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DE DROIT INTERNATIONAL PRIVÉ

RAPPORT

SUR LA CINQUIÈME RÉUNION DE LA COMMISSION SPÉCIALE SUR LE FONCTIONNEMENT DE LA CONVENTION DE LA HAYE DU 25 OCTOBRE 1980 SUR LES ASPECTS CIVILS DE L'ENLÈVEMENT INTERNATIONAL D'ENFANTS ET LA MISE EN ŒUVRE DE LA CONVENTION DE LA HAYE DU 19 OCTOBRE 1996 CONCERNANT LA COMPÉTENCE, LA LOI APPLICABLE, LA RECONNAISSANCE, L'EXÉCUTION ET LA COOPÉRATION EN MATIÈRE DE RESPONSABILITÉ PARENTALE ET DE MESURES DE PROTECTION DES ENFANTS (30 OCTOBRE – 9 NOVEMBRE 2006)

établi par le Bureau Permanent

* * *

REPORT

ON THE FIFTH MEETING OF THE SPECIAL COMMISSION TO REVIEW THE OPERATION OF THE HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION AND THE PRACTICAL IMPLEMENTATION OF 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 (30 OCTOBER – 9 NOVEMBER 2006)

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TERMS OF REFERENCE, CHAIRMANSHIP AND REPRESENTATION

1. The Fifth meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* and to address implementation issues concerning 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* took place in The Hague from 30 October-9 November 2006.

2. Approximately 215 experts from 73 States, including Ecuador, for which the 1996 Convention entered into force on 1 November 2003, participated in the Special Commission. Fifty-six Member States of the Hague Conference, sixty-two States Parties to the 1980 Convention and 9 States Parties to the 1996 Convention attended the Special Commission. Amongst the experts, forty judges from twenty-five countries participated in the discussions. In accordance with the established practice, invitations to the Meeting were extended to observers: six non-Member States, representatives of eight intergovernmental organisations as well as representatives of thirteen non-governmental organisations were in attendance. Member States, States Parties to the Conventions, non-Member States which were invited, intergovernmental organisations and non-governmental organisations made altogether a total of ninety-four. Mr A.V.M. Struycken, President of the Netherlands Standing Government Committee on Private International Law proposed that Mrs Justice Catherine McGuinness take the Chair. Mrs Justice McGuinness was elected by acclamation. On 9 November 2006 The Secretary General informed the Commission that Mrs Justice Catherine McGuinness was unable to attend the meeting and proposed that Mr Justice Jacques Chamberland (Canada) chair the meeting. The proposal was unanimously accepted.

PRELIMINARY DOCUMENTS AND AGENDA

3. Ten Preliminary Documents had been prepared for the meeting:

Preliminary Document No 1 – Questionnaire concerning the practical operation of the Hague Convention of 25 October 1980 on the Civil Aspect of International Child Abduction;[1]

Preliminary Document No 2 – Collated responses to the Questionnaire concerning the practical operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction;[2]

Preliminary Document No 3, Part I – A statistical analysis of applications made in 2003 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction;[3]

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[1] "Questionnaire concerning the practical operation of the Hague Convention of 25 October 1980 on the Civil Aspect of International Child Abduction (Including questions on implementation of 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*)", drawn up by the Permanent Bureau, Preliminary Document No 1 of April 2006 for the attention of the Fifth meeting of the Special Commission to review the operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.

[2] "Collated responses to the Questionnaire concerning the practical operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction", Preliminary Document No 2 of October 2006 for the attention of the Fifth meeting of the Special Commission to review the operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.

[3] N. Lowe, E. Atkinson, K. Horosova and S. Patterson, "A statistical analysis of applications made in 2003 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction", Preliminary Document No 3, Part I, of October 2006 for the attention of the Fifth meeting of the Special Commission to review the operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.

Preliminary Document No 3, Part II – A statistical analysis of applications made in 2003 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. National reports;[4]

Preliminary Document No 4 – Transfrontier access / contact – General principles and good practice;[5]

Preliminary Document No 5 – Note on the development of mediation, conciliation and similar means to facilitate agreed solutions in transfrontier family disputes concerning children especially in the context of the Hague Convention of 1980;[6]

Preliminary Document No 6 – Enforcement of orders made under the 1980 Convention – A comparative legal study;[7]

Preliminary Document No 7 – Enforcement of orders made under the 1980 Convention – Towards principles of good practice;[8]

Preliminary Document No 8 – Report on judicial communications in relation to international child protection and Appendices;[9]

Preliminary Document No 9 – Report on ICHILD pilot and the development of the international child abduction statistical database, INCASTAT – Technology Systems in support of the Hague Convention of 25 October 1980;[10]

Preliminary Document No 10 – Regional Developments.[11]

4. The Agenda concerned successively the introduction to the statistical survey of 2003 cases; encouraging further ratifications / accessions and the accession process and acceptance of accessions; co-operation among Central Authorities; preventive measures;

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[4] N. Lowe, E. Atkinson, K. Horosova and S. Patterson, "A statistical analysis of applications made in 2003 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. National reports", Preliminary Document No 3, Part II, of October 2006 for the attention of the Fifth meeting of the Special Commission to review the operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.

[5] W. Duncan, "Transfrontier access / contact – General principles and good practice", Preliminary Document No 4 of October 2006 for the attention of the Fifth meeting of the Special Commission to review the operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.

[6] S. Vigers, "Note on the development of mediation, conciliation and similar means to facilitate agreed solutions in transfrontier family disputes concerning children especially in the context of the Hague Convention of 1980", Preliminary Document No 5 of October 2006 for the attention of the Fifth meeting of the Special Commission to review the operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.

[7] A. Schulz, "Enforcement of orders made under the 1980 Convention – A comparative legal study", Preliminary Document No 6 of October 2006 for the attention of the Fifth meeting of the Special Commission to review the operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.

[8] A. Schulz, "Enforcement of orders made under the 1980 Convention – Towards principles of good practice", Preliminary Document No 7 of October 2006 for the attention of the Fifth meeting of the Special Commission to review the operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.

[9] P. Lortie, "Report on judicial communications in relation to international child protection" and Appendices, Preliminary Document No 8 of October 2006 for the attention of the Fifth meeting of the Special Commission to review the operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.

[10] "Report on iChild pilot and the development of the international child abduction statistical database, INCASTAT – Technology Systems in support of the Hague Convention of 25 October 1980", drawn up by the Permanent Bureau, Preliminary Document No 9 of October 2006 for the attention of the Fifth meeting of the Special Commission to review the operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.

[11] "Regional Developments", document drawn up by the Permanent Bureau, Preliminary Document No 10 of October 2006 for the attention of the Fifth meeting of the Special Commission to review the operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.

securing voluntary outcomes / use of mediation and other techniques; enforcement of return and contacts orders; implementation of the Hague Convention of 1996; discussion of key Convention concepts; return proceedings; judicial co-operation and communications; transfrontier access / contact and relocation; securing the safe return of the child; and regional developments and relations with "non-Hague" States.

CURRENT STATUS OF THE CONVENTION

5. The Hague Convention of 25 October 1980 entered into force on 1 December 1983 and had seventy-six States Parties at the time of the Special Commission. The meeting of the Special Commission was thus the moment to celebrate the 25th anniversary of the Convention and its expanding geographical scope; it was also the place to consider the implementation of the 1996 Hague Convention on Child Protection as an important adjunct to the 1980 Convention.

INTRODUCTION TO THE STATISTICAL SURVEY OF 2003 CASES

6. The second statistical survey of the operation of the 1980 Convention (Prel. Doc. No 3) funded by the Nuffield Foundation and conducted by the Centre for International Family Law Studies at Cardiff University Law School in collaboration with the Permanent Bureau was introduced at the Special Commission by Professor Nigel Lowe. The report consisted of two parts: a global analysis and a country-by-country analysis. The report focused on 4 points: 1) the number of applications, 2) the parties involved in the abduction, 3) the outcome of the application, and 4) the length of time it took to reach the outcome.

7. Within the survey 1355 return cases and 255 access cases were examined. Attention was drawn to the fact that applications had increased by 25% between 1999 and 2003. Taking into account the increase in the number of Contracting States from 57 (in 1999) to 74 (in 2003) the overall increase was 14%.

8. The survey illustrated that in general, cases took longer to reach a conclusion, increasing on average from 84 days in 1999 to 98 days in 2003 for a voluntary return; from 107 days in 1999 to 125 days in 2003 for a judicial return; and from 147 days in 1999 to 233 days in 2003 for a judicial refusal.

9. The overall return rate was 51% (50% in 1999) and the judicial return rate was 66%. As far as access applications were concerned, 79% of respondents in 2003 were mothers, compared to 86% in 1999. Of the 55 final court orders for access recorded in 2003, 69% were determined as under the Hague Convention and 31% under the relevant domestic law. These results reflected the different interpretations of Article 21 of the 1980 Convention.

ENCOURAGING FURTHER RATIFICATIONS / ACCESSIONS AND THE ACCESSION PROCESS AND ACCEPTANCE OF ACCESSIONS

10. Three-quarters of States Parties were represented at the Special Commission and a certain number of Contracting States expressed the desire to see neighbouring States accede to the 1980 Convention. The Permanent Bureau has continued to make considerable efforts to approach non-Contracting States to encourage their accession.

11. The Permanent Bureau noted that certain States had not accepted many accessions while other States had accepted most accessions. It was emphasised that the acceptance of accessions could be facilitated for newly acceding States if these States were to

respond to the Questionnaire for newly acceding States. The Questionnaire[12] allowed existing States Parties to learn more about the newly acceding State before accepting the State's accession.

12. The specific situation of Latin American countries was explained. Many countries in the region have acceded to the Convention, though acceptance of their accession has been variable. It was noted that most of the Latin American States were acceding States. It was also noted that in July 2006, a letter was sent urging Latin American States to respond to the Questionnaire for newly acceding States.

13. Certain experts agreed that accessions and acceptances should be encouraged as a way to safeguard children's rights. Some experts mentioned that in order to accept an accession some conditions needed to be satisfied. An expert suggested accession be subject to certain criteria relating to the Central Authority's resources and the legislative means at its disposal for the effective application of the 1980 Convention. Another expert stated that her government examined accessions according to two criteria: clarity as to the designation of the Central Authority, and compatibility of domestic legislation with the 1980 Convention.

CO-OPERATION AMONG CENTRAL AUTHORITIES

Establishing and consolidating the Central Authority

14. The Special Commission was reminded that co-operation was the basis for the effective operation of the Convention.

15. The Permanent Bureau noted that some countries had designated a Central Authority but did not have the necessary implementing legislation or procedures in place and so the Convention could not operate. It was then observed that the standards for keeping the Permanent Bureau informed of current contact details of Central Authorities were not as good as they should be and that many countries had not kept their contact information up to date. The necessity of accurate contact details and the problems that could be encountered when such details were not available were successively highlighted.

16. The experts were reminded that a recommendation had been made by the 2001 Special Commission in respect of the importance of ensuring continuity and competence in Central Authority staffing. It was noted that communication problems were not confined to situations where different languages were involved. It was also mentioned that communication problems arose when there was no Central Authority designated, when the Central Authority was designated but not operational, when the Central Authority details were not correct and when Central Authority staff was not able or not available to respond to questions.

17. Several experts emphasised the importance for the functioning of the Convention of establishing Central Authorities and insisted that these should be established at the time the Convention entered into effect. An expert also mentioned the importance of the public visibility of the Central Authority and a number of experts noted its role in raising awareness of the Convention. Another expert commented that the Central Authority had a role to play in preventing abduction also, by distributing information about the Convention and encouraging families to seek advice before abduction took place. Websites were often used to fulfil this role.

18. Experts also noted the importance of international co-operation in assisting newly acceding States to fulfil their obligations and properly establish their Central Authorities.

[12] Available on the website of the Hague Conference at < www.hcch.net > under "Conventions" then "Child Abduction Convention" and "Questionnaires and responses".

Many experts noted the importance of organising seminars and meetings where Central Authorities of different countries could meet to share information and experience and to understand the practical aspects of the implementation of the Convention in other States and help to resolve conflicts or potential conflicts.

19. Many experts stressed the need for effective communication and co-operation between the internal Central Authorities and with other national authorities, such as law enforcement, child welfare organisations and particularly the judiciary, who all may have their own ideas of how best to resolve the situation.

20. Experts discussed the relationship between the Central Authority and the judiciary. The Chair noted that the independence of the judiciary was an important issue and pointed to the organisation of judicial conferences as a method of resolving this by making Judges more conscious of the need to reduce delays in these cases. She also stated that constitutional difficulties separating children and parents may need to be dealt with by changes in the law.

The processing of return applications. How to improve responsiveness of Central Authorities and the speed and efficiency with which cases are handled by Central Authorities

21. The responses to the Questionnaire (Prel. Doc. No 1) were mentioned as revealing that the lack of responsiveness, lack of speed and lack of efficiency were the major concerns for Central Authorities. The Permanent Bureau noted that it was pointless to discuss questions of responsiveness, speed and efficiency of Central Authorities if they did not have the essential resources to perform their functions.

22. The Chair noted that Central Authorities had different levels of skilled staff and resources. If the Central Authority was not able to provide legal advice, the Central Authority should ensure that the applicant had access to legal advice or to legal aid. The majority of experts agreed that the role of the requesting Central Authority was crucial in order to ensure that applications, which were transmitted, contained all the essential information. Some experts commented that the Central Authorities in their countries met personally with the applicants in order to prepare the application together. An expert noted that the requesting Central Authority also had a role to play in relation to a direct application. The Permanent Bureau then underscored the importance for the requesting Central Authorities to clarify the legal basis of an application, in particular, an explanation of the relevant law giving rights of custody to the left-behind parent.

23. Several experts mentioned Article 27 and the right of a Central Authority to reject an application, which was not well-founded. The Permanent Bureau addressed the issue of the scope of Article 27 of the Convention. It was underscored that Central Authorities could not make decisions that should be taken by courts regarding the merits of a case and recalled that Article 27 should be interpreted narrowly and that it should only be applied when it was absolutely clear that the requirements of the Convention were not met. The Chair concluded that while Article 27 afforded some discretion for requested Central Authorities, it should only be used in cases where applications were not made in good faith or where they were manifestly not well-founded.

Language issues

24. Many experts gave accounts of the language difficulties that their Central Authorities encountered in their application of the Convention.

25. The process established by Article 40 of the working draft Convention on the international recovery of child support and other forms of family maintenance was described to the Special Commission: when the translation from one less common language to another was required, Article 40 of the draft Convention permitted a translation from the language of the requesting State into English or French, and then a further translation, in the requested State, from English or French into an official language of the requested State. Some experts stated that Article 40 of the draft Convention could form a basis for co-operation between Central Authorities. One expert believed that it was too early to discuss Article 40 as that Article had not yet been adopted. Another expert expressed the opinion that the process of double translation provided for in Article 40 carried the risk of creating greater errors of translation.

26. Some experts noted that the problem more often related to questions of legal interpretation than translation. In this regard, some experts noted the difficulties encountered in interpreting the concept of rights of custody.

27. Several experts noted that not all the Central Authorities had the necessary financial resources to organise translations. One expert proposed that a recommendation be developed to remind States of their obligation under Article 24 of the Convention that it was obligatory to accept a translation in English or French if a translation into the language of the requested State was not possible and to call upon States to provide information on their laws in order to reduce the problems of legal interpretation.

Use of standardised forms

28. The Permanent Bureau recalled the importance of using standardised forms for improving co-operation and communication between Central Authorities in that they simplify and facilitate the transmission of information. The participants were referred to the form adopted by the Fourteenth Session as well as to the different standard forms in the Annexes in Part I of the Guide to Good Practice on the 1980 Convention.

29. In light of the Permanent Bureau's work on standardised forms for the draft Convention on the international recovery of child support and other forms of family maintenance, it was proposed that the Model Form be improved by using check boxes to identify certain information. The Permanent Bureau also asked the participants whether it would be appropriate for the Permanent Bureau to add to the existing categories on the Model Form. There was strong support for this proposal. Many experts indicated that their Central Authorities currently use the Model Form.

Report on and demonstration of iChild and INCASTAT

30. The Permanent Bureau indicated that Pilot I of iChild was carried out over the Internet using a central server located at the Permanent Bureau. Following concerns raised by States regarding the storage of confidential information outside their jurisdiction, Pilot II was based on software modified to work on local servers. Noting that the system currently operated in three languages (English, French, and Spanish) and included a user guide, the Permanent Bureau strongly encouraged States to examine possibilities to use the software.

31. A demonstration of iChild, highlighting both the case management component and the statistical functions of the programme was given by the Permanent Bureau. Experts from the States that participated in the pilot schemes underscored the user-friendly and useful nature of the programme, and encouraged other States to implement the system.

32. In response to questions raised by the participants, the Permanent Bureau indicated that domestic statistics may be generated in a format that is different to that used on the Permanent Bureau's forms if so requested by the State. For the consolidation and comparison of statistics, it was suggested that this would best be dealt with through the International Child Abduction Statistical Database (INCASTAT) programme. Nevertheless, it was mentioned that for cases decided under Brussels II *bis*, a separate program would be needed. The INCASTAT programme only involved cases under the 1980 Convention. Finally, the participants were assured that the Permanent Bureau did not have access to any information present on the servers, and that forms containing a State's statistical information had to be transmitted by its Central Authority.

33. It was stressed that the Permanent Bureau viewed these technical developments as a very important step in the context of all of the Hague Conventions that required co-operation between Central Authorities. With its demonstrated increase in the consistency, speed, and cost-effectiveness of co-operation, the Permanent Bureau expressed its hope for a strong endorsement of the development of iChild.

Some specific functions of Central Authorities

34. Some emphasis was put on the direct obligation on Central Authorities, imposed by the first paragraph of Article 7 of the 1980 Convention, to co-operate with each other and with their own national agencies to secure the prompt return of children.

Locating the child

35. There is an obligation under Article 7 of the 1980 Convention for Central Authorities and other bodies to take all appropriate measures to locate a child. Recommendation 1.9 of the Special Commission of 2001 addressed concerns that privacy legislation in some countries prevented disclosure of information that would assist in locating the child. The phrase "all appropriate measures" implied that assistance given by a Central Authority to locate the child would depend on the powers and resources of the Central Authority.

36. A Representative of Interpol explained the scope of Interpol's involvement in locating the child. He indicated the organisation was composed of National Central Bureaux (NCB), like Central Authorities, that liaise between themselves and with governments of States in order to communicate confidential information and solicit assistance from other States or NCBs. He explained the methods used to request the location of a missing person and the use of yellow notices. He encouraged Central Authorities to communicate with their national NCB. He also welcomed the possibility of collaboration between Interpol and the Hague Conference. Several experts praised the work of Interpol in assisting with locating children in their countries.

37. Many experts expressed the view that the Central Authority of the requesting State should provide as much information as possible, to enable the Central Authority of the requested State to locate the child quickly and more easily. Certain experts asserted that it was important to know what the Central Authorities of other States could do to assist in locating the child. Some experts expressed the desire to see other Central Authorities offering similar services to those offered by their own States.

The making of practical arrangements to facilitate the safe return of the child (the roles of the requested and requesting Central Authorities)

38. An expert drew parallels between principles set out in the Guides to Good Practice and Recommendation 1.13 of the Special Commission of 2001 and Articles 4 and 5 of the Proposal outlined in Working Document No 2,[13] emphasising the need for binding rules

[13] Working Document No 2, Proposal of the delegation of Switzerland, circulated on 27 October 2006.

and a firm commitment to ensure that Central Authorities had effective procedures and mechanisms in place to ensure a safe return occurred with efficient co-operation and follow-up.

39. While several experts recognised the concerns behind the Proposal, many were of the view that the Proposal would jeopardise the balance and mutual trust achieved by the 1980 Convention. A few experts stated that the 1980 Convention had produced a very balanced system that took into account the crucial interests of the child and the legitimate jurisdiction of the Judge of the State of the child's habitual residence, who was in the best position to have information on the situation of the child.

40. Several experts indicated misgivings regarding the Proposal. In particular, several experts were concerned that privacy and other legislation would not only prevent Central Authorities from following the situation of a child after his or her return, but also from sharing information regarding the child and the family with authorities of other States.

41. An observer opined that the matters raised in the Proposal were addressed by the 1996 Convention.

42. Several experts discussed the issue of who should ultimately bear the financial costs of returning the child. Reference was made to Article 26 of the 1980 Convention, which allowed judicial or administrative authorities to direct the person who removed or retained the child to pay necessary expenses incurred for the return of the child.

43. The Permanent Bureau offered some comments regarding financial responsibilities for the return of the child. Reference was given to the unusual example of a requested State that incurred the financial costs of returning the child. This was contrasted to the more frequent scenario where it was expected that the parties, more specifically the abducting party, would pay for the return of the child. It was also mentioned that some States sought the assistance of their Consulate where parties were unable to pay for the return of the child.

44. Several experts explained practices as requesting countries in their respective States to repatriate their children. A few experts commented that their States maintained a fund to assist parents in paying the necessary expenses for the return of the child. An expert mentioned that two companies in her State provided free transportation for the return of the child.

Facilitating the provision of legal aid or representation

45. The Permanent Bureau recalled the obligation contained in Article 7 *g)* of the Convention, and noted that the wording of that Article accommodated the different capacities of different Central Authorities. It was observed that the obligation could be fulfilled in a number of different ways and noted that some examples were given in the Guide to Good Practice. The Permanent Bureau noted the problems that arose when no substantial assistance was given, and stated that only the provision of information, and nothing more, was not really sufficient. It was added that legal aid may also be required to enforce orders. Finally, the Permanent Bureau referred to the fact that reservations to the obligation to provide legal aid could be seen as unfair to outgoing applicants when their State provided legal aid for all incoming applicants.

46. The majority of experts agreed that legal aid and representation was an extremely important issue. Some experts also highlighted the importance of ensuring that lawyers appointed to represent applicants had sufficient experience. This was acknowledged to be

a particular problem in relation to *pro bono* lawyers. Some experts referred to seminars that were organised for lawyers to provide information in respect of the Convention. Several experts noted that their Central Authority maintained a panel of lawyers or that a network of experienced Hague lawyers existed in their countries.

47. Some experts also referred to additional costs, other than representation itself, which could be incurred; thus even when a lawyer was acting on a *pro bono* basis, the application was not completely cost free. While the cost of interpreters and experts was covered by legal aid in some countries, in others countries those costs were not provided.

48. The Chair summed up the discussion by noting the importance of sharing information about the legal aid systems in various countries. She acknowledged the concerns expressed about *pro bono* lawyers and their possible lack of experience. She commented that the efforts being made in States that did not have a legal aid system to provide other services and assistance were appreciated. In particular, she felt that two less common practices in national systems were worthy of note: that of providing legal aid for outgoing applicants and that of providing legal aid to cover the costs of experts. She stated that the aim was to work towards an effective legal aid system for all involved.

Facilitating judicial communication

49. The Permanent Bureau introduced the issue of the role of the Central Authorities in facilitating judicial communication. It was noted that such communications could be of a general nature or case specific, in the latter case within the limits of the laws and procedures in force in both jurisdictions involved. It was also noted that Central Authorities could facilitate judicial communications in a number of ways. The Central Authority could provide practical tools to facilitate direct communications between judges, such as translation or interpretation services. Where needed, the Central Authority could arrange the initial contact between two judges. The Permanent Bureau observed that the relationship between judges and Central Authorities was different in the various States. It was stressed that dialogue was important both on an international and domestic level and that it was essential for all actors involved in the implementation and operation of the Convention, including Central Authorities and judges, to understand their roles, functions and limitations.

50. The Permanent Bureau commented that as Central Authorities had a communication network, which included the Special Commission meetings, it would also be useful for judges to have their own network. In this regard, the Permanent Bureau encouraged States to include judges as part of their delegations to Meetings of the Special Commission. The Recommendation of the Special Commission of 2001 was also recalled which encouraged States to appoint liaison judges. It was noted that many States had already made such appointments. The international judicial seminars provided important opportunities for judges to share good practices and difficulties encountered among themselves. It was stated that when faced with a particular case, a judge who has to respect the requirements of natural justice might only feel able to openly discuss case management issues with a peer subject to the same principles of natural justice.

51. Some experts whose countries had appointed liaison judges noted the benefits in that communication was assisted both with judges of other States and with the Central Authority. Many experts mentioned seminars for judges that were organised on both national and international levels. Experts also noted that seminars involving both Central Authorities and judicial authorities were also useful to promote good practices. Some experts also noted that concentration of jurisdiction was helpful in assisting communication as it reduced the number of partners involved in the dialogue

52. A few experts referred to some problems relating to the position of a liaison judge. These related to issues of separation of powers and democratic implications of appointing judges to the role. Other experts spoke of problems of natural justice in relation to direct judicial communications. One expert noted that the potentional problem of bias if the liaison judge was an appeal judge and was consulted on a case in a lower court that could later be appealed to his or her court.

53. The Chair acknowledged these concerns and noted that they would be dealt with under the discussion in respect of judicial communications. She noted that the principle of separation of powers could create difficulties but should not interfere with information exchange. Communications between Central Authorities and judges involved exchanging information, not imposing a course of action. She noted that one way forward was the appointment of a liaison judge by the judicial authorities themselves.

Information exchange, training and networking among Central Authorities

54. The Recommendations of the Special Commission of 2001 were recalled to the Special Commission. In respect of answers to the Questionnaire two notable issues were highlighted; one, recalling the comments that after 25 years, the Convention was no longer considered "fashionable" and governments, with new priorities, might not continue to provide the necessary resources for its effective implementation; and two, the risk of complacency about the need for maintaining ongoing information and training programmes. Regarding means of improving the networking and problem solving among Central Authorities, the Permanent Bureau recalled the Recommendations of the Special Commission of 2001 and the relevant sections of the Guide to Good Practice. The Permanent Bureau also noted the example of the teleconference calls used under the Latin American programme.

55. An expert recalled the Recommendation of the Special Commission of 2001, which stated that the Central Authorities should publish information about their legal systems on their website. She emphasised that the problem was not a lack of information but that instead the difficulty was in finding the relevant information quickly in order to respond to specific questions. She proposed the development of a form with a view to creating country profiles. The country profile would constitute a "one-stop shop" where it would be possible to consolidate all relevant information in one place. She stressed that the form attached to Working Document No 6[14] was only one possible example and invited the experts to give their comments.

56. The experts unanimously supported this proposal. Some experts felt that to be effective the form should not be too complicated.

57. The Permanent Bureau highlighted the importance of moving forward with the Recommendations of the Special Commission of 2001. The importance for countries to continue to update the information on their websites was also noted. The possibility of the Permanent Bureau including the country profiles on the Hague Conference website was also envisaged but it was added that the Permanent Bureau did not have the resources to edit the information, and could not be responsible for ensuring its accuracy. It was specified that the responsibility for updating the information would rest with the Contracting States themselves.

[14] Working Document No 6, Proposal of the delegation of Canada, circulated on 31 October 2006.

58. The teleconference organised by the Permanent Bureau for some Latin American countries was then discussed. It was stated that the countries that participated in the teleconference felt that the major obstacle to the successful operation of the Convention was the absence of a flow in communications between the Central Authorities.

59. Finally it was explained that the technology used for the teleconference was not very complicated. The Argentine Republic had generously provided the technical support. For the teleconference an agenda was drafted with a precise timetable and the model developed for iChild teleconferences was used. Additionally, a report of the meeting was composed at the end of the teleconference and sent to the participants. It was felt that teleconferencing was a useful tool that could be utilised by other States.

SECURING VOLUNTARY OUTCOMES / USE OF MEDITATION AND OTHER TECHNIQUES

60. The Permanent Bureau explained that under the 1980 Convention a large number of applications for access and return were resolved through voluntary agreements. This evolution was demonstrated in the statistical study of Mr Lowe presented in the opening session of the Special Commission, and it was noted that a great deal of work was carried out by Central Authorities, judges, and lawyers to secure voluntary solutions through a variety of methods including mediation.

61. A Consultant to the Permanent Bureau presented the Note on the development of mediation, conciliation and similar means to facilitate agreed solutions in transfrontier family disputes concerning children especially in the context of the 1980 Hague Convention (Prel. Doc. No 5). It was stressed that the Note was a very brief overview of mediation and was intended to facilitate discussion on the issue. Finally, the participants were invited to comment on three key areas: the application of mediation within the framework of the Convention; legal aspects of the mediation; and training for international mediators. There was a broad consensus on the important role of mediation in Convention cases.

Structuring mediation within the framework of the Convention

62. A significant number of participants emphasised the value of initiating mediation prior to judicial procedures or even before the submission of an application. Another expert commented that mediation which commenced after judicial proceedings were instituted was more effective, as this created the necessary pressure to speed up the mediation.

63. In view of the concerns of certain participants regarding the time limits for applications set by the Convention, several participants suggested that the time limits prescribed in the second paragraph of Article 11 of the Convention should not run based on the initiation of mediation on its own. One expert noted that it could be useful for a judge to fix a deadline for an agreement to be reached in order to ensure that mediation was quick and efficient and to ensure that parents were moving towards a workable solution.

64. Many of the participants emphasised that mediation should be considered as a complementary option alongside judicial proceedings, and not as an alternative to judicial proceedings. They underscored the importance of providing information to professionals and parents regarding the possibility of mediation, and of establishing national and international organisations to centralise mediation resources. Some experts expressed concerns that recourse to mediation should not be automatic and that its integration within the framework of the Convention should be carefully considered. Other

participants highlighted exceptional cases where mediation was not appropriate, such as cases involving domestic violence. Many participants recalled that mediation must be voluntary and short time frames must be set.

65. A representative of the European Community (Commission) explained that a Directive on mediation had been adopted by the Council of the European Union and was pending before the European Parliament. Furthermore a European Code of Conduct for Mediators, adopted in 2004, had already been adopted by approximately one hundred mediation organisations in Europe.

Legal aspects of mediation

66. Many experts insisted that confidentiality, impartiality, and independence were essential for the success of the mediation process. They also noted that mediation must take place within the limitations of the relevant legal frameworks.

67. One expert raised the question of the role of the child during mediation, highlighting that a child may have the right to be heard under the *United Nations Convention of 20 November 1989 on the Rights of the Child* should its age and maturity permit. Several experts acknowledged that the child should be heard in certain cases, but cautioned that the child should be protected and not drawn into the parental conflict.

Training for international mediators

68. One expert noted the need for professionals involved in mediation to receive on-going training, particularly with regard to the applicable legal instruments. Certain participants described their experiences with binational mediation and pointed to several important factors, including: the presence of two mediators, each speaking the mother tongue of one of the parents; the representation of both genders in the mediation team; and the presence of one jurist and one expert with a psycho-social background. The representative of the European Network on Parental Child Abduction referred to the findings in the Final Report on the Reunite Mediation Project. Their model had achieved a successful outcome in 78% of cases.

69. Some experts underscored that information technology could be very useful in the mediation process, but that the face-to-face meeting between parents at the beginning of mediation was still extremely important.

70. With regard to future possible directions for the Hague Conference and the Permanent Bureau, it was indicated that the work done in Preliminary Document No 5 would be continued in co-operation with organisations and States. Furthermore in terms of the feasibility study on cross-border mediation in family law issues which would include the possibility of an instrument on the matter, the experts were informed that the Permanent Bureau would be exploring the structures for mediation in the international sphere; legal issues such as confidentiality, enforcement; the role of the child; scope, location and relationship to jurisdiction; and practical issues. It was indicated that this study would be produced for the next meeting of the Council on General Affairs and Policy of the Conference in April 2007.

DISCUSSION OF PART III OF THE GUIDE TO GOOD PRACTICE UNDER THE 1980 CONVENTION – PREVENTIVE MEASURES

71. The Permanent Bureau briefly introduced Part III of the Guide to Good Practice, mandated by the Special Commission in 2002 and published in September 2005. Part III

of the Guide to Good Practice was based on a reference document and responses from the Questionnaire on Preventive Measures sent out in 2003.

72. A Consultant to the Permanent Bureau pointed to four important aspects of the Chapter of the Guide: its broad scope which made it useful and accessible to both Contracting and non-Contracting States; its range of different preventive measures; its structure around possible types of preventive measures, and; its practical examples drawn from existing practice. The Permanent Bureau provided a brief outline of the Guide to Good Practice on Preventive Measures, elaborating on the content of its five chapters on 1) creating a legal environment to reduce the risk of abduction; 2) preventive measures where there was a heightened risk of abduction; 3) preventive measures which reacted to the threat or risk of abduction; 4) dissemination of information; and 5) training and co-operation.

73. Certain experts noted the excellent work accomplished in Part III of the Guide to Good Practice and expressed the view that this Guide was very complete and offered several interesting practice points. An observer expressed some concern regarding the fact that Part III of the Guide to Good Practice had not been presented to and approved by a Special Commission before publication. Some experts stated that evaluation of the risk of abduction should be addressed in Part III of the Guide to Good Practice, as well as the threshold to be met to convince a judge that the implementation of preventive measures was necessary.

Standardised parental consent form for the child to travel out of the jurisdiction

74. A Consultant to the Permanent Bureau presented the idea of developing a standardised parental consent form for a child to travel out of the jurisdiction, which could facilitate travel for a child accompanied by a parent and assist border control. It was explained that the development of such a form would require the approval of a Special Commission and indicated that several States already have such a form in place. The Consultant stated that such a form would not be intended to be applicable in all circumstances, but rather could be used for short-term displacements from a State.

75. The Consultant to the Permanent Bureau indicated that this form could not require consent where it is not required by the domestic law of a State. She indicated that such a form could not be considered absolute proof that removal was lawful and the absence of such a form should not be construed as evidence of lack of consent.

76. The Consultant to the Permanent Bureau highlighted the concerns already expressed by certain States regarding possible conflicts between such a form and defences under Article 13 of the 1980 Convention, court orders allowing or prohibiting removal, existing domestic legal requirements, and consent revocations. Finally she noted the concerns that some States had expressed regarding formalities of the form and potential duress or undue influence issues that could arise with the use of such a form. The experts were then invited to comment further on the idea of developing such a form.

77. Certain experts mentioned, by way of example, that in their States both parents must consent to a passport application for a minor. One expert explained that in her country a programme existed whereby one parent may be informed if the other parent attempts to obtain a passport for the child. A few experts mentioned that in their States courts are able to limit the child's ability to travel at certain times and to certain places. Another expert added that parents may be required to produce information regarding the whereabouts of the child during these travels.

78. Generally experts were in favour of a non-mandatory standardised parental consent form for a child to travel out of the jurisdiction. However further consideration was needed of the contents, legal status and authentification of the form. Some experts mentioned that their Sates already used such a form for a child to travel out of the jurisdiction. An expert stated that airline companies in her State required parents of a child travelling with only one parent to provide written consent before a child was permitted to board the aircraft. Some experts expressed doubts regarding the usefulness of the form. Certain experts from Latin American States and from Africa pointed to the lack of border controls in their respective States, making the use of such forms futile.

79. A representative of the European Community (Commission) highlighted the difficulty in limiting movement outside national borders in the light of the fundamental freedom of movement guaranteed by the Maastricht Treaty.

80. An observer expressed concern that Part III of the Guide to Good Practice went beyond the Recommendations of the Special Commission of 2002.

81. The Consultant to the Permanent Bureau thanked experts for their instructive comments and remarked that the intention behind the idea of the standardised parental consent form for a child to travel out of the jurisdiction was not that it be binding or obligatory. The Permanent Bureau also commented that the International Civil Aviation Organisation has been consulted on this issue and transport carriers may, in the future, require consent forms from parents before transporting a child.

ENFORCEMENT OF RETURN AND CONTACT ORDERS

82. Three documents dealt with the issue of enforcement: Preliminary Documents Nos 6 and 7 and Information Document No 1. The Information Document contained a comparative empirical study on the practice in nine jurisdictions which was commissioned by the Permanent Bureau and generously sponsored by the International Centre for Missing and Exploited Children (ICMEC). The discussion was based on Preliminary Document No 7 which contained proposed principles of good practice, drawn from the two legal studies as well as conclusions and recommendations of previous meetings of the Special Commission on the operation of the 1980 Convention and judicial seminars.

The Empirical study on enforcement of return orders (Info. Doc. No 1)[15]

83. Mr Lowe (Consultant to the Permanent Bureau) introduced the empirical study on enforcement of return orders (Info. Doc. No 1) as the result of research on the practices of nine different States: Australia, England and Wales, France, Germany, the Netherlands, Romania, Slovakia, Sweden and the United States of America. He explained that the research covered civil law and common law jurisdictions, as well as new and well-established Contracting States.

84. Examples were provided of problems experienced in enforcing return orders, including the removal of the child to another country, the deliberate concealment of the child, the child's objection to travel, the use of appeals to delay enforcement, a risk to the health and welfare of the child or parent, deliberate obstruction of the travel

[15] Information Document No 1, "Enforcement of Orders under the 1980 Convention – An Empirical Study – Commissioned by the Permanent Bureau and sponsored by the International Centre for Missing and Exploited Children", by Professor Nigel Lowe, Samantha Patterson and Katarina Horosova, Centre for International Family Law Studies, Cardiff Law School, Cardiff University.

arrangements the lack of funds to finance necessary travel arrangements and administrative or judicial delays. Mr Lowe listed several different States' solutions to enforcement problems, including the placement of the child in care while a case was pending, mediation where the mediators had knowledge of the Convention, and police assisted enforcement.

85. It was noted that many enforcement problems were parent-led. Mr Lowe emphasised good practices of speed, familiarity with the 1980 Convention by key actors, effective communication and effective location powers. He remarked that preventive measures should preferably be implemented first to alleviate enforcement problems later.

86. Several points for discussion were enumerated, including the issue of when an order became enforceable; the extent to which appeals should not interrupt the enforcement process; and the ability to make *ex parte* orders for the collection and removal of children.

87. Mr Lowe noted that all the States studied had penalties for the non-compliance with return orders. He then summarised the good practices which emerged from his research: a centralised jurisdiction was more effective; it was an advantage to have expedited access to the courts; there should be an expedited procedure for appeals; judges should consider enforcement issues at every stage of the return process; judges should be very specific in their orders about the details of the return and about the responsibilities of both parents.

Enforcement of orders made under the 1980 Convention – A comparative legal study carried out by the Permanent Bureau (Prel. Doc. No 6)

88. The Permanent Bureau introduced Chapter 1 of the proposed principles and outlined the importance of available mechanisms for the protection of the child at every stage of the return process, including enforcement. Three potential coercive enforcement measures imposed were highlighted: pecuniary measures, imprisonment, and the physical removal of the child. It was noted that such measures could normally be taken in civil proceedings and sometimes, with greater delays, also in criminal proceedings.

89. The Permanent Bureau emphasised that the steps required before proceeding to coercive measures were different from one State to another and that all measures had to be ordered by a court. It was noted that proceedings progress more quickly if a court includes the potential penalty or coercive measure for non-compliance in the original return order. This limits the need to return to court for further orders. It is very important to minimise the number of steps in the enforcement process. Where it is not possible to reduce additional steps, the Permanent Bureau pointed to the need for communication to raise applicants' awareness of the required additional steps.

Enforcement of orders made under the 1980 Convention – Towards principles of good practice (Prel. Doc. No 7)

90. The Chair opened the floor to contributions from experts regarding the principles proposed in Preliminary Document No 7. Many experts considered that the 1980 Convention covered enforcement of return orders. An expert remarked that the thrust of the 1980 Convention was to bring about a return, preferably a voluntary one.

91. An expert stated that the principles from Preliminary Document No 7 should be brought to the attention of those who draft legislation. Another expert stated that in her State, coercive measures were normally not imposed on persons who did not comply

with return orders. Some experts mentioned that imposing pecuniary sanctions was ineffective. An expert expressed concern about the degree to which measures could be taken to force the return of the child. An expert asserted that care must be taken where a child refuses to leave and it was important to avoid traumatic separations.

92. A few experts explained that in their States, the judges set deadlines for a voluntary return, and on the expiration of the deadline, enforcement of a return order could be sought. An expert mentioned that in her State, the appeal period for return orders was very short.

93. Certain experts raised the issue of whether to take into consideration the changed situation of the child following a lengthy delay in enforcement of an earlier decision. One expert expressed the view that in that case, Article 13(1) *b)* of the 1980 Convention should be applied.

94. One expert noted that Principle 1.7 could present a difficulty because service was required to allow a defendant time to take steps in relation to the order. This right would be infringed upon if the order was only served at the time enforcement was to take place. The majority of experts agreed that enforcement was included in the Convention.

95. Many experts emphasised that the measures used to enforce a return order must to be carried out in a way that did not result in harm to the child. Several experts stressed the need for professionalism and training of the officers who would carry out the enforcement. Several experts noted the importance of preventing a re-abduction or the taking of the child into hiding after a return order had been made. They stated that measures to preclude this situation should be considered by the court when making the order and by other authorities involved. Many experts indicated the importance of specifying the details of the return in the order. This would include precise details of how the return was to be effected as well as what could happen if the order was not complied with.

Legal challenges available against return and contact orders or against their enforcement

96. The Permanent Bureau introduced Chapter 2 of the Proposed Principles for Good Practice (Prel. Doc. No 7). The issues in relation to concentration of jurisdiction for those enforcing the order were discussed. The Permanent Bureau warned that where there was no concentration of competence at the level of enforcement officers, it should be kept in mind that working routines which had developed between a court and the competent local enforcement officers may be different in other districts. All actors should therefore be as explicit and clear as possible in their mutual communications when preparing for enforcement. The importance of limiting the timeframe for proceedings was noted. The Permanent Bureau pointed to delays that could be caused when there were a number of challenges available to a decision and noted the benefits and drawbacks of requiring leave to appeal. It was added that this problem could be increased if it was possible to challenge the enforcement procedure separately to the decision of the merits.

97. Some experts expressed concern that the principle of imposing a timeframe on courts was not confined merely to enforcement proceedings but also referred to the entire return application. They felt that this intruded into domestic law, was not required by the Convention, and could also be seen as interfering with judicial discretion. Some experts noted that the requirements of due process should not be sacrificed for speed.

98. The Permanent Bureau responded to these concerns by noting that a careful balance had to be struck between the interests of the child in the context of a speedy

return and the rights of the parties to due process. It was stated that sometimes this issue could be dealt with in the abstract by the legislature but also noted that sometimes it could be dealt with by judges when they have the power to do so. Reference to Chapter 3 of the Proposed Principles for Good Practice (Prel. Doc. No 7) was made and problems noted that could be caused when a return order was enforced before the appeal had taken place, particularly in cases where Article 13 of the Convention was invoked, but it was also noted that every case had different requirements. The Permanent Bureau highlighted that because of these problems, the appeal needed to be heard expeditiously and so a time frame for the appeal court processing the return application was appropriate.

99. The Chair noted that it was important to have a timeframe set out, whether in legislation or in court rules, for all stages of the proceedings and not just a time limit for filing an appeal.

Enforcement and the actors involved

100. The Permanent Bureau introduced Chapter 4 of the Proposed Principles of Good Practice (Prel. Doc. No 7). It was explained that in the context of return orders, courts should be aware of the existing possibilities. They could (1) order the abducting person to return the child to the State of habitual residence, (2) order the child to be surrendered to the applicant parent or a person designated by him or her for the purpose or returning the child to that State, or (3) order for the child to be fetched by an enforcement officer who would then make the practical arrangements for returning the child. The Permanent Bureau referred to the example of States where decisions for return had a high level of compliance because the court closely involved the parties in working out the practical details of the child's return, had them agree on the practical arrangements and then incorporated those practical details into the return order. The Permanent Bureau added that a decision given on this basis had a greater chance of being complied with, and in case of actual non-compliance it would be easier to move to the "second option" mentioned in the order, or to coercive enforcement if the details were as specific as possible.

101. One expert asked if the return order had to provide that the child would be returned to his or her home of origin, or if it was enough to provide that he or she would be returned to his or her country of origin. She also questioned the possibility of judges providing conditions when they gave such an order. Many experts felt that it was necessary to take account of the best interests of the child at all times. One expert recalled that Article 13 of the Convention gave discretion to the judicial or administrative authority in cases where the interests of the child were endangered.

102. The Chair also recalled that it was the courts of the habitual residence of the child who were competent to take the necessary measures in order to ensure the protection of the child upon return.

Promoting voluntary compliance

103. The Permanent Bureau was invited to introduce Chapter 5 of the Proposed Principles of Good Practice (Prel. Doc. No 7). The Permanent Bureau highlighted that an amicable solution was the solution that was most in line with the child's best interests. Even if an amicable agreement was not found during the return proceedings and a return order was made, all the people involved, including the enforcement officers, should continue their efforts to achieve voluntary compliance. In addition, the Permanent Bureau added that in cases where circumstances suggested that it was important to include other professionals, particularly psychologists and social workers, these should be involved as early as possible. Finally, the Permanent Bureau stated that it was important to take the point of view of the child into account, and to do this as early as possible, to avoid a failure of implementation of the return order due to opposition by the child.

104. Some experts highlighted the importance of consulting the child in the context of the enforcement of return orders. Some experts felt that it was not appropriate to include psychosocial professionals in the proceedings because this carried the risk of complicating proceedings that were intended to be summary, and particularly when they did not understand the role that they were to play. One expert noted that the use of such professionals could be very expensive.

105. One expert noted that the use of the term "enforcement" was not appropriate in the context of a discussion about voluntary compliance. The Chair highlighted the importance of clearly defining the terms utilised in order to avoid misunderstandings. She recalled the question whether the term "enforcement" was appropriate when referring to voluntary compliance. She mentioned that mediation was important, because it gave a last chance for the parents to agree on the practical arrangements for the return of the child.

Co-operation and practical arrangements

106. The Permanent Bureau introduced item 6 *a)* of the Proposed Principles of Good Practice (Prel. Doc. No 7), noting that the subject matter of Principle 6.2 has already been discussed. First, with regard to Principle 6.1, it was underscored that where the system permitted, one body, either a court or a public authority, should be responsible for supervision over the process of the return of the child to ensure that the return order was effectively implemented. Second, in terms of involving other professionals in the enforcement process, the Permanent Bureau referred the participants to Principle 6.3 and emphasised the role of interpreters. Finally, the Permanent Bureau presented Principle 6.4, recalling the difficult issues that were raised in deciding whether the applicant should be present at the scene of enforcement.

107. Some participants noted that with regard to Principle 6.3, it was important to inform the professionals who might be brought in to assist in the enforcement process of the means available to them. One expert recalled that planning was crucial for the co-ordination of different professionals and that the speed of enforcement could affect the number of professionals involved.

108. In addition, some participants highlighted the importance of including, within Principle 6.4, questions regarding the preparation of a child for the return and the presence of the abductor at the scene of enforcement.

Training and education

109. With reference to Principle 7 of the Proposed Principles of Good Practice, The Permanent Bureau underscored the importance of training professionals responsible for enforcing a return order and indicated that experience had shown that the use of networking was essential for the professionals to be aware of each others' roles and experiences. The Permanent Bureau then indicated the importance of preparing professionals for the pressures that the media or lobby groups may exert at the time of enforcement. Finally, it was noted that documents such as practice guidelines could be of assistance to professionals involved in enforcement.

110. Several experts shared their experiences with the enforcement process. Certain experts highlighted the importance of on-going professional training and indicated that it is crucial for ensuring the proper implementation of the 1980 Convention.

111. Some experts cautioned that in considering the role of the media in the enforcement of a return order, it was important to balance the right of the public to be informed with the protection of the child involved. Several experts noted that when professionals were properly trained to interact with the media and provide them with

accurate information on the mechanism of the Convention, the media could play a positive role in raising public awareness.

112. The Chair concluded that it was important to take the media into consideration because proper information of the media was essential for avoiding misrepresentation by the media. She underscored that Principle 7.3 was not designed to set out details about how to manage the media, but is merely a reminder of the situations that may arise. The Chair also concluded that given the complexities surrounding the crucial issue of enforcement orders, the Special Commission should give the Permanent Bureau a mandate to develop a Guide to Good Practice based on Preliminary Document No 7. She indicated that this would be done in consultation with a group of experts.

113. The Chair's proposal of mandating the development of a Guide to Good Practice was widely supported. Several experts acknowledged that Preliminary Document No 7 provided an excellent base, but that certain points should be examined more closely or added in order to produce as complete a Guide as possible. This might include the issue of abductors who move to a third State after a final return order had been issued. The participants appreciated that the Guide to Good Practice be made in close collaboration with experts and that States would be consulted before the publication of the final document.

114. The Permanent Bureau indicated that it would take these comments into account and that it would develop written recommendations to be available before the end of the meeting. The Permanent Bureau hoped at that time a list of experts would also be available to the participants. The Permanent Bureau explained that Preliminary Document No 7 was a synthesis of extensive research by First Secretary Ms Schulz and Mr Lowe and that it would be fleshed out with numerous examples as it has been done with the other Guides to Good Practice.

115. The Chair concluded that a recommendation would be put to the meeting, recommending that the Permanent Bureau develop the Guide to Good Practice and that a list of experts who would assist the Permanent Bureau would be included.

IMPLEMENTATION OF THE HAGUE CONVENTION OF 1996

116. The Permanent Bureau provided an overview of the status of 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. Recalling that the Convention came into force in January of 2002, it was noted that there were 13 Contracting States and 18 signatory States to the Convention at the time of the Special Commission. The Permanent Bureau indicated that ratification by the remaining European Union States was imminent and that a number of those States already had implementing legislation in place. As an example of European acceptance of the main principles in the Convention, reference was made to the adoption of the Brussels II *bis* Regulation. The Permanent Bureau informed the participants that many other States were at different stages of considering implementation of the Convention.

117. The Permanent Bureau emphasised that the value of the 1996 Convention was in the combination of a legal framework with co-operation mechanisms. This combination has made the Convention very attractive in many parts of the world where the cross-border movement of children had created a pressing need for legal, non-criminal solutions. Referring to the recent Malta Judicial Conference and to Morocco's status as

the first Contracting State to the 1996 Convention, the Permanent Bureau noted the potential value of this instrument for States of Islamic tradition and for other States with complex judicial systems. Finally, the Permanent Bureau indicated that its staff is available to assist States who encounter technical difficulties related to the implementation of the Convention.

118. It was acknowledged that the 1996 Convention had a very broad scope and that this could present difficulties in terms of adopting the Convention, but the Permanent Bureau stated that it represented an advantage in that it brought together the different kinds of protection measures that a child may need. It was then underscored that the latter represents the spirit of the Convention and the Permanent Bureau reviewed the major areas where the 1996 Convention will reinforce the 1980 Convention.

119. Some experts from Member States of the European Union, as well as the Representative of the European Community (Council), highlighted the value of the 1996 Convention and indicated that it was complementary to the Brussels II *bis* Regulation. They informed the Special Commission that despite the fact that their States had not yet ratified the 1996 Convention, studies on implementation legislation were underway and, in certain cases, implementation legislation was already in place. They insisted that the delay in ratifications was not due to a lack of interest in the instrument and that the situation should be resolved shortly.

120. On this note, experts from Spain and the United Kingdom jointly stated that an agreement between their States was expected within the next few weeks regarding the issue of Gibraltar. The participants eagerly welcomed the progress of the negotiations.

121. Finally, many experts underscored their States' interest in the Convention and noted that adoption of the 1996 Convention was being studied. Several experts suggested that it would be useful if Contracting States could share their experiences in the implementation of the Convention with the States that were considering joining the 1996 Convention. One expert stated that it would be very helpful to centralise this information.

Relationship between the 1996 and 1980 Conventions

122. The Permanent Bureau reiterated the provisions of Article 50 of the 1996 Convention, which stated that the 1996 Convention did not affect the 1980 Convention, but may be invoked for the purposes of obtaining the return of a child. The Permanent Bureau explained that the 1996 Convention provided a clearer framework for jurisdiction, even for exceptional cases where return of a child was refused, or the State was not yet Party to the 1980 Convention, or return had not been requested. The Permanent Bureau stated that the 1996 Convention also ensured that custody and contact orders were recognised in all other States and provided improvements with respect to applicable law and co-operation between authorities.

123. An expert questioned whether the appointment of a guardian *ad litem* during return proceedings under the 1980 Convention was within the scope of Article 11 of the 1996 Convention, which dealt with cases of urgency, or Article 12 of the 1996 Convention, which dealt with measures of a provisional nature and was subject to Article 7 of the 1996 Convention. He also expressed concern that there were not enough precise rules regarding co-operation between authorities besides Article 34 of the 1996 Convention. He also expressed concern about the lack of specific provisions regarding measures for the protection of the child, to prepare for the child's return.

124. The Permanent Bureau explained that contact orders and the appointment of a guardian *ad litem* could be considered urgent measures within the scope of Article 11 of the 1996 Convention.

125. Several experts expressed the view that the 1996 Convention and the 1980 Convention were compatible. A few experts questioned whether Article 7 of the 1996 Convention conferred jurisdiction. An expert expressed the view that parties could not agree between themselves to the transfer of jurisdiction in an international child abduction case. Another expert was of the opposite view.

126. The Permanent Bureau responded that Article 7 of the 1996 Convention was, together with Article 5, read as conferring jurisdiction. Then, the Permanent Bureau clarified the distinction between Article 11 of the 1996 Convention, which was applied in cases of urgency, and Article 12 of the 1996 Convention, which provided for provisional measures that were subject to Section 7 of the 1996 Convention. It was explained that in principle, Article 12 of the 1996 Convention would not apply where there was no jurisdiction under Article 7, and urgency within the meaning of Article 11 would have to be assessed in the particular circumstances of each case. The Explanatory Report recognised, however, that a provisional measure falling under Article 12 could also be urgent and would then be covered by Article 11, without the restrictions of Article 7.

Relationship between the 1996 Convention and regional or federal instruments

127. A representative of the European Community (Commission), as well as another expert, provided clarification on the background and scope of the Brussels II *bis* Regulation, as well as its interaction with the 1996 Convention. They cited Articles 61 and 62 of the Brussels II *bis* Regulation, which gave the regulation supremacy over the 1980 and 1996 Conventions where a child concerned had his or her habitual residence in a Member State of the European Community.

128. The Representative of the European Community noted that Article 15 of the Regulation allowed for cases to be transferred in a manner similar to that set out in Articles 8 and 9 of the 1996 Convention. He commented that where there had been a wrongful removal or retention of a child and an order was made in the state of refuge, the Brussels II *bis* Regulation could be used to counteract the transfer of jurisdiction. He also commented that Article 7 of the 1996 Convention strengthened the respect for Article 16 of the 1980 Convention.

129. An expert questioned whether acquiescence was established under Article 7 of the 1996 Convention where there was a refusal to return a child for reasons other than those set out in Article 13 *a)* of the 1980 Convention, and parents do not avail themselves of Article 11 of Brussels II *bis*. Another expert commented that she understood the approaches set out in Article 7 of the 1996 Convention and the Brussels II *bis* Regulation as being identical and expressed reticence in transferring jurisdiction to a State other than that of the child's habitual residence.

The establishment of Central Authorities under the Convention

130. When introducing the topic of the establishment of Central Authorities under the 1996 Convention, the Permanent Bureau focussed on what differentiates them from Central Authorities established under the 1980 Convention and under the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in respect of Intercountry Adoption*. The Permanent Bureau remarked that Article 30 of Chapter V of the 1996 Convention contained the only direct obligation imposed on Central Authorities because the other articles allowed for the possibility of imposing obligations on a competent authority. The Permanent Bureau indicated that no application procedure was prescribed in Chapter V of the 1996 Convention.

131. The Permanent Bureau explained that the focus of Chapter V was on co-operation of Central Authorities and on the promotion of co-operation between different authorities

and their States. The experts' attention was driven to the flexibility in the definition of the obligations of Central Authorities which allowed States to give Central Authorities greater or lesser responsibility depending on their national structure and needs.

132. An expert remarked that the intention of the 1996 Convention was not to involve Central Authorities in all the cases.

133. Some contributions from multi-unit States and from States where there was more than one system of law were then asked by the Chair.

134. An expert explained that her State was a federal State and that the provisions of the 1996 Convention seemed appropriate to resolve problems in the international and inter-provincial context. In her State it had been determined which of the Central Authority's responsibilities were delegable and which were not. She added that there must be a single point of entry for the transmission of requests, *i.e.* a central department, which could delegate certain responsibilities. An expert highlighted that Articles 47, 48 and 49 of the 1996 Convention were of wider interest, not only to multi-unit States, but to several legal systems because it was possible, for example, that a State had to apply the law in force in one of these multi-unit States. An expert indicated that his State, which was federally organised, decided to designate a single Central Authority, which was sufficient, considering the limited role of the Central Authority under the 1996 Convention. By contrast, another expert indicated that his State had several Central Authorities, but that there was no need for a principal authority and no obligation for a principal authority under the 1996 Convention.

135. The Chair remarked that Article 29 of the 1996 Convention provided that where a State had appointed more than one Central Authority, it shall designate the Central Authority to which any communication may be addressed for transmission to the appropriate Central Authority within that State.

The practical operation of the transfer procedures in Articles 8 and 9

136. The Permanent Bureau explained that Articles 8 and 9 of the 1996 Convention introduced an exceptional transfer mechanism, whereby jurisdiction was transferred to a more appropriate forum or demanded by a more appropriate forum. There was transfer of jurisdiction only where the more appropriate authority agreed to exercise jurisdiction or to be relieved of jurisdiction in favour of a transfer of jurisdiction to another authority claiming jurisdiction. There could be no denial of justice because at least one authority was always seised. The Permanent Bureau suggested that Articles 8 and 9 of the 1996 Convention were parallel provisions. The content of Article 8 was explained and it was indicated that the two choices provided in the first paragraph were on an equal footing and were available to administrative, as well as judicial authorities.

137. Questions for experts to consider were listed: 1) Can the transfer of jurisdiction be limited in time? If so, how and by whom? 2) Can the transfer of jurisdiction be solely for certain issues in a case? 3) Can the authority of the habitual residence act on its own motion, or does it require authorisation from one of the two parties? 4) Should the subject matter of communication be limited? 5) Should a record of communication be kept on file? 6) Is it necessary to put the transfer arrangement in writing? Is it necessary to define the limits of this transfer? 7) Do parties have to be present during these exchanges between authorities? 8) Should there be a deadline to respond to a transfer application? 9) In the context of a State with more than one legal system, how can the transfer of jurisdiction be arranged effectively where two or more authorities could be called upon or seised of the matter in the other State? The Permanent Bureau remarked that these questions seemed to support the argument for putting in place implementing measures in Contracting States.

138. Concerning the question of limiting the transfer in time, an expert expressed the view that transfers of jurisdiction should actually be limited in time and to certain issues

in a case. He added that in light of its limited character, the transfer of jurisdiction could not and should not be revoked. As for the information of the parties, an expert expressed the view that parties must be informed of all the procedures undertaken by the authorities in relation to the transfer of jurisdiction. An expert mentioned that in her State, parties were always informed of all communications and their result, as well as the transfer of jurisdiction if it occurred.

139. An expert raised a question regarding the form that a transfer of jurisdiction would take, *i.e.* by letter or by decision, and she suggested that direction on this issue be provided to avoid divergent interpretations. Another expert questioned whether Articles 8 and 9 of the 1996 Convention should really be invoked in light of the urgent nature of cases involving children and the length of a procedure under Articles 8 and 9. An expert questioned whether it was possible to use Article 8(2) *d)* for a transfer of jurisdiction with regard to custody issues to the authority of the State where the child was located and which was seised of an application for return under the 1980 Convention. Another expert advocated against this idea and stated that the criteria of habitual residence must apply for abduction cases. Some experts asserted that transfer of jurisdiction should be used only in exceptional cases.

140. In relation to the definitive character of the transfer, the Permanent Bureau referred to the Lagarde Explanatory Report, which stated: "[t]he text should not therefore be understood as instituting a definitive transfer of jurisdiction to the requested authority. The transfer is limited to what is necessary 'in the particular case' which has been the occasion for it. Nothing, indeed, allows it to be affirmed in advance that under future circumstances the authority which had jurisdiction under Article 5 or 6 might not be better placed to decide in the best interests of the child."

141. Finally, an expert stated that there was no right of appeal during the transfer procedure until a decision had been reached on the merits of a case. However, he expressed the view that the party opposed to the transfer of jurisdiction should have a right of appeal. Since the procedure took time, he indicated that it would be preferable to use this mechanism only if the two parties were in agreement. An expert indicated that his State was opposed to the idea of granting a right of appeal against jurisdictional transfer decisions because such a transfer did not amount to a denial of justice, and the best interests of the child should take priority. The Chair emphasised that further thought should be given to the question of appeals.

The effect of a change of the child's habitual residence in the course of proceedings

142. The Permanent Bureau introduced the question of the effect of a change of the child's habitual residence in the course of proceedings. Reference was made to Article 5(2) and the explanation in the Explanatory Report that where there was a change of the child's habitual residence, including during legal proceedings, there would be a change of jurisdiction.

143. Some experts thought that this question should be governed by internal law. Other experts felt that Article 13 of the 1996 Convention gave competence to the court that was first seised with the case, irrespective of the change in habitual residence of the child. Other experts were of the opinion that the 1996 Convention established a new regime and gave jurisdiction to the authorities of the new habitual residence of the child. Some experts felt that it was not necessary to adopt a definite solution in the subject and that it was necessary to take into account the best interests of the child to determine what authority was the most competent to adjudicate the application.

144. The Chair recalled that case law dealing with the question did not exist yet. The Permanent Bureau stated that the responses to the Questionnaire (Prel. Doc. No 1) revealed only very few problems of interpretation with the 1996 Convention. The importance of reducing delays during an application was also recalled in as much as that

this would have the effect of reducing the number of cases where the habitual residence of the child was changed during the course of proceedings.

Other concerns relating to implementation

145. An expert raised two questions, namely (1) whether the parent who had obtained permission from the court to relocate to a new jurisdiction and who had custody of the child could apply to the authorities of the new jurisdiction to obtain a modification of the first decision; and (2) how in practice has the right of the child to be heard been implemented and dealt with in States.

146. In relation to the first question, some experts felt that it was necessary for the applicant to demonstrate the occurrence of a change in circumstances in order to justify an application to the authorities of the new jurisdiction.

147. The Permanent Bureau underlined that this question was very important and that it would be addressed within the discussion on transfrontier access / contact and relocation. It was recalled that a section of Preliminary Document No 4 was devoted to the question. The Permanent Bureau noted the importance of the judge in the new jurisdiction being reluctant to modify the original decision considering that it was made after a considered judicial process by a judge who was well placed to balance the different considerations, and in anticipation of the relocation. The Permanent Bureau noted that in a relocation case, if a judge was aware that the terms of an order would be modified or that the order would not be respected in the new country, permission to relocate might be refused.

148. In relation to the second question, the majority of experts agreed that hearing the child was of vital importance and they recalled that the child had a right to be heard under Article 12 of the *United Nations Convention on the Rights of the Child*. Some experts recalled that not providing the child with an opportunity to be heard was a ground for refusal of recognition of decision under Article 23(2) *b)* of the 1996 Convention. Various experts noted the different procedures in use to hear the child: the child could be heard directly by the judge, through a legal representative, or by another expert, for example a social worker, who would provide a report to the court. It was commented that what was important was that the child had an opportunity to express his or her view and not the method that was used to achieve this. Some experts noted that the weight to be given to the child's opinion was another difficult question and that often it was not decisive but was taken into account. An expert noted that Article 23(2) *b)* of the Convention of 1996 did not mention any consideration as to the age and maturity of the child that was to be heard.

The development of a Guide to Good Practice on Implementation of the 1996 Convention

149. The Permanent Bureau noted that the responses to the Questionnaire (Prel. Doc. No 1) were generally in favour of a Guide to Good Practice on Implementation of the 1996 Convention. The Permanent Bureau stated that a Guide at this point would however be different to the Guides that had been published in relation to the 1980 Convention as those Guides were written at a time when there was a great deal of information on practice and many examples of implementing legislation. The Permanent Bureau stated that this Guide would perhaps be more of a practical handbook rather than providing detailed answers to legal issues. The Permanent Bureau noted that this work would require more resources for the Permanent Bureau.

150. There was general support for this proposal.

151. Several experts emphasised differences between this proposed Guide and that available for the 1980 Convention, in particular the lack of practical experience and the

impossibility of adopting definitive solutions on some aspects. Some experts also noted the differences between the provisions of the two Conventions, such as in the role played by the Central Authorities and the broader application of the Convention of 1996. Although some experts commented that the proposed Guide could not be aimed towards judges and the legal issues that they have to determine, other experts suggested that judges could also find assistance in such guides.

152. A representative of the European Community (Commission) noted the success of the Guide developed to support implementation of the Brussels II *bis* Regulation and stated that this could be used to help develop the proposed Guide. He stated that the European Commission would be willing to provide assistance in the development of the proposed Guide.

153. The Permanent Bureau noted that the Guide to Good Practice under the 1980 Convention had proven useful to governments when developing implementing legislation and when determining how to set up Central Authority structures. The Permanent Bureau also noted that models and examples of how other States had implemented the Convention were often sought and that these were found useful. The Permanent Bureau recommended that they should be included, along with other practical information on how to ratify or accede to the Convention.

154. The Secretary General referred to the issue of additional resources and stated that it would be useful if a recommendation could be adopted to demonstrate the usefulness of a Guide on the 1996 Convention to present to those responsible for the budget of the Hague Conference. He also noted that the area was an ideal one for co-operation with the European Community.

DISCUSSION OF KEY CONVENTION CONCEPTS

155. The Permanent Bureau reminded participants of the recommendations, made at the 2001 meeting of this Special Commission, regarding the interpretation of the key concepts of the 1980 Convention. First, the Convention should be interpreted having regard to its autonomous nature and in light of its objects. Second, emphasis was placed on the importance of the Explanatory Report by Elisa Pérez-Vera for the interpretation of the Convention. Third, it was noted that given the narrow construction by courts in Contracting States of the "grave risk" defence in Article 13(1) *b)*, as borne out by statistical evidence presented at that meeting (Prel. Doc. No 3, March 2001), the Special Commission recommended that it was in keeping with the objectives of the Convention to interpret this defence in a restrictive fashion.

Habitual residence

156. The Permanent Bureau underscored that there was no recommendation regarding the issue of habitual residence and noted an emerging divergence in the case law concerning the weight to be attached to the shared intention of custodians about their future residence and that of the child.

157. The participants emphasised that habitual residence was a complex issue and that the divergence in current case law discussing the issue underscored that it would be helpful to provide judges with guidelines for interpretation. Several experts cautioned, however, that the idea of habitual residence in the Convention was intentionally undefined. It was a factual concept designed to accommodate the diversity of legal systems.

158. An expert noted that in the framework of the European Union Regulation Brussels II *bis*, which adopted the concept of habitual residence, the European Court of Justice may eventually render a decision on habitual residence and that this would bind the Member States of the European Union and could have persuasive value for non-Member States.

159. Many experts agreed that the use of a strict definition for habitual residence would go against the spirit of the Convention, noting that habitual residence was above all a question of fact to be decided on a case-by-case basis, and should be distinguished from the more subjective concept of domicile. They suggested that factual considerations could include indicia such as the child's schooling, the time spent in one place, the settling of the family in a certain place, and the integration of the child. Some experts pointed to the difficulty in determining the length of time that was pertinent to the establishment of a new habitual residence. Several experts indicated that this factual evaluation should include, to a certain extent, an examination of the common intent of the parents in establishing their residence. Recalling the realities of globalisation and migration, some experts noted the difficulty of applying the concept of habitual residence to cases involving illegal immigrants and asylum seekers.

160. The Chair concluded that there was wide consensus on the factual approach to habitual residence and that it had been wise of the drafters of the Convention not to define the concept. She underscored therefore that it was the role of judges to exercise their discretion on this matter.

The "grave risk" defence in Article 13(1) *b)*

161. Mr Lowe (Consultant to the Permanent Bureau) presented statistics for the use of the Article 13(1) *b)* defence for 2003. He indicated that there were 38 such cases, which represented 19% of all refusals for the return of the child and 3% of all applications for return. With regard to habitual residence, 27 cases relied on the absence of habitual residence to refuse to return the child, representing 13% of all refusals and 2% of all applications for return.

162. An expert from Switzerland presented the proposals from his State concerning the amendment of Article 13(1) *b*) of the Hague Convention of 1980. He referred the participants to Working Document No 1 at item 5, and Working Document No 2 at Article 7. The expert indicated that the proposals from Switzerland were developed following several unfortunate instances where children were returned to the requesting State despite the fact that the abducting parent could not return and the left-behind parent did not have custody of the children and was not in a position to take custody. In addition, the expert highlighted the fact that recent case law clearly links the *UN Convention of 20 November 1989 on the Rights of the Child* to the 1980 Hague Convention and that the latter Convention must therefore be applied with the best interest of the child as its main priority. The expert from Switzerland thus proposed to clarify the scope of the exception in Article 13(1) *b*) by adding a provision to the Convention that would deal with the situation where neither parent could take custody of the child in the requesting State (Work. Doc. No 2, Art. 7). He concluded that Article 13(1) *b*) was a key element of the Convention that was too seldom applied in Switzerland when it should be used to serve the best interest of the child.

163. A clear majority of experts indicated that the Swiss proposal to amend the Convention, while raising important and timely issues for debate, should not be accepted.

164. Many experts acknowledged the importance of the 1989 *UN Convention on the Rights of the Child* and underscored that it built upon the 1980 Hague Convention. They noted that the best interest of the child lay at the heart of both Conventions. They also insisted that the 1980 Hague Convention was based on the idea that it was in the best interest of the child for the child to maintain regular contact with both parents: illegal removals should therefore be discouraged and when they do occur, returns should be

effected expeditiously. These experts feared that the proposal would promote forum shopping and that it would erode the dissuasive aspect of the Convention. One expert also noted that asking a judge in a requested State to evaluate the substantive issues related to the best interest of the child would delay the process of return.

165. A majority of experts also insisted that the Article 13(1) *b*) exception should be interpreted narrowly and cautioned that the Swiss proposal created an additional ground for refusal, which would undermine the principle of comity by inviting courts in requested States to examine the best interests of the child. Some participants, however, noted that difficult situations arose in instances where the exception had been interpreted too narrowly.

166. The experts agreed that the 1980 Convention provided sufficient tools for judges to refuse the return of a child when this was necessary. They indicated that greater co-operation and exchange of information between Central Authorities and between judges should be encouraged to ensure more effective implementation of the Convention. This was especially important when a return order was issued in conjunction with protective measures by a judge in a requested State, particularly in cases of domestic violence. They also emphasised the concept of an "intolerable situation", which was included in Article 13 of the Convention to address those situations where the return of a child would not necessarily create a grave risk, but where it would still be inappropriate to order the return.

167. The Chair concluded that it was the opinion of the Special Commission that the Convention should not be changed, but that the child's interests may be affected in those cases where there was likely to be a long delay in the habitual residence country before the custody proceedings were heard. She noted that it was important to deal with cases expeditiously and urgently since it was in the best interest of the child to be returned quickly, but that effective safeguards must also be in place.

The one-year period under Article 12 of the 1980 Convention

168. An expert from Switzerland indicated that in Article 6 of Working Document No 2, it was proposed to reduce the period mentioned in Article 12 from one year to six months. He presented some situations where the time period could be more flexible, such as when the child was hidden, when the left-behind parent was not aware of the 1980 Convention, and when there was an attempt to reconcile with the abducting parent.

169. The proposal in Working Document No 2 was not accepted. The Special Commission agreed to keep the Article 12 time period of one year as it represented a good balance between the best interest of the child and the rights of the left-behind parent. Some experts added that in certain situations it might be considered that the left-behind parent had acquiesced to the removal or retention of the child before the expiration of the one-year time period.

170. One expert asked when the time period began. One observer was of the view that the time period began when the left-behind parent became aware of the location of the child. Another expert indicated that the time period began only when the petition was filed in court.

171. Mr Lowe (Consultant to the Permanent Bureau) noted that in 2003 less than 3% of all applications concerned Article 12.

RETURN PROCEEDINGS

172. The Permanent Bureau was invited by the Chair to present the issue of how to expedite proceedings and avoid delays, especially those arising from appeals. The Permanent Bureau reminded the experts of the Conclusions and Recommendations of the Special Commission of 2001 concerning speed of Hague procedures, including appeals (Conclusions 3.3 to 3.5). The Permanent Bureau referred to Mr Lowe's statistical analysis and noted that between 1999 and 2003 there was no general improvement in the processing times for applications made under the 1980 Convention.

173. An expert suggested that the application process was divided into three phases: (1) receipt and process of the application by the Central Authority; (2) judicial proceedings including appeals; (3) enforcement of the decision and the physical return of the child. He queried which phase was covered by the six-week time period. The majority of experts indicated that the six-week time period was only applicable to judicial proceedings. However some experts stated that the six-week time period should not include the appeals process. Many experts presented the judicial time periods in force in their State regarding urgent cases under the 1980 Convention.

174. The Permanent Bureau reminded the experts that the proposed principles of good practice on enforcement (Prel. Doc. No 7) contained the three suggested phases and added that speed in all phases served the best interest of the child.

175. Some experts noted that the time periods proposed were incompatible with the mediation process. Other experts indicated that a balance between speed and due process needed to be found. Some experts indicated that it was crucial to bring to the attention of the judge the importance of giving priority to applications under the 1980 Convention. A few experts highlighted the advantages of judicial seminars as an effective information tool.

176. The Chair concluded that the establishment of time periods was a positive step towards an effective implementation of the 1980 Convention.

JUDICIAL CO-OPERATION AND COMMUNICATIONS

Direct judicial communication and the Hague International Hague Network of Judges

177. The Permanent Bureau presented Preliminary Document No 8, "Report on judicial communications in relation to international child protection", and its appendices as a follow up to the 2002 Preliminary Report.[16] The Permanent Bureau noted that the Report drew on Conclusions and Recommendations of various international judicial conferences and seminars, existing national laws and regional norms in force at the time, and all volumes of *The Judges' Newsletter*.

178. The Permanent Bureau highlighted that no legal barrier to direct judicial communications had been raised in the responses to any Questionnaires. It was thus concluded that the exchange of information between judges did not constitute a problem as long as the judges did not impose a course of action. Consequently discussions between judges would not deal with the merits of the case, would have to be approved by the parties, and would need to be open and transparent. In this regard the Permanent Bureau indicated that it was evident that Recommendations 5.5 and 5.6 of the 2002 Special Commission could be reaffirmed. The States were encouraged to nominate liaison

[16] It was indicated that the Report included responses of more than 15 jurisdictions to the 2002 Questionnaire (Prel. Doc. No 2 of 2002) and of 45 jurisdictions to the 2006 Questionnaire (Prel. Doc. No 1 of 2006).

judges and to promote co-operation between judges. The Permanent Bureau affirmed that a majority of States supported the efforts of the Permanent Bureau in organising international judicial seminars and encouraging States to promote the attendance of judges at these forums.

179. The Permanent Bureau briefly presented *The Judges' Newsletter on International Child Protection*, a Hague Conference publication. It was indicated that *The Judges' Newsletter* was published and distributed biannually by Butterworths Legal Publishing Company at a nominal cost. Most contributions to the Newsletter were submitted by judges from around the world. It was noted that the Newsletter was published in both official languages of the Hague Conference, English and French, as well as in Spanish. One edition was also published in Arabic. The Permanent Bureau highlighted that the Newsletter was an excellent medium for the exchange of information and views between judges and was now circulated to hundreds of judges, to Central Authorities and others around the world. Appreciation was expressed to Editorial Board for their continued assistance and contributions.

180. The experts were then invited to read the Conclusions and Recommendations suggested at pages 31 to 33 in Preliminary Document No 8. Each of the possible conclusions and recommendations were explained in detail by the Permanent Bureau.[17]

181. The Permanent Bureau underlined that the relationship between judges and Central Authorities could differ from State to State. It was noted that even though the Permanent Bureau kept an up-to-date list of members of the International Network of Liaison Judges (Network), this list was not distributed, as the Permanent Bureau did not have the authority to do so. The Permanent Bureau suggested that this list, including full contact details and languages spoken, be made available to members of the Network. It was suggested that the Permanent Bureau inform the Central Authorities of the formal designations (*i.e.* those coming directly from the judiciary or the judicial body). It was indicated that informal designations (*i.e.* unilateral designations) have their limits and should only be temporary. Formal designations were strongly encouraged.

182. The Permanent Bureau stated that the Network was only constituted of sitting judges. However, it was noted that the Permanent Bureau realised that in certain States judges could not hold administrative functions. Therefore, in certain cases, the contact would need to be initiated through another authority, such as the Central Authority. On the other hand, once the contact has been initiated, resulting communications would have to take place between the sitting judges.

183. The Chair invited the experts to concentrate on future work and particularly points u),[18] v),[19] w)[20] and x)[21] of Section V – "Possible Conclusions and Recommendations and Future Work" of Preliminary Document No 8.

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[17] The Conclusions and Recommendations suggested at pages 31 to 33 in Preliminary Document No 8 deal with the following themes: encouraging direct judicial communication; ensuring cooperation; consolidating the international network of liaison judges; encouraging synergy; case specific communications; the 1996 Hague Convention; future work.

[18] "u) Maintain an inventory of existing practices relating to direct judicial communications in specific cases under the 1980 Hague Convention and with regard to international child protection".

[19] "v) Draw up a short information document on direct judicial communications that could be used by judges when contacting a judge who is not familiar with direct judicial communications under the 1980 Hague Convention".

[20] "w) Explore the value of drawing up more detailed guidelines concerning direct judicial communications, which could serve as a model for the development of norms at national, bilateral and regional level with the advice of a consultative group of experts drawn primarily from the judiciary".

[21] "x) Develop a secured system of communications for members of the International Network of Liaison Judges".

184. Some experts were of the view that a legal basis was necessary to appoint a liaison judge. An expert noted that the *chapeau* of Article 7(2), and Article 2 of the Convention provided the legal foundation for co-operation between the Central Authorities and the judicial authorities.

185. An expert suggested linking the judge to a Central Authority, which in the judge's opinion, was in a better position to provide information. Another expert stated that, on the contrary, in his State, the Central Authorities take part in proceedings and that in such circumstances collaboration with Central Authorities would be contrary to judicial independence. An expert claimed that it was not necessary to have a liaison judge but rather to allow communication between the judges concerned. Many experts were of the view that liaison judges were very useful. Some experts noted that it was difficult to give judges directives and that communications between judges should not be too formal.

186. Some experts underlined the importance of having regional networks for judicial authorities. One expert explained that the networks of judges were essential and that their development for the past eight years attested to their importance.

187. Some experts suggested replacing the expression "liaison judge" and several experts put forward "national judicial consultant" and "resource judge" as suggestions. In relation to the appropriate title for the judges, the Permanent Bureau suggested the use of the expression "designated judge" and explained that if the States did not have designated judges, it should be possible to contact their Central Authorities who would be responsible for communication with the sitting judge. The Chair indicated that the expert from the delegation of Israel had suggested, as an alternative for the term "liaison judge", the terms "facilitory judge", "facilitating judge" and "consulting judge".

188. An expert expressed concern about the conclusions stated in paragraph 2 *d)* and *e)* of Section V of Preliminary Document No 8. In relation to paragraph 2 *d)*, she indicated that it could harm the independence of the judiciary. In relation to paragraph 2 *e)*, she felt that it was necessary to add the following phrase to the text, "consistent with the independence of judges and fair procedures."

189. The Permanent Bureau stated that States had adopted different systems and structures of co-operation between Central Authorities and judicial authorities and emphasised that the conclusions and recommendations of paragraph 2 of Preliminary Document No 8 reflected the variety of existing approaches. He noted that some States enjoyed good relations between the judicial authorities and Central Authorities; however, others were reluctant to maintain a cooperation that would be perceived as continuous and regular.

190. An expert expressed reservations relating to the intervention of liaison judges, because she felt that the position could encroach on the work of Central Authorities. Other experts were of the opinion that there should not be a rivalry between liaison judges and Central Authorities. In addition, another expert noted that the judges of his State did not want to be involved in co-operation with Central Authorities, because of independence issues. An expert explained that the problems of trust between the Central Authorities and the judicial authorities were not present in his State because the Central Authority was made up of judges who work in government ministries, a common situation in civil law countries.

191. In addition, some experts underlined the benefits of having a network of judicial authorities. It was also mentioned that, in practice, the judges rarely discuss the merits of a case but instead want to enquire about the law and procedures existing in another State.

192. An expert felt that that it was essential to elaborate rules to regulate the communications between judges in different States. In relation to the necessity of providing rules for the communication between judges, the Permanent Bureau stated that some States preferred to have minimal rules while others would like the communication to be regulated by specific rules. It was stated that the Permanent Bureau was not in a position to develop such rules at the moment but that it may be possible in the future.

193. An expert, referring to paragraph 3 *j)* of Section V of Preliminary Document No 8, questioned whether the designation of a liaison judge had to be formal or informal, or whether the idea was to avoid unilateral designations. The Permanent Bureau addressed the difficulties relating to the formal and informal designation of liaison judges and explained that some judges could decide, without formalities, to be a liaison judge while others were designated by judicial authorities. The Permanent Bureau recalled that every State was free to use the type of designation that they found most suitable and highlighted the importance of avoiding unilateral designations.

194. Some experts proposed the creation of a working group composed of judges which would deal with the different questions raised by the intervention of judicial authorities.

195. The Chair underlined that the Permanent Bureau did not at all intend to substitute the Central Authorities with the liaison judges. She emphasised the importance of establishing regional networks. In addition, she recalled that independence was not limited to judges and that Central Authorities also had to be independent. Finally, she noted that differences existed in the cultures of different States. She observed that the judges in civil law countries could be called upon to play different roles, and that the role of common law judges was limited to hearing cases.

TRANSFRONTIER ACCESS / CONTACT AND RELOCATION

Consideration of draft General Principles and Guide to Good Practice

196. The Permanent Bureau stated that Preliminary Document No 4 dealt with the right of the child to maintain contact with his parents and that this right was universally recognised. It was explained that the framers of the 1980 Convention were conscious that Article 21 of the Convention only partially responded to the issues.

197. The Permanent Bureau recalled the discussion and conclusions of the Special Commission of 2002, which had been assisted by an extensive Report on Transfrontier Access / Contact. Since that time the Permanent Bureau had continued to work on a number of fronts including: (1) completion of Chapter 5 of the Guide to Good Practice on Central Authority Practice, (2) the organisation of several international judicial seminars involving both Hague Convention and non-Hague Convention States, (3) continuing work on the related topics of enforcement, mediation and child support, and (4) further consultation including a meeting of experts in The Hague in 2005.

198. It was noted that the present Report went beyond the 1980 Convention and provided a general template of what was needed in an effective international system for the protection of rights of access / contact. For this reason the General Principles and Good Practice set out in the Report would also be of value to States not Parties to the 1980 Convention.

199. The Permanent Bureau noted that certain matters, such as mediation and enforcement, had not yet been incorporated in the Report. The Permanent Bureau explained that, if the Report were approved, these gaps would be filled. The Permanent Bureau proposed that if the Special Commission assented to Chapters 1 to 7, a small

group of experts would be established to work with the Permanent Bureau to complete the document.

200. The Permanent Bureau then proceeded to discuss the report and highlight areas on which discussion would be required. It was stressed that this did not mean that the other areas were any less important, rather that there was a greater measure of consensus in relation to them. It was stated that Chapter 2 required discussion because it demonstrated a much more proactive and broader approach to Central Authority responsibilities than was currently the case. Chapter 4 required debate of whether international cases should be granted priority over domestic cases. Chapter 6 on relocation required consideration of how to construct a system in which proper respect was – given to contact ordered in the context of a decision giving the parent permission to relocate. Chapter 7 dealt with an area of divergence of opinion, that is, rights of custody and rights of access.

201. The Chair noted that ICMEC had submitted proposals in this area that were contained in Working Document No 8. She then invited discussion on Chapter 2 of Preliminary Document No 4.

202. Several experts expressed a general welcome for the Report. Some experts expressed concerns over paragraph 2 (3) *e)* – the report on the child – and stated that this would be difficult for the Central Authorities of some States to comply with. Other experts noted that the obligations in this Chapter could have resource implications for Central Authorities and also that some Central Authority functions could be delegated to other competent authorities and the wording should allow this interpretation.

203. Many experts noted the problems encountered with Article 21, the vagueness of its terms and the varying interpretations it had received. Some experts called for the development of a protocol to the 1980 Convention to clarify the area and to provide a legal basis for solutions. One expert noted that there would be inherent problems with attempting to draw up a new text. Some experts noted the importance of being able to make interim contact orders to allow parents to have contact with their child after an abduction but before a decision is given in the return proceedings. Some experts also highlighted that access proceedings required an examination of the merits and this made them different from return proceedings.

Chapter 4 of Preliminary Document No 4

204. The Chair then called for discussion on Chapter 4 of Preliminary Document No 4. One expert raised concern about the recommendation in Working Document No 8 that international access applications should be handled expeditiously and prioritised over domestic cases. Many other experts also doubted whether such prioritisation was appropriate. The Chair noted that it was necessary to establish a distinction between access and return proceedings. Differences between them included the length of time they took and the different frameworks they used.

205. The Permanent Bureau noted that Chapter 4 of Preliminary Document No 4 did not make the recommendation that all international access cases should be prioritised above domestic cases. Instead, provision should be made for speedy access to the courts in certain urgent cases. The Permanent Bureau also stated that, in any event, all proceedings concerning contact whether domestic or international needed to be heard with a certain degree of speed and pointed to the jurisprudence of the European Court of Human Rights on the issue.

206. The Permanent Bureau also noted that in addition to speed, the other major concern in the area was prioritisation in relation to the provision of legal aid. It needed to be examined whether foreign applicants should have the same entitlements as local applicants and also whether the provisions for legal aid should be the same for access and return proceedings. An expert also noted that even in the absence of international instruments, States could always take national measures to assist the exercise of rights.

Chapter 6 of Preliminary Document No 4

207. The Permanent Bureau presented Chapter 6 of Transfrontier Access / Contact: General Principles and Good Practice (Prel. Doc. No 4). The Permanent Bureau highlighted that the chapter on relocation and contact raised three main issues: first, the circumstances in which it may be necessary for a parent to obtain a court order for permission to relocate the child; second, the factors to be taken into account by a judge in determining whether relocation should be permitted; and third, the approach to be taken by the court to guaranteeing and securing the contact rights of the left-behind parent. The Permanent Bureau proposed that the present discussion should focus on the recommendations at items 6.3 and 6.4 of Preliminary Document No 4, which related to the issue of how to ensure the recognition and enforcement of contact orders accompanied by conditions stipulated by the judge making the relocation order. It was indicated that this issue could be addressed through two mechanisms: either through advance recognition of orders or through mirror orders and direct judicial communications. In noting a preference for advance recognition, the Permanent Bureau underscored difficulties related to jurisdiction when resorting to mirror orders were underscored. The attention of the participants was drawn to the fact that the 1996 Hague Convention could eventually address certain concerns.

208. The participants agreed that these issues were extremely important because judges must be confident that their contact orders would be fully respected in the relocation process. They underscored the need to clarify and simplify procedures related to the recognition and enforcement of contact orders, and the need to promote greater co-operation and communication between judges. Some participants strongly endorsed the mechanism of advance recognition, noting that it was important to encourage parents to obtain an order before relocating.

209. The Permanent Bureau observed that in cases where it was legal for the relocating parent to do so without obtaining permission from a court, Central Authorities had a responsibility for providing assistance to support the rights of the left-behind parent.

210. The Chair noted that there seemed to be general agreement regarding Chapter 6 and asked the participants for any further comments on Chapters 1, 3 and 5. An expert indicated that with regard to item 5.9, it would be preferable not to automatically link child support to financial aspects of arranging transfrontier contact.

The dividing line between custody and access rights

211. The Permanent Bureau presented Chapter 7, "The meaning of rights of access / contact" (Prel. Doc. No 4) and emphasised the immense case law dealing with the issue, outlined in item 7.2, relating to the status of access rights combined with a veto on the removal of a child. The Permanent Bureau noted that a clear preponderance

of case law supported the view that this combination constituted a custody right for the purposes of the 1980 Convention.

212. Some participants emphasised the importance of resolving the conflict in case law regarding this aspect of the definition of custody. Several experts explained that in their States, the meaning of access / contact rights in relation to custody rights was not an issue in itself where parents both exercised their parental authority over the child, where the child was removed without the permission of the left-behind parent and the latter would ask for the return of the child, based on a right of custody arising from his / her parental authority. One expert underscored that concepts such as "parental responsibility" have evolved since the 1980 Convention was adopted and that it was important to keep these changes in mind in the application of the Convention.

Enforcement of contact orders

213. The Permanent Bureau noted that it was difficult to draw any firm conclusions regarding the enforcement of contact orders based on the responses to the Questionnaire of 2004. Referring the participants to Chapter 8 of "Enforcement of orders made under the 1980 Hague Convention – Towards Principles of Good Practice" (Prel. Doc. No 7), it was noted that certain principles outlined earlier in that document with regard to return orders could apply equally to contact orders. The Permanent Bureau then discussed the consequences related to the on-going and recurring nature of contact, as opposed to the one-time enforcement of return orders.

Possible amendments to Article 21

214. The Chair invited the participants to discuss the possibility of an amendment to Article 21 of the 1980 Hague Convention, noting that a proposal (Work. Doc. No 8), had been submitted by the International Centre for Missing and Exploited Children (ICMEC). An observer from ICMEC presented her proposal to the Special Commission, emphasising the need for expeditious procedures, the significance of maintaining continuity of contact between the child and both parents, and the importance of having judges and Central Authorities track and manage cases from beginning to end. Reiterating the importance of maintaining contact between the child and both parents, an observer indicated that mediation was very useful throughout the proceedings.

215. The Permanent Bureau referred the participants to page 37 of Preliminary Document No 4, which included a postscript outlining considerations of a protocol and future work concerning transfrontier contact. However, the Permanent Bureau cautioned that, especially with regard to Central Authority services, negotiations would undoubtedly be complex and lengthy as the issues were inextricably linked to the resources of States. With regard to the meaning of rights of access / contact, the Permanent Bureau noted the difficulties that might be encountered in achieving consensus on the matter of definitions. Finally, the Permanent Bureau noted that it would be wise to ensure that a broad consensus existed before embarking on a Protocol.

216. Certain experts supported the development of a protocol to resolve the difficulties related to the application of Article 21 of the 1980 Hague Convention. They underscored that this would ensure that the Convention was a living document that could adapt to the problems of today.

217. While acknowledging the importance of maintaining the relevance of the Convention, the majority of experts were of the opinion that it was too early to develop a protocol for such purposes and that it would be wise to wait until the 1996 Convention

entered into force for a larger number of States. They agreed that the 1996 Convention should resolve some of the difficulties regarding the implementation of the 1980 Convention. One expert doubted that the 1996 Convention would address all the issues, but acknowledged that this was not the best time to establish a protocol. Some experts added that other options, such as the modification of domestic legislation, should resolve some of the lacunae in the 1980 Convention in the meantime.

218. The Chair concluded that while a protocol may eventually be desirable, it may be premature to embark on that endeavour, particularly in view of the work that must be done to encourage full ratification and implementation of the 1996 Convention. She noted that there was general consensus on the importance of that Convention. She then invited the participants to consider the future work of the Hague Conference.

The future work of the Hague Conference

219. The Deputy Secretary General referred the participants to the list of future works presented at page 41 of Preliminary Document No 4. He indicated that it was proposed that a small group of experts be established to work with the Permanent Bureau on the new Guide to Good Practice and that if the States so desired, the text would be distributed to them for final approval. He emphasised the fact that the Permanent Bureau would continue to make every effort to assist States in the promotion and application of the 1996 Convention and that it would keep States informed on developments regarding mediation. Finally, he announced that the Permanent Bureau would continue to organise professional seminars and conferences to encourage discussion of and good practice in transfrontier contact and international relocation of children. The Chair concluded that the Special Commission accepted the Permanent Bureau's proposals regarding future work.

Relocation issues

220. The Chair opened the debate on the factors that must be taken into consideration by courts with regards to relocation. The Permanent Bureau explained that this covered the issue of the approach taken by the court to guaranteeing and securing the contact rights of the left-behind parents.

221. The experts insisted on the importance of the issue of relocation. Noting that there was no universal standard for dealing with cases of relocation, an expert from the United Kingdom indicated that his State had conducted a comparative study of the principles applied by various jurisdictions. He indicated that the full report was available on the Internet and, emphasising the importance of recognising a variety of approaches, he summarised the three categories that were identified in the study: a permissive approach, a negative approach, and a case-by-case approach. Another expert also invited the Permanent Bureau to clarify the concept of relocation so that changes could be effected at the domestic level where necessary.

222. Several experts provided insight as to the practice in their respective States where relocation was at issue. An expert enumerated a checklist of factors, used by judges in his State in inquiries relating to relocation. The checklist included, among other factors, the parents' testimony, the relationship between the child and the custodial parent, as well as the non-custodial parent, the possible disruption that relocation might cause, and the best interests of the child, decisive factors also mentioned by several other experts. An expert mentioned that in her State, courts favour continuity in a child's education. A few experts mentioned the importance of reaching agreements and of having off-the-

record judicial settlement conferences where the child has counsel to represent his or her interests if necessary.

223. An expert stated that since proceedings regarding relocation were fact driven, the court in the place of the child's habitual residence was well placed to decide these matters. Another expert explained that the legislation in his State was restrictive when it came to granting authorisation to relocate. A few experts noted that in their respective States, such authorisation to relocate was always subject to access orders, which guaranteed contact or visitation rights of a left-behind parent. A few experts explained that their States seek to prevent unilateral action by a parent seeking to relocate. A few experts stated that care must be taken in inquiring into relocation cases. These experts raised several reasons for which a parent might oppose relocation and reminded experts that false allegations may be made by a left-behind parent to prevent relocation. A few experts mentioned that the issue of relocation tended to affect mothers more than fathers.

224. A few experts expressed concern regarding the term "relocation". An expert suggested that the words "change of residence" or "*changement de résidence*" be used instead. Another expert stated that the term must be clearly defined. Some experts stated that the English term "relocation" was neutral and appropriate. Another expert stated that the Spanish term was also appropriate.

225. The Chair emphasised that agreement between parents was advantageous and that the issue of access was likely to improve as the 1996 Convention entered into force in more jurisdictions.

SECURING THE SAFE RETURN OF THE CHILD

226. The Permanent Bureau reminded experts that it is the role of Central Authorities, under Article 7 of the 1980 Convention to assist with the safe return of the child. The experts were also reminded of some of the problems identified in previous discussions: (1) allegations by the taking parent of violence by the left behind parent could only be examined in the court of habitual residence; (2) the taking parent may face hardship upon return to the place of habitual residence; (3) the taking parent may not, upon return, have access to the court in the place of habitual residence. The Permanent Bureau enumerated other concerns that were raised such as privacy legislation in some countries preventing monitoring the safe return of the child; burdens placed on Central Authorities for additional services; and the need for judges to receive reliable information about the conditions in the place of habitual residence in order to make the best decision for the child. The Permanent Bureau reminded experts of advice offered in the Guide to Good Practice including at Appendix 5.2.

The use of protective measures such as undertakings, mirror orders and safe return orders

227. The Permanent Bureau indicated that responses to the 2006 Questionnaire revealed an increasing use of protective measures such as undertakings, mirror orders and safe harbour orders. The Permanent Bureau stated that Questionnaire responses indicated that the use of undertakings was confined largely to common law jurisdictions, related usually to material considerations, and often incorporated promises that the left-behind parent will not pursue criminal proceedings or enforce custody rights granted after the abduction. The Permanent Bureau underlined that it was common for the parent giving undertakings to ignore them once the child was returned to the habitual residence and that undertakings made by agreement were not enforceable in some States. The

Permanent Bureau noted concern relating to undertakings exceeding the authority of the court or issued despite a demonstrated unwillingness to comply.

228. The Permanent Bureau stated that suggestions had been made to limit the use of undertakings to where they are appropriate in scope, facilitate the objective of a swift return, help to minimise the issuance of non-return orders based on Article 13 of the 1980 Convention, and respect the jurisdictional nature of the Convention by not intruding on custody issues to be determined by the court of the habitual residence. The Permanent Bureau noted difficulties with mirror orders, particularly where there were no legal proceedings ongoing in the requesting State or where there were jurisdictional problems. Safe harbour orders, which were enforceable in the country of habitual residence, were also discussed. Finally, The Permanent Bureau drew experts' attention to the related articles by Mr Bucher and Justice Chamberland in the recent Judges' Newsletter. The Permanent Bureau outlined the jurisdictional importance of Article 11 of the 1996 Convention and emphasised the importance of inter-judicial communications in these matters.

229. Several experts were of the opinion that undertakings must be reasonable and appropriate; must be limited in time; must not be exorbitant; and must be limited to the question of the safe return of the child. Some experts described situations where undertakings did not yield positive results or were inadequate, such as in cases of abuse or bad faith. An expert told the Special Commission that his State did not use undertakings. Another expert explained that in his State, undertakings and the requirements of safe harbour were used where Article 13 of the 1980 Convention was at issue, not where Article 12 of the 1980 Convention was at issue.

230. Some experts emphasised that the judge of the requested State must know which measures could be enforced in the State of the left-behind parent, and in this regard, judicial communications were found to be essential. An expert suggested the creation of country profiles to properly inform judiciaries about the measures applicable in the other jurisdiction.

231. Certain experts remarked that judicial decisions relating to the return of the child were not enforceable in the State to which the child was returned. An expert indicated, therefore, that safe harbour orders made in the habitual residence country that guarantee instantaneous safety must be favoured. An expert suggested that the idea of the creation of a protocol, relating specifically to the return of the child, be kept on the long-term agenda of the Hague Conference.

232. The Chair reminded experts that when the child was returned, the case on the merits should be dealt with promptly so that measures of safe return need not be unduly prolonged. She reminded experts that undertakings need only relate to the return of the child. She indicated that the idea of the creation of a protocol should not be put off altogether.

Pending criminal proceedings against a returning parent

233. The Permanent Bureau reiterated Recommendation and Conclusion 5.2 adopted at the Special Commission of 2001. From responses to the 2006 Questionnaire, it was noted the general view that criminal proceedings may have a negative effect even if they are a deterrent. The Permanent Bureau noted that the judge seized of the case may be reluctant to order the return of the child if criminal proceedings were pending. However, an arrest warrant made locating the child easier. The Permanent Bureau added that in some States, the enforcement of a return order could be suspended until the charges against the abducting parent were withdrawn. However, in certain States, the decision to withdraw charges was in the hands of the prosecutor and not in the hands of the Central Authorities or the parent.

234. The majority of experts were of the opinion that criminal proceedings could have negative and positive effects on the return of the child. An expert emphasised that pending criminal proceedings could expedite the process of locating a child or abducting parent. An expert remarked that the agreement between parents should be sought and that this could be made difficult by the initiation of criminal proceedings. An expert mentioned that in her State, the Attorney General could communicate, by way of letter, his intention to stay the charges once the child was returned. The arrest warrant could be suspended to allow the parent to return to the country and have access to the child. An expert mentioned that it was important to inform Central Authorities if there were criminal proceedings against the abducting parent so that they could determine whether or not he or she could enter into the State to which the child was to be returned. An expert was of the opinion that criminal proceedings must cease where the 1980 Convention, a civil remedy, was invoked. An expert indicated that good communication between the Prosecutor and the Central Authorities could prevent counter-productive criminal proceedings.

235. The Chair pointed out that the initiation of criminal proceedings could be counter-productive in relation to having the child returned. She informed the Special Commission that a representative from Interpol requested that the point be made that the left-behind parent should avoid taking steps toward the issuance of an international arrest warrant, unless the child had completely disappeared because this created enormous difficulties. The involvement of police at the international or national level should not necessarily lead to the bringing of criminal proceedings.

Access to procedures for determining custody and contact in the country of return

236. The Permanent Bureau recalled that one of the essential premises of the 1980 Convention was that it attributed jurisdiction to the courts of the habitual residence of the child. The Permanent Bureau explained that the difficulties encountered in practice raised questions about speed of procedures and lack of resources. In relation to the lack of resources, the Permanent Bureau recalled Recommendation 5.4 of the Special Commission of 2001 in relation to the provision of legal aid and advice.

237. One expert questioned what progress had been made since the adoption of Recommendation 5.4. Another expert indicated that the co-operation between Central Authorities could contribute to resolving the problems relating to a lack of information, notably by providing information about the duration of procedures and the practicalities for the provision of legal aid and advice. Some experts noted the difficulties encountered by the abducting parents in accessing procedures, notably the need to obtain a visa to be present at proceedings that were taking place in the other State and the risk of losing the custody of the child for the duration of these proceedings.

238. The Permanent Bureau felt that the recommendations have had a great effect and recalled that when the question of the rights of abducting parents was raised for the first time, many States highlighted that this question was not part of the Convention. However, the Permanent Bureau noted a change of attitude in this regard and emphasised that now the States were conscious of the importance of the question.

Immigration and visa issues

239. Some experts worried about the difficulties relating to the obtaining of an entrance visa for certain States. In this regard, an expert explained that her State had made amendments to the legislation in order to facilitate the obtaining of visas in that type of case.

240. The Permanent Bureau explained that the responses to the Questionnaire (Prel. Doc. No 1) had demonstrated that immigration and visa issues were of three types: (1) the abducting parent could not return to the State where the proceedings were taking place; (2) the applicant had difficulty in going to where the child was found; and (3) the applicant had difficulty in exercising his rights of access.

REGIONAL DEVELOPMENTS AND RELATIONS WITH "NON-HAGUE" STATES

241. The Permanent Bureau introduced Preliminary Document No 10 and indicated the different initiatives that had been taken to encourage regional development and relations with countries that were not Parties to the 1980 Convention. The Permanent Bureau explained briefly the Latin American Programme, the Malta Process, the Africa Project and Developments in the Asia-Pacific region.

The Latin American Programme

242. The Liaison Legal Officer for Latin America highlighted that the Latin American Programme aimed: (1) to establish a bridge between the different States of Latin America and the Hague Conference; (2) to develop good practices in the region; and (3) to remove barriers of communication between Spanish-speaking and non-Spanish-speaking States. He indicated the different seminars and training sessions on the Hague Conventions that had taken place in Latin American countries. He noted that some countries in the region had participated in the iChild project and highlighted that a Spanish version of INCADAT had been completed.

243. An expert from Ecuador stated that her State was preparing to become a Member of the Hague Conference.

The Malta Process

244. The Permanent Bureau explained that the Hague Conference had been invited to consider the functioning of bilateral agreements between States Parties to the Convention of 1980 and States of the Islamic tradition that were not Parties. The experts were informed that the Permanent Bureau had presented a research document on this subject to the Special Commission of October / November 2002 on the 1980 Convention. This research document suggested that bilateral agreements which had the most success at the time were those that offered procedures promoting and facilitating agreed solutions between the family members concerned. The document also pointed out the lack of a legal framework in which these parties could negotiate an agreement, give effect to an agreement and the possibility of providing solutions when an agreement was not possible. The Permanent Bureau emphasised that the Conventions of 1980 and 1996 could fill the gap in this regard by providing an appropriate legal framework. It was therefore necessary to intensify research of common legal principles which could constitute a rule of law for States that were not ready to join the Conventions of 1980 and 1996.

245. The Permanent Bureau stated that it was this legal research that had inspired the Malta Process. The Permanent Bureau noted that at this stage, the Hague Conference had organised two Malta Conferences and that the States involved had adopted a common declaration at the end of each Conference. The Permanent Bureau recalled the importance of continuing dialogue in advancing the Malta Process.

246. Some experts expressed support for the Malta Process and explained the approaches embarked upon by their States to promote co-operation with other States.

The Africa Project

247. It was noted that ongoing research of the Permanent Bureau focussed on realities and challenges that were especially relevant to the area. The Permanent Bureau stated that a meeting of key judges from 18 African States had taken place in September 2006 and the discussions had considered how the Hague Conventions could practically implement many of the principles set out in the *UN Convention on the Rights of the Child*. The conclusions focussed on establishing systems of co-operation between authorities at the administrative and judicial levels. The Permanent Bureau noted that the next stage was to organise a broad regional conference in Africa in 2007 to develop a set of proposals on how to implement the Conventions in a way that respects local conditions and cultures. The Permanent Bureau thanked all those who had supported the project and called on current Contracting States to the Hague Conventions to lend their experience and practical skills in implementing the Hague Conventions.

248. One expert thanked the Permanent Bureau for their support in this area and noted that it was encouraging to see that progress had been made.

Developments in the Asia-Pacific area

249. The Permanent Bureau noted that a conference on the Hague Conventions had taken place in Malaysia in 2005 to promote co-operation and collaboration between States in the region and two members of the Permanent Bureau had attended. It was stated that the Australian Government planned to hold another conference in Sydney in June 2007 aiming to foster communication about and understanding of Hague Conventions in the Asia-Pacific region.

250. An expert noted that there were two issues in the region. The first was the interaction of Islamic and non-Islamic States and the second was a lack of capacity in some States in the region to set up the necessary structures.

INTRODUCTION OF WORKING DOCUMENT NO 10 CORRIGENDUM II BY THE DELEGATION OF SWITZERLAND

Background

251. The delegation of Switzerland presented several Working Documents, the first two documents had been circulated on 30 May 2006 and 27 October 2006. The delegation explained that the documents were aimed at drawing the attention of the Special Commission to possible improvements in the implementation of the 1980 Convention which would be of international interest and which it was asserted could afford additional protection to abducted children. In summary the proposals by the delegation of Switzerland addressed several issues:

- "Determining in detail the procedure and measures likely to secure the voluntary return of the child within the meaning of Article 10 (in association with Art. 7, para. c))";
- "Formulating in detail the procedure and measures to secure the safe return of the child (as per Art. 7, para. *h)*) and arrangements for securing rights of access (Art. 21)";
- The creation of "supplementary rules allowing the authorities [of the requested State] to obtain information on custody rights, on the relationship between the child and its parents and on the well being of the child [once returned to his country of habitual residence]";
- "Reducing the period of one year set out in Article 12, clause 1";

– "Amending Article 13, clause 1 *b)* so as to clarify the relationship between the principle of returning the abducted child and the interest of the child".

Introduction of Working Document No 10 Corrigendum II

252. An expert from Switzerland felt that although there was a decision against considering a Protocol to the Convention, efforts should still be made to seek a way to achieve progress that went beyond the usual recommendations. He referred to Working Document No 10, Corrigendum II, and noted that the wording provided that these solutions were allowed by the 1980 Convention but were not binding on States. He then detailed the provisions of the proposal. Many experts expressed concern about the status of the proposed document and how it would be interpreted by those not attending the Special Commission.

253. Many experts also raised issues concerning some of the individual provisions. Other experts expressed support for the proposal. Some experts noted that it was important to be positive and innovative in the area. An expert from Switzerland responded that there was a need to be pro-active in the area and to take new steps. He noted that the document did not compel or oblige States to undertake any action.

254. The Swiss proposals were examined and discussed further by the Special Commission and were embodied in an Appendix to the Conclusions and Recommendations of the Special Commission entitled "Additional considerations relevant to the safe return of the child".

INCADAT

255. The Acting Chair invited the Permanent Bureau to give a brief update on the International Child Abduction Database (INCADAT).

256. A Consultant to the Permanent Bureau indicated that INCADAT was created by the Permanent Bureau in 1999 in order to assist States in applying the 1980 Convention in a more uniform manner. Since the last meeting of the Special Commission in 2002, the volume of case law included in the database has tripled and case summaries were now available in English, French, and Spanish. She informed the participants of a new page on the website that included a simplified search engine for recent decisions. She also underscored two other important new pages, one for Inter-American Child Abduction and another for non-Hague Convention Child Abduction.

257. The Acting Chair acknowledged that INCADAT was a very useful and powerful tool for judges.

258. The Acting Chair then opened the floor for discussion on two items remaining on the Agenda, the interplay between return and asylum applications and the use of Article 15 of the 1980 Convention. As there were no further interventions requested on the issues, he concluded that the items had been properly disposed of in previous discussions as well as in answers to certain questions in the Questionnaire of Preliminary Document No 1.

A N N E X E / A N N E X

ENLÈVEMENT INTERNATIONAL D'ENFANTS
INTERNATIONAL CHILD ABDUCTION

HccH
HAGUE CONFERENCE ON
PRIVATE INTERNATIONAL LAW
CONFÉRENCE DE LA HAYE
DE DROIT INTERNATIONAL PRIVÉ

novembre / November 2006

CONCLUSIONS ET RECOMMANDATIONS

DE LA CINQUIÈME RÉUNION DE LA COMMISSION SPÉCIALE SUR LE FONCTIONNEMENT DE LA CONVENTION DE LA HAYE DU 25 OCTOBRE 1980 SUR LES ASPECTS CIVILS DE L'ENLÈVEMENT INTERNATIONAL D'ENFANTS ET LA MISE EN ŒUVRE DE LA CONVENTION DE LA HAYE DU 19 OCTOBRE 1996 CONCERNANT LA COMPÉTENCE, LA LOI APPLICABLE, LA RECONNAISSANCE, L'EXÉCUTION ET LA COOPÉRATION EN MATIÈRE DE RESPONSABILITÉ PARENTALE ET DE MESURES DE PROTECTION DES ENFANTS (30 OCTOBRE – 9 NOVEMBRE 2006)

adoptées par la Commission spéciale

* * *

CONCLUSIONS AND RECOMMENDATIONS

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adopted by the Special Commission

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INTRODUCTION

The Special Commission met in the context of important developments since the Fourth meeting of the Special Commission to review the operation of the 1980 Convention in March 2001:

- Firstly, the number of Contracting States to the 1980 Convention had grown from 66 to 76, including new States from three continents, indicating the expanding global scope of the Convention.

- Secondly, all of these were acceding States, and, not having taken part in the original negotiations, new to the Convention. In a growing number of cases this gave rise to issues relating to the implementation of the Convention, including the need to provide technical assistance and training.

- Thirdly, the trend already noticed by the Fourth Special Commission in 2001 that approximately 2/3 of the taking parents were primary caretakers, mostly mothers, had confirmed itself, giving rise to issues which had not been foreseen by the drafters of the Convention.

- Fourthly, since the Fourth Special Commission meeting, the 1996 Convention on the International Protection of Children had come into force at the global level (1 January 2002). Thirteen States were now parties to the 1996 Convention, and a further 18 States had signed the Convention. Of these 31 States, 29 were also Parties to the 1980 Convention.[*]

- Fifthly, at the regional level, the Brussels II *bis* Regulation, which is designed to facilitate the return of children further, and many of whose provisions were inspired by the 1996 Convention, took effect on 1 March 2005. At the same time important initiatives to promote the 1996 Convention and good practice in relation to the 1980 Convention were underway in Latin America, Africa, the Asian Pacific region, and in the framework of the Malta process.

- Finally, important new initiatives had seen the light in respect of cross-border mediation and direct cross-border co-operation among judges.

CHAPTER I – OPERATION OF THE 1980 CONVENTION

PART I – THE ROLE AND FUNCTIONS OF CENTRAL AUTHORITIES

Role of the requesting and requested Central Authorities in handling applications

1.1.1 The problem of legal concepts being mistranslated or misunderstood may be eased if the requesting Central Authority provides a summary of the relevant law concerning rights of custody. This summary would be in addition to a translation or copy of the relevant law.

1.1.2 In exercising their functions with regard to the transmission or acceptance of applications, Central Authorities should be aware of the fact that evaluation of certain factual and legal issues (for example, relating to habitual residence or the existence of custody rights) is a matter for the court or other authority deciding upon the return application.

[*] Following the meeting of the Special Commission, Romania, also a Party to the 1980 Convention, signed the 1996 Convention on 15 November 2006.

1.1.3 The discretion of a Central Authority under Article 27 to reject an application that is manifestly not well-founded should be exercised with extreme caution.

Legal aid and representation

1.1.4 The importance for the applicant of having effective access to legal aid and representation in the requested country is emphasised. Effective access implies:

a) the availability of appropriate advice and information which takes account of the special difficulties arising from unfamiliarity with language or legal systems;

b) the provision of appropriate assistance in instituting proceedings;

c) that lack of adequate means should not be a barrier to receiving appropriate legal representation.

1.1.5 The Central Authority should, in accordance with Article 7 *g)*, do everything possible to assist the applicant to obtain legal aid or representation.

1.1.6 The Special Commission recognises that the impossibility of, or delays in, obtaining legal aid both at first instance and at appeal, and / or in finding an experienced lawyer for the parties, can have adverse effects on the interests of the child as well as on the interests of the parties. In particular the important role of the Central Authority in helping an applicant to obtain legal aid quickly or to find an experienced legal representative is recognised.

Language and translation issues

1.1.7 States are reminded of the terms of Article 24 and the possibility that a requesting State may send an application in either English or French when a translation into the official language or an official language of the requested State is not possible.

1.1.8 As a matter of co-operation between Central Authorities, it would be desirable, in the circumstances foreseen by Article 24, for the requesting State to communicate with the requested State regarding any difficulties it has with the translation of the application. The Special Commission invites States to consider the possibility of agreeing arrangements for a translation of the application to be made in the requested State, while the cost is borne by the requesting State.

Information exchange, training and networking among Central Authorities

1.1.9 The Special Commission recognises the advantages and benefits to the operation of the Convention from information exchange, training and networking among Central Authorities. To this end, it encourages Contracting States to ensure that adequate levels of financial, human and material resources are, and continue to be, provided to Central Authorities.

1.1.10 The Special Commission supports efforts directed at improving networking among Central Authorities. The value of conference calls to hold regional meetings of Central Authorities is recognised.

Country profiles

1.1.11 The Special Commission recognises the value of having information concerning the relevant national laws and procedures readily accessible to all States, and endorses the development of country profiles for this purpose. Contracting States should exclusively be responsible for updating the information contained in the country profiles. It is recommended that a Working Group facilitated by the Permanent Bureau develop a country profile form and that States representing a range of different experience, capacities and legal systems be represented on the Working Group. Those States include: Argentina, Australia, Bahamas, Belgium, Brazil, Canada, Chile, France, Portugal, South Africa, Spain, Sweden, the United Kingdom and the United States of America. The draft country profile should be circulated to all Contracting States for their comments before its publication on the Hague Conference website.

Ensuring the safe return of children

1.1.12 The Special Commission reaffirms the importance of Recommendation 1.13 of the Special Commission meeting of 2001:

"*To the extent permitted by the powers of their Central Authority and by the legal and social welfare systems of their country, Contracting States accept that Central Authorities have an obligation under Article 7 h) to ensure appropriate child protection bodies are alerted so they may act to protect the welfare of children upon return in certain cases where their safety is at issue until the jurisdiction of the appropriate court has been effectively invoked.*

It is recognised that, in most cases, a consideration of the child's best interests requires that both parents have the opportunity to participate and be heard in custody proceedings. Central Authorities should therefore co-operate to the fullest extent possible to provide information in respect of legal, financial, protection and other resources in the requesting State, and facilitate timely contact with these bodies in appropriate cases.

The measures which may be taken in fulfilment of the obligation under Article 7 h) to take or cause to be taken an action to protect the welfare of children may include, for example:

a) *alerting the appropriate protection agencies or judicial authorities in the requesting State of the return of a child who may be in danger;*

b) *advising the requested State, upon request, of the protective measures and services available in the requesting State to secure the safe return of a particular child;*

c) *encouraging the use of Article 21 of the Convention to secure the effective exercise of access or visitation rights.*

It is recognised that the protection of the child may also sometimes require steps to be taken to protect an accompanying parent."

The Special Commission affirms the important role that may be played by the requesting Central Authority in providing information to the requested Central Authority about services or facilities available to the returning child and parent in the requesting country. This should not unduly delay the proceedings.

Use of standardised forms

1.1.13 The Special Commission reaffirms the Recommendation of the Fourteenth Session of the Conference to use the standard Request for Return form.

1.1.14 The Special Commission recommends that the Permanent Bureau, in consultation with Contracting States, up-dates the standard Request for Return form.

1.1.15 The Special Commission encourages Central Authorities to use the sample forms and checklists set out in Appendix 3 to the Guide to Good Practice under the Child Abduction Convention: Part I – Central Authority Practice.

Case management and maintenance of statistics

1.1.16 The Special Commission reaffirms Recommendation No 1.14 of the 2001 meeting of the Special Commission:

"*Central Authorities are encouraged to maintain accurate statistics concerning the cases dealt with by them under the Convention, and to make annual returns of statistics to the Permanent Bureau in accordance with the standard forms established by the Permanent Bureau in consultation with Central Authorities*."

1.1.17 In this respect, the Special Commission welcomes the results of the iChild case management software pilot project and invites Central Authorities to consider the implementation of iChild.

1.1.18 The Special Commission also welcomes the development of INCASTAT, the statistical database for the 1980 Convention and invites all Central Authorities to make their annual returns of statistics using the database for which user names and passwords will be distributed in the near future.

1.1.19 The Special Commission, in order to promote the collection of more accurate statistics, approves the proposed amendments[1] to the existing Annual Statistical Forms.

1.1.20 The Special Commission expresses its gratitude to the Member States who have, through the Supplementary Budget, supported the developments of iChild and INCASTAT, and to WorldReach Software Corporation for its generosity in supporting the iChild project.

1.1.21 The Special Commission welcomes the Statistical Analysis of Applications made in 2003 under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*.[2] It expresses its appreciation to the authors of the Report, and to the Nuffield Foundation which provided the funding.

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[1] Set out in Appendix C of Prel. Doc. No 9, "Report on the iChild pilot and the development of the international child abduction statistical database, INCASTAT – Technology Systems in support of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*", October 2006.

[2] N. Lowe, E. Atkinson, K. Horosova and S. Patterson, "A statistical analysis of applications made in 2003 under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*", Prel. Doc. No 3 of October 2006.

PART II – PREVENTIVE MEASURES

The Guide to Good Practice on Preventive Measures

1.2.1 The Special Commission welcomes the publication of Part III of the Guide to Good Practice on Preventive Measures.

1.2.2 The Special Commission recommends that Part III of the Guide to Good Practice on Preventive Measures be widely promulgated particularly to governments of Contracting States, judges, lawyers, mediators, border control officers, passport authorities and other relevant authorities and organisations.

Standardised or recommended permission form

1.2.3 The Permanent Bureau is requested to continue to explore the feasibility and the development of a standardised or recommended permission form in consultation with Contracting States and in co-operation with relevant international organisations which regulate international travel. The Special Commission recognises that it is necessary to have regard in the first instance to the purpose and content of the form. It was agreed that such a form would not be designed to introduce any new substantive rules but rather to operate within existing systems. The form would be non-binding and non-obligatory.

PART III – PROMOTING AGREEMENT

Securing the voluntary return of the child

1.3.1 The Special Commission reaffirms Recommendations 1.10 and 1.11 of the 2001 meeting of the Special Commission:

> *"1.10 Contracting States should encourage voluntary return where possible. It is proposed that Central Authorities should as a matter of practice seek to achieve voluntary return, as intended by Article 7* c) *of the Convention, where possible and appropriate by instructing to this end legal agents involved, whether state attorneys or private practitioners, or by referral of parties to a specialist organisation providing an appropriate mediation service. The role played by the courts in this regard is also recognised.*
>
> *1.11 Measures employed to assist in securing the voluntary return of the child or to bring about an amicable resolution of the issues should not result in any undue delay in return proceedings*".

Mediation

1.3.2 The Special Commission welcomes the mediation initiatives and projects which are taking place in Contracting States in the context of the 1980 Hague Convention, many of which are described in Preliminary Document No 5.[3]

1.3.3 The Special Commission invites the Permanent Bureau to continue to keep States informed of developments in the mediation of cross-border disputes concerning contact and abduction. The Special Commission notes that the Permanent Bureau is continuing its work on a more general feasibility study on cross-border mediation in family matters including the possible development of an instrument on the subject, mandated by the Special Commission on General Affairs and Policy of April 2006.

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[3] S. Vigers, "Note on the development of mediation, conciliation and similar means to facilitate agreed solutions in transfrontier family disputes concerning children especially in the context of the Hague Convention of 1980", Prel. Doc. No 5 of October 2006.

PART IV – PROCEEDINGS FOR RETURN

Speed of Hague procedures, including appeals

1.4.1 The Special Commission reaffirms Recommendations 3.3 to 3.5 of the of the 2001 meeting of the Special Commission:

> "*3.3 The Special Commission underscores the obligation (Article 11) of Contracting States to process return applications expeditiously, and that this obligation extends also to appeal procedures.*
>
> *3.4 The Special Commission calls upon trial and appellate courts to set and adhere to timetables that ensure the speedy determination of return applications.*
>
> *3.5 The Special Commission calls for firm management by judges, both at trial and appellate levels, of the progress of return proceedings."*

Article 13, paragraph 1 b)

1.4.2 The Special Commission reaffirms Recommendation 4.3 of the 2001 meeting of the Special Commission:

> "*The Article 13, paragraph 1* b), *"grave risk" defence has generally been narrowly construed by courts in the Contracting States, and this is confirmed by the relatively small number of return applications which were refused on this basis …".*

PART V – ENFORCEMENT OF RETURN AND CONTACT ORDERS

1.5.1 The Special Commission encourages support for the principles of good practice set out in Preliminary Document No 7.[4]

1.5.2 The Special Commission recommends that the Permanent Bureau be invited to draw up a draft Guide to Good Practice on Enforcement Issues based on Preliminary Document No 7 which takes into account the discussions on the proposed principles during the Fifth Meeting of the Special Commission and any additional information received on experiences in Contracting States. The draft should be completed with the assistance of a group of experts. As a starting point, this group should include Nigel Lowe (Consultant to the Permanent Bureau), Irène Lambreth (Belgium), Sandra Zed Finless (Canada), Suzanne Lee Kong Yin (China – Hong Kong SAR), Peter Beaton (European Community – Commission), Markku Helin (Finland), Eberhard Carl (Germany), Leslie Kaufmann (Israel), Peter Boshier (New Zealand), Petunia Seabi (South Africa), Mariano Banos (United States of America) and Ricardo Pérez Manrique (Uruguay). Before publication, the draft Guide to Good Practice should be circulated to Member States of the Hague Conference as well as other Contracting States of the 1980 Hague Convention for their comments.

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[4] A. Schulz, "Enforcement of orders made under the 1980 Convention – Towards principles of good practice", Prel. Doc. No 7 of October 2006.

1.5.3 The Special Commission welcomes the comparative legal study carried out by the Permanent Bureau and the empirical study carried out by Professor Lowe on the enforcement of orders made under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*.[5] It expresses its appreciation to the authors of the studies, and to the International Centre for Missing and Exploited Children which provided the funding for the empirical study.

PART VI – JUDICIAL COMMUNICATIONS

1.6.1 The Special Commission expresses support for the developments outlined in Preliminary Document No 8.[6]

1.6.2 The Special Commission acknowledges that effective functioning of the 1980 Hague Convention depends on the concerted efforts of all interveners in matters of international child abduction, including judges and Central Authorities on internal and international levels.

Direct judicial communications

1.6.3 The Special Commission reaffirms Recommendations No 5.5 and 5.6 of the 2001 meeting of the Special Commission, and underlines that direct judicial communications should respect the laws and procedures of the jurisdictions involved.

> *"5.5 Contracting States are encouraged to consider identifying a judge or judges or other persons or authorities able to facilitate at the international level communications between judges or between a judge and another authority.*
>
> *5.6 Contracting States should actively encourage international judicial co-operation. This takes the form of attendance of judges at judicial conferences by exchanging ideas/communications with foreign judges or by explaining the possibilities of direct communication on specific cases.*
>
> *In Contracting States in which direct judicial communications are practised, the following are commonly accepted safeguards:*
>
> – *communications to be limited to logistical issues and the exchange of information;*
> – *parties to be notified in advance of the nature of proposed communication;*
> – *record to be kept of communications;*
> – *confirmation of any agreement reached in writing;*
> – *parties or their representatives to be present in certain cases, for example via conference call facilities."*

Respective roles of judges and Central Authorities

1.6.4 The Special Commission recognises that, having regard to the principle of the separation of powers, the relationship between judges and Central Authorities can take different forms.

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[5] A. Schulz, "Enforcement of orders made under the 1980 Convention – A comparative legal study", Prel. Doc. No 6 of October 2006; N. Lowe, S. Patterson and K. Horosova, "Enforcement of orders made under the 1980 Convention – An empirical study", Info. Doc. No 1 of October 2006 (available in English only).

[6] P. Lortie, "Report on judicial communications in relation to international child protection", Prel. Doc. No 8 of October 2006.

1.6.5 The Special Commission continues to encourage meetings involving judges and Central Authorities at a national, bilateral or multilateral level as a necessary part of building a better understanding of the respective roles of both institutions.

Judicial conferences

1.6.6 The Special Commission encourages the development of the established pattern of conferences for specialist family law judges (national, bilateral and multilateral) and emphasises the importance of both the regional and global frameworks that have been developed.

Actions to be undertaken by the Permanent Bureau

1.6.7 In relation to future work, the Permanent Bureau in the light of the observations made during the meeting will:

a) continue consultations with interested judges and other authorities based on Preliminary Document No 8;

b) continue to develop the practical mechanisms and structures of the International Hague Network of Judges;

c) continue to develop contacts with other judicial networks and to promote the establishment of regional judicial networks;

d) maintain an inventory of existing practices relating to direct judicial communications in specific cases under the 1980 Hague Convention and with regard to international child protection;

e) explore the value of drawing up principles concerning direct judicial communications, which could serve as a model for the development of good practice, with the advice of a consultative group of experts drawn primarily from the judiciary;

f) explore the development of a secured system of communications for members of the International Hague Network of Judges.

1.6.8 The Special Commission notes the link between the work on direct judicial communications and the feasibility study to be prepared by the Permanent Bureau for the Council on General Affairs and Policy of the Conference with regard to the development of a new instrument for cross-border co-operation concerning the treatment of foreign law.

The Judges' Newsletter on International Child Protection

1.6.9 The Special Commission supports the continued publication of the Judges' Newsletter on International Child Protection and expressed its appreciation to LexisNexis Butterworths for publishing and distributing the Newsletter.

PART VII – TRANSFRONTIER ACCESS / CONTACT AND RELOCATION

Transfrontier access / contact

1.7.1 The Special Commission reaffirms the priority it attaches to ongoing work to improve transfrontier protection of rights of access / contact. It recognises the interest in this matter among many States, including those that are not Parties to the Convention of 1980 and the important role in this regard that can be played by the Convention of 1996.

1.7.2 Recognising the limitations of the 1980 Convention, and in particular of Article 21, the Special Commission:

a) gives broad endorsement to the general principles and good practices set out in Preliminary Document No 4,[7] and recommends that the Permanent Bureau, in consultation with a group of experts, amend and complete the document in the light of discussions within the Special Commission and prepare it for publication as soon as possible;

b) recommends that the Permanent Bureau should continue to keep States informed of developments in the mediation of transfrontier disputes concerning contact. It will also continue its work on a more general feasibility study on cross-border mediation in family matters including the possible development of an instrument on the subject, mandated by the Special Commission on General Affairs and Policy of April 2006;

c) recommends that the Permanent Bureau should continue to examine ways to improve the operation of Article 21 and, through international judicial conferences and by other means, to stimulate discussion of and good practice in respect of the problems surrounding transfrontier contact and international relocation of children, taking into account also the experience with the application of the 1996 Convention and with legal regimes inspired by this Convention.

1.7.3 The Special Commission recognises the strength of arguments in favour of a Protocol to the 1980 Convention which might in particular clarify the obligations of States Parties under Article 21 and make clearer the distinction between "rights of custody" and "access rights". However, it is agreed that priority should at this time be given to the efforts in relation to the implementation of the 1996 Convention.

Relocation

1.7.4 The Special Commission concludes that parents, before they move with their children from one country to another, should be encouraged not to take unilateral action by unlawfully removing a child but to make appropriate arrangements for access and contact preferably by agreement, particularly where one parent intends to remain behind after the move.

1.7.5 The Special Commission encourages all attempts to seek to resolve differences among the legal systems so as to arrive as far as possible at a common approach and common standards as regards relocation.

PART VIII – SECURING THE SAFE RETURN OF THE CHILD

The use of protective measures

1.8.1 Courts in many jurisdictions regard the use of orders with varying names, *e.g.*, stipulations, conditions, undertakings, as a useful tool to facilitate arrangements for return. Such orders, limited in scope and duration, addressing short-term issues and remaining in effect only until such time as a court in the country to which the child is returned has taken the measures required by the situation, are in keeping with the spirit of the 1980 Convention.

[7] W. Duncan, "Transfrontier access / contact – General principles and good practice", Prel. Doc. No 4 of October 2006.

Enforceability of protective measures

1.8.2 When considering measures to protect a child who is the subject of a return order (and where appropriate an accompanying parent), a court should have regard to the enforceability of those measures within the country to which the child is to be returned. In this context, attention is drawn to the value of safe-return orders (including "mirror" orders) made in that country before the child's return, as well as to the provisions of the 1996 Convention.

A possible Protocol concerning protective measures

1.8.3 Positive consideration was given to the possibility of a Protocol to the 1980 Convention which would provide a clear legal framework for the taking of protective measures to secure the safe return of the child (and where necessary the accompanying parent). The potential value of a Protocol was recognised though not as an immediate priority.

Criminal proceedings

1.8.4 The Special Commission reaffirms Recommendation 5.2 of the 2001 meeting of the Special Commission:

"*The impact of a criminal prosecution for child abduction on the possibility of achieving a return of the child is a matter which should be capable of being taken into account in the exercise of any discretion which the prosecuting authorities have to initiate, suspend or withdraw charges*."

The Special Commission underlines that Central Authorities should inform left-behind parents of the implications of instituting criminal proceedings including their possible adverse effects on achieving the return of the child.

In cases of voluntary return of the child to the country of habitual residence, Central Authorities should co-operate, in so far as national law allows, to cause all charges against the parent to be abandoned.

The Central Authorities should also inform the left-behind parent of the alternative means available to resolve the dispute amicably.

Access to procedures

1.8.5 Contracting States should take measures to remove obstacles to participation by parents in custody proceedings after a child's return.

PART IX – REGIONAL DEVELOPMENTS

1.9.1 The Special Commission welcomes the advances made by the Permanent Bureau in further expanding the influence and understanding of the Hague Conventions through the Latin American Programme, the Africa Project and developments in the Asia Pacific Region. The value of the Hague Convention model and principles are recognised for use with non-Hague Convention States as in the context of the Malta Process.

1.9.2 Strong support is expressed for the effort being undertaken by the Hague Conference, through the Malta Process, to develop improved legal structures for the resolution of cross-frontier family disputes as between certain Hague Convention States and certain non-Hague Convention States.

1.9.3 The importance of the appointment of the Liaison Legal Officer for Latin America is welcomed and the impact already made in strengthening the operation of the Convention in the Region is recognised.

CHAPTER II – IMPLEMENTATION OF THE 1996 CONVENTION

2.1 The Special Commission welcomes the fact that a large number of States are in the process of implementing or considering implementation of the Hague Convention of 1996 on the international protection of children. It welcomes the support for that Convention expressed by the European Community and its Member States, as well as the efforts being undertaken to ensure that authorisation is obtained in the near future for all such States to become Parties to the Convention. The Special Commission also welcomes the fact that several American States are studying the Convention with a view to its ratification or accession.

2.2 The Special Commission invites the Permanent Bureau, in consultation with Member States of the Hague Conference and Contracting States to the 1980 and 1996 Conventions, to begin work on the preparation of a practical guide to the 1996 Convention which would:

a) provide advice on the factors to be considered in the process of implementing the Convention into national law, and

b) assist in explaining the practical application of the Convention.

2.3 Recognising the limitations of the 1980 Convention, and in particular of Article 21, the Special Commission recommends that the Permanent Bureau should continue to make every effort to assist States in their consideration of the 1996 Convention and to promote its widespread ratification. This applies both to States which are Parties to the 1980 Convention and those which are not.

ANNEXE

Considérations additionnelles relatives au retour sans danger de l'enfant

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APPENDIX

Additional considerations relevant to the safe return of the child

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Considering that the interests of children are paramount in matters relating to their custody and that to protect children from the harmful effects of their wrongful removal or retention and to ensure the safe return of the child, it remains important to improve the procedures established for this purpose;

The Special Commission is of the view that the provisions of the *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* support measures to be taken, where appropriate in a particular case, to –

1. attempt by mediation or conciliation to obtain the voluntary return of the child or the amicable resolution of the issues, in a manner that does not delay the return of the child;

2. provide an opportunity for the child to be heard, unless this appears inappropriate having regard to the child's age or degree of maturity;

3. secure the exercise of rights of access and contact, as appropriate, during the proceedings related to the application for return of the child;

4. enable or require the relevant authorities to cooperate in order to ensure access to pertinent information available in the States concerned;

5. provide for the protection of the child upon his / her return and to enquire in particular about the measures which the competent authorities of the State where the child was habitually resident immediately before its removal or retention can take for the protection of the child upon its return;

6. inform the competent authorities of the State where the child was habitually resident immediately before its removal or retention about proceedings on the application for return and any decision taken in this respect in the State where the child is;

7. assist in the implementation of protective measures, approved by the authorities in the requesting State, to provide for the protection of the child and, if necessary. the parent who removed or retained the child upon its return;

8. upon request, inform the Central Authority of the State where the return of the child has been ordered about the decision on the merits of rights of custody, rendered in the wake of such return, in so far as is permitted by the law of the State where the decision has been taken.