications submitted under this Convention. In particular, they may not require any payment from the applicant towards the costs and expenses of the proceedings or, where applicable, those arising from the participation of legal counsel or advisers. However, they may require the payment of the expenses incurred or to be incurred in implementing the return of the child.

However, a Contracting State may, by making a reservation in accordance with Article 42, declare that it shall not be bound to assume any costs referred to in the preceding paragraph resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.

(...)

34. ***Hague Convention of 25 October 1980 on International Access to Justice***

- *Article 1*

Nationals of any Contracting State and persons habitually resident in any Contracting State shall be entitled to legal aid for court proceedings in civil and commercial matters in each Contracting State on the same conditions as if they themselves were nationals of and habitually resident in that State.

Persons to whom paragraph 1 does not apply, but who formerly had their habitual residence in a Contracting State in which court proceedings are to be or have been commenced, shall nevertheless be entitled to legal aid as provided by paragraph 1 if the cause of action arose out of their former habitual residence in that State.

In States where legal aid is provided in administrative, social or fiscal matters, the provisions of this Article shall apply to cases brought before the courts or tribunals competent in such matters.

- *Article 2*

Article 1 shall apply to legal advice provided the person seeking advice is present in the State where advice is sought.

- *Article 3*

Each Contracting State shall designate a Central Authority to receive, and take action on, applications for legal aid submitted under this Convention.

(...)

- *Article 13*

Where legal aid has been granted in accordance with Article 1, service of documents in any other Contracting State in pursuance of the legally aided person's proceedings shall not give rise to any charges regardless of the manner in which service is effected. The same applies to Letters of Request and social enquiry reports, except for fees paid to experts and interpreters.

Where a person has received legal aid in accordance with Article 1 for proceedings in a Contracting State and a decision has been given in those proceedings, he shall, without any further examination of his circumstances, be entitled to legal aid in any other Contracting State in which he seeks to secure the recognition or enforcement of that decision.

- *Article 14*

No security, bond or deposit of any kind may be required, by reason only of their foreign nationality or of their not being domiciled or resident in the State in which proceedings are commenced, from persons (including legal persons) habitually resident in a Contracting State who are plaintiffs or parties intervening in proceedings before the courts or tribunals of another Contracting State.

The same rule shall apply to any payment required of plaintiffs or intervening parties as security for court fees.²⁹

35. ***New York Convention of 20 June 1956 on the Recovery Abroad of Maintenance***

- *Article 9 - Exemptions and facilities*

1. In proceedings under this Convention, claimants shall be accorded equal treatment and the same exemptions in the payment of costs and charges as are given to residents or nationals of the State where the proceedings are pending.

2. Claimants shall not be required, because of their status as aliens or non-residents, to furnish any bond or make any payment or deposit as security for costs or otherwise.

3. Transmitting and Receiving Agencies shall not change any fees in respect of services rendered under this Convention.

36. ***Inter-American (Montevideo) Convention of 15 July 1989 on Support Obligations***

- *Article 14*

No security of any kind may be required from the support creditor because of his foreign nationality or his domicile or habitual residence in another State.

An *in forma pauperis* waiver of court costs granted to a support creditor in the State Party where he brought his action for support shall be recognized in the State Party where recognition or enforcement is sought. The States Parties undertake to provide free legal assistance to the beneficiaries of such waivers.

37. ***Council of the European Union Directive 202/08/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes***

- *Article 1 - Aims and scope*

1. The purpose of this Directive is to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid in such disputes.

2. It shall apply, in cross-border disputes, to civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.

(...)

Article 2 - Cross-border disputes

1. For the purposes of this Directive, a cross-border dispute is one where the party applying for legal aid in the context of this Directive is domiciled or habitually resident in a Member State other than the Member State where the court is sitting or where the decision is to be enforced.

(...)

²⁹ See also Chapters III and IV of the Hague Convention of 1 March 1954 relating to Civil Procedure.

- *Article 3 - Right to legal aid*

1. Natural persons involved in a dispute covered by this Directive shall be entitled to receive appropriate legal aid in order to ensure their effective access to justice in accordance with the conditions laid down in this Directive.
2. Legal aid is considered to be appropriate when it guarantees:
 - (a) pre-litigation advice with a view to reaching a settlement prior to bringing legal proceedings;
 - (b) legal assistance and representation in court, and exemption from, or assistance with, the cost of proceedings of the recipient, including the costs referred to in Article 7 and the fees to persons mandated by the court to perform acts during the proceedings.

In Member States in which a losing party is liable for the costs of the opposing party, if the recipient loses the case, the legal aid shall cover the costs incurred by the opposing party, if it would have covered such costs had the recipient been domiciled or habitually resident in the Member State in which the court is sitting.

3. Member States need not provide legal assistance or representation in the courts or tribunals in proceedings especially designed to enable litigants to make their case in person, except when the courts or any other competent authority otherwise decide in order to ensure equality of parties or in view of the complexity of the case.
4. Member States may request that legal aid recipients pay reasonable contributions towards the costs of proceedings taking into account the conditions referred to in Article 5.
5. Member States may provide that the competent authority may decide that recipients of legal aid must refund it in whole or in part if their financial situation has substantially improved or if the decision to grant legal aid had been taken on the basis of inaccurate information given by the recipient.

Article 4 - Non-discrimination

Member States shall grant legal aid without discrimination to Union citizens and third-country nationals residing lawfully in a Member State.

Article 7 - Costs related to the cross-border nature of the dispute

Legal aid granted in the Member State in which the court is sitting shall cover the following costs directly related to the cross-border nature of the dispute:

- (a) interpretation;
- (b) translation of the documents required by the court or by the competent authority and presented by the recipient which are necessary for the resolution of the case; and
- (c) travel costs to be borne by the applicant where the physical presence of the persons concerned with the presentation of the applicant's case is required in court by the law or by the court of that Member State and the court decides that the persons concerned cannot be heard to the satisfaction of the court by any other means.

Article 9 - Continuity of legal aid

1. Legal aid shall continue to be granted totally or partially to recipients to cover expenses incurred in having a judgment enforced in the Member State where the court is sitting.
2. A recipient who in the Member State where the court is sitting has received legal aid shall receive legal aid provided for by the law of the Member State where recognition or enforcement is sought.
3. Legal aid shall continue to be available if an appeal is brought either against or by the recipient, subject to Articles 5 and 6.

(...)

38. ***United States Model Agreement for the Enforcement of Maintenance (Support) Obligations***

Article 6 - Cost of services

All procedures described in this Agreement, including services of the Central Authority, and necessary legal and administrative assistance, shall be provided by the Central Authority or other designated public body of the Requested Party without cost to the claimant. The costs of testing blood or tissue for parentage determinations shall be borne by the Central Authority or other designated public body of the Requested Party. The Central Authority or other designated public body of the Requested Party may assess costs in any proceeding against the respondent appearing in its jurisdiction.

PART IV – A POSSIBLE STRUCTURE FOR DISCUSSION

A. *General Considerations*

39. Applicants for maintenance generally have very limited resources, and even small financial barriers may inhibit use by them of the opportunities otherwise provided by the new Convention. The costs for the applicant should not be such as to inhibit the use of, or prevent effective access to, the services and procedures provided for in the Convention.

40. At the same time the Convention, if it is to be attractive to a wide range of Contracting Parties, should not be seen to impose excessive financial burdens on them. This does not mean that the provision of services under the Convention will be free of cost to Contracting Parties, but rather that the costs of providing services should not be disproportionate to the benefits in terms of achieving support for more children and other family dependants and in consequence reducing welfare budgets.

B. *Costs of services provided by Central Authorities or Intermediaries under Chapter II of the Working Draft*

41. The first general principle set out tentatively in the Working Draft³⁰ is that the provision of assistance under the Convention should be without costs to the applicant, save as expressly provided for in the Convention. (See Article 25, paragraph 1.)

In considering what exceptions there should be to this general principle, the following are some of the relevant factors:

- (i) the particular services in question;
- (ii) whether the application in question is for child support or for some other form of family maintenance;
- (iii) who is the applicant - the creditor, the debtor or a public authority;
- (iv) to what extent recovery of costs from the debtor will be permitted;
- (v) whether it will be possible for Contracting Parties to insist upon reciprocity with regard to the free provision of services.

42. Bearing these in mind, the following is a possible structure for a Convention provision:

- (a) Central Authorities, Intermediaries and other public services of Contracting Parties shall not impose any charge on an applicant for the provision of services, including the processing of applications, under the Convention.
- (b) Nothing in this Article should prevent the recovery of costs from a maintenance debtor, provided that this does not affect the capacity of the debtor to discharge his/her maintenance obligations.
- (c) A Contracting Party may, by making a declaration in accordance with Article, reserve the right to impose reasonable charges –
 - (i) for services provided at the request of a public authority (or maintenance debtor);
 - (ii) for services provided under Article 8, sub-paragraphs (yet to be determined);
 - (iii) for services provided under Article 8, sub-paragraphs (yet to be determined), except in the context of child support.
- (d) Where a Contracting Party has made such declaration, other Contracting Parties may impose reasonable charges for services on a reciprocal basis in respect of applications transmitted by the Central Authority of that Contracting Party.

Note: This formula is offered as a means of clarifying the issues and to provide a possible structure for discussion within the Special Commission.

³⁰ Prel. Doc. No 7 of April 2004, Working Draft of a Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, prepared by the Drafting Committee which met at The Hague from 12-16 January 2004, for the attention of the Special Commission of June 2004 on the International Recovery of Child Support and other Forms of Family Maintenance.

43. The second general principle set out in the Working Draft ... is that costs incurred by one Central Authority should not be charged to another Central Authority. (See Article 25, paragraph 2.)

It will need to be considered –

- (i) whether any exceptions to this general principle should be permitted, and
- (ii) whether exceptions may be provided for in bilateral or regional arrangements.

44. Finally it may need to be considered whether special rules should be developed concerning –

- (i) translation costs;
- (ii) the costs of blood or tissue testing for the purposes of determining parentage.

C. *Legal Advice, Assistance and Representation*

45. General factors to be considered in formulating a provision on legal advice, assistance and representation (apart from those already mentioned) include the following:

- (i) ensuring that applicants have effective access to the services and procedures provided for in the Convention;
- (ii) ensuring that the burdens on Contracting Parties, as well as the levels of access to services, are equivalent whether procedures are administrative or judicial in nature;
- (iii) whether special rules should apply where the applicant is a public body or a debtor;
- (iv) the application of means or merits tests;
- (v) avoidance of discrimination against overseas applicants;
- (vi) consideration of any special needs of overseas applicants arising from distance, language, etc.

46. Bearing these in mind, the following is a possible structure for a Convention provision:

- (a) Contracting Parties shall provide effective access to the procedures set out in Chapter III, including where necessary by the provision of free legal advice, assistance and representation.
- (b) Contracting Parties shall not be obliged to provide legal assistance or representation in respect of the procedures set out in Chapter III where the processes established are designed to enable the applicant to make the case in person and where the Central Authority provides such assistance as is necessary.
- (c) Contracting Parties are not obliged to provide free legal advice, assistance or representation where the applicant is a public body (or a maintenance debtor).
- (d) The provision of free legal assistance or representation may be made subject to a means or a merits test. (In the case of applications concerning child support, the means assessed should be those of the child.)
- (e) Entitlements to legal assistance or representation shall not be less than those available in equivalent domestic cases.

- (f) A creditor, who in the State of origin has benefited from complete or partial exemption from costs or expenses should be entitled, in any proceedings for recognition and enforcement, to the most extensive exemption from costs or expenses provided for by the law of the State addressed.
- (g) Applicants should not be required to furnish any bond or make any payment or deposit as security for costs or otherwise.

Note: This formula is offered as a means of clarifying the issues and to provide a possible structure for discussion within the Special Commission.

47. Further matters that may be considered include:

- (i) Should free legal aid and assistance necessarily cover:
 - interpretation costs;
 - translation of required documents;
 - travel costs where personal attendance by the applicant is required?
- (ii) Should there be a provision concerning the continuity of free legal aid and assistance in case of an appeal or where separate enforcement proceedings are necessary?