LE DROIT DE VISITE/DROIT D’ENTREtenir UN CONTACT TRANSFRONTIÈRE
et la Convention de La Haye du 25 octobre 1980
sur les aspects civils de l’enlèvement international d’enfants

Rapport final
établi par William Duncan, Secrétaire général adjoint

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TRANSFRONTIER ACCESS / CONTACT
on the Civil Aspects of International Child Abduction

Final Report
drawn up by William Duncan, Deputy Secretary General

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INTRODUCTION

a Background

1 The Special Commission on General Affairs and Policy of the Hague Conference on Private International Law (8-12 May 2000), on a proposal by the delegations of Australia, Spain, the United Kingdom and the United States of America (Work. Doc. No 3), agreed to request the Permanent Bureau:

"To prepare by the Nineteenth Diplomatic Session of the Hague Conference a report on the desirability and potential usefulness of a protocol to the 1980 Hague Convention on the Civil Aspects of International Child Abduction that would provide in a more satisfactory and detailed manner than Article 21 of that Convention for the effective exercise of access / contact between children and their custodial and non-custodial parents in the context of international child abductions and parent re-locations, and as an alternative to return requests."

2 In further explanation of this proposal, and of the matters, which might be considered within the study to be carried out by the Permanent Bureau, the Working Document states:

"We believe that the attempt in Article 21 to begin to address this issue within the 1980 Convention provides a specific justification for charging the Permanent Bureau with examination of this problem in relation to improving the 1980 Convention, as well as the ways and degree to which the 1996 Convention might help to resolve these problems. However, while there are other ways in which the 1980 Convention and its implementation might be improved, we believe that the proposed study should be limited to this visitation/access issue and should not extend to other issues except to the extent they impact on Article 21. The Permanent Bureau study might include examination of available case law and commentary interpreting Article 21 and discussing the visitation/access problem, the legal issues involved and not addressed, how a protocol to the 1980 Convention might deal with these issues, the adequacy with which the 1996 Convention addresses the issues, the advantages of a protocol to the 1980 Convention, and what effect such a protocol might have on acceptance of the 1996 Convention."

3 There was initial discussion of the issues surrounding transfrontier access / contact during the Fourth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, which took place at The Hague from 22-28 March 2001 [hereinafter the 'Fourth Special Commission' or the 'Special Commission of March 2001']. The Preliminary Report on Transfrontier Access / Contact, drawn up by William Duncan, Deputy Secretary General, had been prepared for the attention of that meeting. This Preliminary Report drew in part

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1 See Working Document No 3, Proposal submitted by the delegations of Australia, Spain, the United Kingdom and the United States of America at the Special Commission on general affairs and policy of the Conference (8–12 May 2000).
2 The Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children will be referred to throughout this Report as the '1996 Convention'.
3 See Prel. Doc. No 4 of March 2001 for the attention of the Special Commission of March 2001, Transfrontier
on responses to a general

Access / Contact and the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Preliminary Report, drawn up by William Duncan, Deputy Secretary General. This document will be referred to as the 'Preliminary Report' throughout this Report.
questionnaire on the operation of the 1980 Convention,\textsuperscript{4} which had been circulated among Member States, States Parties to the 1980 Convention, and relevant governmental and non-governmental organisations in advance of the March 2001 meeting.\textsuperscript{5} In the Preliminary Report, an attempt was made to delineate some of the principle areas of concern and to summarise some of the policy issues, as follows:

"(1) There is a need for more order and precision in the rules determining the jurisdiction of authorities to make or to modify contact orders. The absence of adequate provisions for the recognition and enforcement of contact orders is another serious gap in the system. The Hague Convention of 1996 provides a possible solution to both of these problems. Its ratification is being considered, as the responses to the questionnaire show, by a large number of countries. Is there any reason why this should not be the appropriate solution? If it is true that some States may be inhibited from ratifying the 1996 Convention because of its broad scope (as was suggested in the original proposal for this study), should consideration be given to a Protocol to the 1980 Convention which incorporates, with respect only to matters falling within the scope of the 1980 Convention (or perhaps with respect to matters of custody and contact more generally), the jurisdiction and recognition and enforcement provisions of the 1996 Convention?

(2) The practical obstacles which confront a foreign applicant in securing effective contact with his or her child can be formidable. There exist substantial differences in the levels of support for foreign applicants offered by the different Contracting States to the 1980 Convention. Reciprocity for the most part does not exist. This applies to the information made available, the level of support given to the achievement of agreed arrangements between the parties, as well as to the practical facilities made available to support particular contact arrangements. The ability of the applicant practically to access the legal system is a key consideration and raises the issue of provision for free legal aid and advice. The question arises whether States will be willing to accept wider obligations with regard to these matters. In particular, should Central Authorities be given more specific duties and powers? Should provisions concerning legal assistance be strengthened?

(3) Legal procedures for determining contact applications can be slow, and the processes for enforcing contact orders vary widely. The question arises whether the same or similar requirements of expedition should apply to the processing of international contact applications as apply to return applications. In this context, careful thought needs to be given to achieving the correct balance between speed and the need to encourage an agreed outcome.

(4) What can be achieved by international agreement with regard to national enforcement processes? Without looking for uniformity, are there any general principles applying to the enforcement process which could be the subject of agreement?

(5) Co-operation, e.g. between Central Authorities, with regard to the exchange of information in respect of particular contact cases is practised to some extent but tends to be unstructured. The more explicit provisions of the 1996 Hague Convention, and in particular those contained in

\textsuperscript{4} The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction will be referred to throughout this Report as the '1980 Convention'.

\textsuperscript{5} See Prel. Doc. No 1 of October 2000 for the attention of the Special Commission of March 2001, Information concerning the agenda and organisation of the Special Commission and Questionnaire concerning the practical operation of the Convention and views on possible recommendations, drawn up by William Duncan, Deputy Secretary General.
Article 35, help to fill this lacuna.
(6) With regard to cases of unlawful retention following a period of contact, the question arises, in the light of proposals currently being discussed within the European Union, whether the provisions of the 1980 Convention are satisfactory or whether they need to be tightened, particularly with regard to the defenses, which are currently available.

Finally, it is important, in considering what improvements may be achieved by the Hague Conference, to bear in mind the important work being carried out by other international and regional organisations, such as the Organization of American States, the Council of Europe and the European Union. The objective should be to avoid conflict and any unnecessary duplication."

4 During the discussions in the March 2001 Meeting of the Special Commission, several delegations emphasised the seriousness of the problems surrounding transfrontier access / contact and the need for an urgent response. The formal conclusion from the discussion was as follows:

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

5 Following the Special Commission Meeting of March 2001, the Permanent Bureau continued the process of consultation and, in January 2002, circulated a Consultation Paper on Transfrontier Access / Contact to Member States, States Parties to the 1980 Convention and relevant governmental and non-governmental organisations. Part of the purpose of this Consultation Paper was to obtain preliminary views on the approaches or techniques, which were thought by respondents most likely to offer effective solutions to those aspects of transfrontier access / contact which are causing concern. The Consultation Paper listed several possible approaches or techniques (a protocol, recommendations, a Guide to Good Practice, model agreements), and it discussed some of their implications.

6 Commission I on General Affairs and Policy of the Nineteenth Session of the Hague Conference, which met in The Hague from 22-24 April 2002, decided that a Special Commission Meeting should be held in September/October 2002 to follow up on matters arising from the Fourth Meeting of the Special Commission to Review the Operation of the 1980 Convention and that at that Meeting which has now been scheduled to take place from 27 September to 1 October 2002, there should be on the agenda, inter alia, initial discussion of the Final Report on Transfrontier Access / Contact.

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6 Prel. Doc. No 4, supra note 3, at paragraph 61.
8 Prel. Doc. No 1 of January 2002 for the attention of the Special Commission of September / October 2002, Consultation Paper on Transfrontier Access / Contact, drawn up by William Duncan, Deputy Secretary General. This document will be referred to as the ‘Consultation Paper’ throughout this Report.
b Sources and terminology

7 The sources used in drawing up this Report include the responses to the Questionnaire concerning the practical operation of the 1980 Convention [hereafter the 'Questionnaire'] and the responses to the Consultation Paper on Transfrontier Access / Contact [hereafter the 'Consultation Paper']. Thanks are due to the national authorities (including Central Authorities) and the international governmental and non-governmental organisations for making valuable and scarce time available to supply such a wealth of information. My colleagues in the Permanent Bureau and I also had the opportunity to have consultations and conversations with various national authorities and international organisations, as well as with many individuals affected by the problems which are discussed in this Report. We owe them all a special debt.

8 It should be explained that in this Report, as well as in other preliminary documents, the composite term “access / contact” has been used in a broad sense to include the various ways in which a non-custodial parent (and sometimes another relative or established friend of the child) maintains personal relations with the child, whether through periodic visitation or access, by distance communication or by other means. It has been suggested that the use of the word “contact”, in preference to a term like “access”, reflects a child-centred approach and is more in line with modern concepts such as “parental responsibility” or “parental responsibilities”.

9 Although in this Report the distinction between contact and custody is frequently used, it should be noted that the difference between the two concepts is not always clear-cut. Nor does it fit readily with those national systems, which have moved away from the concept of custody towards the concept of parental responsibility. For practical purposes, except where the context otherwise indicates, the term “custodial parent” should be read in a non-technical sense as referring to the parent with whom the child has his or her normal or habitual residence. There will, of course, be cases in which residence or custody rights are so equally shared that the distinction between custody and contact breaks down. There will also be cases where the custodial parent may himself or herself wish to exercise contact rights, as for example where the child is enjoying an extended visit to the non-custodial parent. Finally, it should be noted that existing international instruments may have specific definitions of custody and contact or access, as is the case with the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.

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9 The responses to the Questionnaire were made available in Prel. Doc. No 2 for the attention of the Special Commission of March 2001. There were 45 responses from the following States: Argentina, Australia, Austria, Belarus, Belgium, Bosnia & Herzegovina, Burkina Faso, Canada, Chile, China (Hong Kong Special Administrative Region and Macau Special Administrative Region), Croatia, Cyprus, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Luxembourg, Mauritius, Mexico, Netherlands, New Zealand, Norway, Panama, Poland, Portugal, South Africa, Spain, Sweden, Switzerland, the United Kingdom (England and Wales, Montserrat, Northern Ireland, Scotland), United States of America, Council of Europe, International Center for Missing and Exploited Children (ICMEC) and Reunite/ENPCA.


11 The responses to the Consultation Paper will be included in Prel. Doc. No 8 for the attention of the Special Commission of September/October 2002. Responses were received from 22 States and Organisations as follows: Argentina, Austria, Bosnia & Herzegovina, Canada, Chile, China (Hong Kong Special Administrative Region), Czech Republic, Denmark, France, Germany, Iceland, Italy, Netherlands, Switzerland, Sweden, the United Kingdom (England and Wales, Northern Ireland, Scotland), United States of America, Defence for Children International (DCI), International Center for Missing and Exploited Children (ICMEC) and Reunite.

12 See, supra, note 8.


14 The 1980 Convention itself, in Article 5, defines rights of custody as including not only “rights relating to the care of the person of the child”, but also “the right to determine the child’s place of residence”. There are divergences in the case law with respect to the precise definition of rights of custody in this context. See, infra, paragraphs 12, 38-41.
CHAPTER I – PRELIMINARY CONSIDERATIONS. TYPICAL CASES, FUNDAMENTAL PRINCIPLES AND GENERAL OBJECTIVES

a The dynamics of the problem

10 The issue of contact will usually arise in the context of the breakdown of the marriage or other relationship of the parents. In the international context the parents will often have different national origins. The question of contact may have to be considered in the light of other problems arising from the breakdown. The custodial parent may, for example, be applying to a court for permission to relocate to another country (usually his / her country of origin); this would be more likely to happen in a common law than a civil law jurisdiction. One parent may have abducted or unlawfully retained the child, or be alleged to have done so, in another jurisdiction. There may be allegations of violence or abuse either in respect of the child or the other parent. The circumstances of the parents following the breakdown of the marriage or other relationship are often subject to rapid and unexpected changes.

11 It may be helpful to begin this preliminary account with a brief description of some of the typical fact situations giving rise to difficulties over the exercise of contact in transfrontier context.

(a) In the context of applications for the return of a child under the 1980 Convention, the applicant may wish to establish contact with the child pending the decision on return. It has been suggested that in a case where delay occurs in determining the return application, denial of contact with the applicant parent may contribute to the alienation of the child from that parent, and may thereby increase the prospects of an Article 13(b) defense succeeding. In any event, preserving the continuity of the child’s relationship with the applicant parent requires that the issue of contact be dealt with as quickly as possible.

(b) When a return application is refused, e.g. on the basis of an Article 13 defense, the question immediately arises of the appropriate arrangements for contact between the child and the left behind parent.

(c) There are those cases where a parent from abroad applies, outside the context of an abduction, for the enforcement of a contact order made in another jurisdiction. A typical case is where a court of the country where the child had his or her previous habitual residence permits the parent who is the primary carer to relocate to another jurisdiction together with the child, but at the same time makes a contact order with respect to the left behind parent. There is a connection between this type of case and the phenomenon of abduction. If no respect is given abroad to contact orders made in the context of relocation orders, this may affect the willingness of judges to permit relocation, where such permission is required; and, if judges are unwilling to allow relocation, this may precipitate abductions by primary carers.

(d) There are cases where a parent from abroad applies de novo for a contact order from the authorities of the State where the child lives. The importance of facilitating the

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15 Some of the wording used in this chapter is drawn from the “Report on transfrontier contact with children” which was presented by the Committee on International Family Law (Chairman, Professor Jun Yokoyama; Rapporteur, Professor William Duncan) of the International Law Association (ILA) at the New Delhi Conference of the ILA, held in April 2002. The Report is available on the website of the ILA at: <http://www.ila-hq.org>.

16 As, for example, where a mother applies to a court for permission to take a child out of the jurisdiction against the objections of a father whose rights (by operation of law or by court order) include a veto on removal of the child.

17 In civil law countries, such as Germany or Austria, applications for relocation are rare because the custodial parent generally has the right, as an incident of custody, to move with the child to another country.

18 See Working Document No 3, supra note 1.
application derives principally from the interests, which the child has in maintaining beneficial links with both parents. In addition, as the framers of the 1980 Convention recognised, the failure to support a reasonable application for contact by a non-custodial parent may itself fuel the temptation to abduct.

(e) There are cases where modification of existing cross-frontier contact arrangements is sought either by the custodial parent or the parent exercising contact. These cases may range from modification sought in order to restrict or even terminate the exercise of contact, to those cases where changes in circumstances are thought to require practical adjustments to contact arrangements.

(f) There are cases where the custodial or non-custodial parent claims that transfrontier contact terms have been breached, and seeks an order to restore the status quo. The extreme case is unlawful retention where, following a period of transfrontier visitation, the non-custodial parent refuses to return the child. The alleged infringement may be less dramatic. The parent exercising contact may unilaterally decide to alter some of the terms on which contact was agreed / ordered, for example, by extending the period of contact unilaterally or by not providing details of the child’s movements as had been agreed. Equally the custodial parent may place obstacles in the way of agreed contact, as for example, by not allowing agreed telephone access, by not passing on correspondence, etc.

(g) There are cases where access is about to occur – e.g. the child is about to travel to spend a school holiday with the non-custodial parent, or the non-custodial parent is about to travel a long distance to visit the child – and the custodial parent at the last minute raises objections, based perhaps on fear that access terms will be breached. The non-custodial parent may in such a case need to have his/her application dealt with on an emergency basis if access is to go ahead as arranged.

12 In the above examples, the terms "custodial" and "non-custodial" parent are used. The cases may of course be more complicated where this distinction does not readily apply, for example, in some cases of joint custody where there may be an initial problem of determining whether the rights in question are access rights or rights of custody. The 1980 Convention itself, in Article 5, defines rights of custody as including not only "rights relating to the care of the person of the child", but also "the right to determine the child’s place of residence".19

b Some fundamental principles

13 The right of the child to maintain personal relationships with both parents, even when the parents live in different States, is now an almost universally accepted norm.20 Among other relevant principles, which appear in international instruments are the following:

(a) The right of the child who is capable of forming his or her own views to express those views freely, those views to be given due weight in accordance with the age and maturity of the child.21

19 Article 5. See, infra, paragraphs 38-41.
21 Id., Article 12(1).
(b) The right of all family members to have their family relationships respected by the law.\textsuperscript{22}
(c) The right of the child to protection in the case of dissolution of the parents’ marriage.\textsuperscript{23}
(d) The right of all persons, especially children, to be protected from physical or other abuse.\textsuperscript{24}
(e) The common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.\textsuperscript{25}

c Some general objectives for the international framework

14 By way of preface, it should be stressed that at the national level, the problems surrounding contact, in the absence of agreement between the persons involved, are difficult to resolve, subject to differing approaches in domestic laws, and often give rise to chronic litigation. The difficulties are multiplied at the international level by the geographic distance, as well as legal, linguistic and other cultural differences between the countries concerned. One cannot expect to achieve at the international level more than is achievable within national systems.

15 The law can be a somewhat blunt instrument when applied to the maintenance of long-term human relationships. In the area of parent/child contact, one of its principal functions is to provide a framework, which will encourage and support agreed solutions. Unless parents can achieve a minimum level of co-operation, disputes on the terms of contact tend to occur time and time again and may result in costly and ineffective litigation. This introduces another preliminary consideration, that of cost. The provision of services, whether they be judicial or administrative, to assist in resolving frequently occurring transfrontier contact disputes can be extremely costly.

16 While the law cannot itself guarantee the successful development of long-term human relationships, such as those between parents and children, it should be capable of providing a firm legal framework which:

(a) promotes agreement between parents concerning access / contact arrangements and supports agreements once made;
(b) discourages vexatious or repetitive litigation concerning access / contact;
(c) provides a secure legal background against which the custodial parent may feel safe in releasing a child for access / contact, \textit{i.e.} with a degree of confidence that the conditions of contact will be adhered to and that the child will be returned after a period of visiting contact is complete;
(d) provides a framework within which the non-custodial parent may with confidence expect access / contact arrangements to be respected by the custodial parent;

\textsuperscript{22} See, for example, Article 8 of the \textit{European Convention for the Protection of Human Rights and Fundamental Freedoms} (opened for signature by the Council of Europe on 4 November 1959; entered into force on 3 September 1953), and the judgments of the European Court of Human Rights, \textit{infra}, at note 164. \textit{See also} Article 10 of the \textit{International Covenant on Economic, Social and Cultural Rights} (adopted and opened for signature, ratification, and accession by United Nations General Assembly resolution 2200 A (XXI) of 16 December 1966. Entered into force on 3 January 1976, in accordance with Article 27).


\textsuperscript{24} See Article 19 of the CRC, \textit{infra} note 20.

\textsuperscript{25} Article 5b of the \textit{Convention on the Elimination of All Forms of Discrimination against Women} (adopted and opened for signature, ratification, and accession by United Nations General Assembly resolution 34/180 of 18 December 1979. Entered into force on 3 September 1981, in accordance with Article 27(1)).
(e) deters conduct by either parent designed to frustrate the enjoyment of access / contact or to break the conditions of access / contact;
(f) offers reasonable assistance to foreign parents seeking to effect access / contact in an unfamiliar legal system; and

(g) offers reasonable facilities for supervised access / contact, or other appropriate protective measures, where unsupervised access / contact is not in the best interests of the child.
CHAPTER II - RIGHTS OF ACCESS. LAW AND PRACTICE UNDER THE 1980 CONVENTION

a The objectives of the 1980 Convention and its provisions concerning access

17 The primary objective of the 1980 Convention is to secure the prompt return of children wrongfully removed or retained across international boundaries. The Preamble and Article 1 of the Convention make it clear that the objectives of the Convention include securing “protection for rights of access” (i.e. in cross-border situations), and “effective respect” for such rights. The framers of the Convention recognised the close linkage between issues of international access / contact and the phenomenon of abduction. It was felt that abductions might be reduced, by assisting parents to gain proper access to their children. At the same time, arrangements for access / contact are more likely to be made and respected where there exist strong provisions against the unlawful retention of a child by the parent who is exercising access / contact.

18 The Pérez-Vera Explanatory Report makes it clear that the ambitions of Article 21, which is the only Article of Chapter IV of the Convention entitled "Rights of Access" were limited.

“Above all, it must be recognized that the Convention does not seek to regulate access rights in an exhaustive manner; this would undoubtedly go beyond the scope of the Convention’s objectives. Indeed, even if the attention which has been paid to access rights results from the belief that they are the normal corollary of custody rights, it sufficed at the Convention level merely to secure cooperation among Central Authorities as regards either their organization or the protection of their actual exercise. In other respects, the best indication of the high level of agreement reached regarding access rights is the particularly short amount of time devoted to them by the First Commission.”

As concerns the extent of the obligations of Central Authorities, the Convention, and in particular Article 7f), leaves a great deal of discretion to the Contracting States. This is even more the case with regard to the role of the courts. Indeed, it is generally recognised that, because of the open texture of Article 21, Chapter IV of the 1980 Convention has not in practice provided an effective means by which rights of access / contact may be established, protected or regulated. While Article 21 provides a basic structure and the potential for improving the effective exercise of international access / contact, its lack of precision

26 Article 1(3).
28 Article 1(b).
29 See the Pérez-Vera Report, supra note 27, at paragraph 17.
30 See, supra, note 27.
31 Id. at paragraph 125.
detail has in practice in many countries reduced its effectiveness and led to widely differing interpretations.  

**b The role of Central Authorities under the Convention**

19 Article 21 provides for application to be made to a Central Authority "to make arrangements for organising or securing the effective exercise of rights of access". This in part mirrors the wording of Article 7f) which, however, qualifies the duty of a Central Authority to make such arrangements by limiting it to the taking of "all appropriate measures" and "in a proper case". The Central Authorities are bound by the Article 7 obligations of co-operation "to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject". They are bound to take steps "to remove, as far as possible, all obstacles to the exercise of such rights", and they may directly or indirectly initiate or assist in the institution of proceedings "with a view to organising or protecting those rights and securing respect for the conditions to which the exercise of those rights may be subject".

20 As the Pérez-Vera Report points out, the precise ways in which the Central Authorities are required to co-operate under Article 21 (with the exception of removing obstacles as far as possible), in securing the exercise of access rights is "left up to the cooperation among the Central Authorities", and the specific measures which Central Authorities are able to take "will depend on the circumstances of each case and on the capacity to act enjoyed by each Central Authority". The requirements of co-operation are thus very broadly defined leaving much to the discretion of Central Authorities, whose powers are often limited under their national laws. The responses to the Questionnaire confirm that this is an area in which practices vary widely. The issue of resources also arises for many Central Authorities. Although access/contact cases may be smaller in number than abduction cases the Central Authority resources required to deal with them can be much greater, bearing in mind also that in the absence of agreement between parents the dispute may be long running.

21 With respect to the provision of other supports, the picture again is a varied one. Most Central Authorities will provide general information to the applicant, though this clearly varies in the amount of detail provided. For example, Manitoba, Canada, offers a free public information booklet describing all aspects of family law services available. Many Central Authorities attempt to inform the others of the exact help it is able to offer to those seeking rights of access. (See the document submitted by the Central Authority for England and Wales, attached as an annex to the Permanent Bureau’s Circular No 2(93) addressed to the Central Authorities.)

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32 See e.g., the Report of the Second Special Commission Meeting to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (June 1993) at Question 32: "Have any applications been made under Article 21? What were the results? It was noted that, whilst Article 21 recognises rights of access, it has no firm legal provisions to enforce such rights. A number of experts considered this to be a major problem because Central Authorities might be unwilling to act unless there is a firm legal requirement and judges might not attribute sufficient weight to these rights. Many others disagreed, pointing out that Central Authorities could assist in giving effect to access provisions, at least by providing administrative assistance to bring the case before a tribunal. They argued that the final decision concerning access should be made by a judge. Two experts pointed out that access is an important part of custody and that more might be possible if one recognises access as a legitimate interest in custody. One expert explained that, in many cases, the problem was financial rather than legal. Finally, it was suggested that each Central Authority should inform the others of the exact help it is able to offer to those seeking rights of access. (See the document submitted by the Central Authority for England and Wales, attached as an annex to the Permanent Bureau’s Circular No 2(93) addressed to the Central Authorities.)"

33 Article 21(1).
34 Article 21(2).
35 Article 21(3).
36 See the Pérez-Vera Report, supra note 27, at paragraph 127.
37 "Family Law in Manitoba 2002".
Authorities use websites to provide relevant information. With regard to practical facilities to assist in organising access, some countries offer support from social or youth/child welfare services, e.g. where supervision of access is required or measures are needed to accustom a child to contact after a long period of separation. Some Central Authorities will contact the International Social Services for assistance. In the United States, in some States, there exist supervised visitation centres for cases involving domestic violence. The extent to which Central Authorities will themselves become involved in arranging or funding supporting services, is limited. An exceptional example is Australia where the Central Authority has in certain difficult cases arranged and funded supervised access, arranged and funded telephone access and acted as a post box for letters where the child’s address cannot be disclosed. This is by no means a comprehensive picture, but it does illustrate the patchwork nature of the information and services made available to foreign applicants.

c Article 21 and the role of the courts

22 The courts of Contracting States, whether through their interpretation of the relevant implementing legislation or of Article 21 itself of the Convention, have taken widely differing views of the proper interpretation of Article 21. Contracting States from the common law tradition differ as to whether a court may under Article 21 entertain an application in respect of access rights. Among those which accept that the courts may do so, some limit this to cases where access rights have already been established by court order. On the other hand, in civil law countries such as Germany, the question of whether Article 21 establishes a cause of action does not even arise; proceedings are possible in any case where the applicant is pursuing a substantive right.

23 In some countries expedited procedures are available, similar to those which apply to return applications; in others, such procedures are not available. In some countries, legal aid is available on the same basis as in return cases; in others, it is not. The following more detailed analysis of some selected cases gives some idea of the range of different approaches.

24 In England and Wales the Court of Appeal has decided in the case of Re. G (a minor) that Article 21 confers no jurisdiction on the courts to determine matters relating to access or to recognise or enforce foreign access orders. Article 21 was seen by the Court of Appeal as directed not to the courts, but to Central Authorities which may assist an applicant by introducing him to a lawyer. Any application to the courts for access must then proceed, not under Article 21, but under domestic law. In Re. G the child had been habitually resident in Ontario when the Ontario court granted custody to the mother and access to the father, also permitting the mother to live in England with the child. England then became the child’s habitual residence and, as a result, in the view of the Court of Appeal, the English court was the appropriate one to determine matters of access. 

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38 The website of the Hague Conference provides links to the websites of the majority of Central Authorities designated under the 1980 Convention. See <http://hcch.net/e/conventions/links28e.html>.
40 Re. G (a Minor) (Enforcement of Access Abroad) [1993] Fam. 216. (English Court of Appeal, 1992) [INCADAT cite: HC/E/UKe 110].
41 Under Section 8 of the Children Act, 1989 (England and Wales).
father argued unsuccessfully that the English court was bound to give effect to the Ontario order.
However, the order ultimately made by the English court was in similar terms to the Ontario order. It has been commented that the result in Re. G reflects “a fusion of international comity and child welfare, despite the determination that the English jurisdiction was unfettered.”

25 In the United States of America a broadly similar approach has been adopted. In *Bromley v. Bromley* a federal district court held that it had no jurisdiction under Article 21 to consider a claim for breach of access rights. Article 21 authorises only an application to the Central Authority for the making of arrangements. The Convention establishes no judicial remedy for breach of access rights. This approach was followed in the case of *Teijeiro Fernandez v. Yeager*, which confirmed that Article 21 does not grant the courts any independent authority to enforce access rights in respect of children who had not been wrongfully removed.

26 By contrast, in countries such as Australia, Scotland and New Zealand, Article 21 may be used as a basis for court proceedings. Taking first the case of Australia, the Federal Central Authority, which through its State Central Authorities acts on behalf of applicants for return or access under the Convention, in the early 1990’s adopted a broad interpretation of the Convention’s provisions and allowed access applications to be made under the Convention in almost any circumstances, accepting applications to establish or secure access rights in Australia, whether or not the applicant had already established access rights by court order or by statute. In 1997 however, the Full Court of the Family Court of Australia in the case *Police Commissioner of South Australia v. Castell* placed certain limitations on this liberal policy of the Central Authority by limiting applications under Article 21 to cases in which the rights of access in question are “already established in another Convention country either by operation of law, or as a consequence of a judicial or administrative decision, or by reason of an appropriate agreement having legal effect ...”. The court took the view that the purpose of the Convention was to ensure that foreign access rights are respected. Under draft regulations made under the Family Law Amendment Act of Australia of 2000, it is intended to reverse some of the effects of the decision in *Castell*, by providing that in future applicants will not be required to prove that they have already established access / contact rights in another country as a prerequisite for an application under the Hague procedures.

27 In Scotland Article 21 may be used as a basis for petitioning the courts. In addition, an expedited procedure applies. However, the decision of the Extra Division of the Inner House of the Court of Session in the case of *Donofrio v. Burrell* establishes certain limitations, suggesting that the provisions of the Convention are intended to be supportive only of existing access rights and that the language of Article 21 should be used only where urgent action is required following a breach of access rights, to maintain the status quo on a relatively short-term basis. In other cases it would be more appropriate for the petitioner to bring an ordinary family action, i.e. not under the Article 21 procedure. The rule of court, which is now relied on, and which came into force on 18 September 2001

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46 *Id.*
following the decision in *Donofrio v. Burrell*, reads as follows:
“An application for organising or protecting rights of access granted by any court or a Contracting Party to the Hague Convention, or for securing respect for the conditions to which exercise of such rights of access is subject shall be made by petition ...”.

The expedited procedure has been retained for cases arising under Article 21. However, it may be noted that the criteria for making an order are the same whether the action proceeds under the Article 21 procedure or as a domestic family action.

28 In New Zealand, the relevant implementing legislation was held in the case of Gumbrell v. Jones to authorise the Central Authority to apply to the court for an access order. This decision was influenced by the fact that the statute which embodies the 1980 Convention is part of the same statute which provides jurisdiction to apply for access orders in purely domestic cases. In the case of Gumbrell v. Jones, two children had moved with their mother from England to New Zealand with the permission of the English court, but subject to detailed arrangements to ensure continuing contact with the father. The arrangements were not all adhered to by the mother. An order was made by the New Zealand court in terms which gave effect to the English order. In the course of his decision, Adam J. decided that applications which come under the umbrella of the Convention, involving international obligations, should be generally fast-tracked. He was also of the opinion that, while the ultimate order was that of the New Zealand court (the children now having their habitual residence in New Zealand), respect should be afforded to the foreign access order made in the State of the children’s former habitual residence. It could generally be assumed that such orders were in accordance with the welfare of the child when made. However, the welfare of the child remained the paramount consideration and, where appropriate, a foreign order could be modified or no order made at all.

29 In summary, there is no uniform view among Contracting States on the answers to any of the following questions:

(a) Does Article 21 provide a basis for petitioning a court or administrative tribunal to secure access rights? (This is largely a preoccupation in common law jurisdictions.)

(b) If it does provide such a basis, what are the limits? In particular, should proceedings under Article 21 be limited to cases in which access rights have been already established in another Convention country? Must there be proof that access rights have been breached? Are proceedings limited to cases of urgency?

(c) If Article 21 does provide a basis for legal proceedings, what procedures are appropriate? In particular, should expedited procedures applicable to return requests also apply to applications under Article 21? Should the entitlements to legal aid or assistance given to applicants for a return order apply equally to applicants under Article 21?

(d) What substantive criteria should be applied in resolving applications concerning access under Article 21? Should they be the same as those which apply in purely domestic access applications?

30 The view does seem to be generally accepted that Article 21, whether or not it

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49 Amended Rules of the Court of Session (Scotland), Rule 70.5(2).
50 Under the Children (Scotland) Act 1995, Section 11(7).
51 See, supra, note 42.
52 Guardianship Act 1968, which was amended in 1991 to accommodate the 1980 Convention.
provides the basis for court proceedings, does not give rise to any obligation to recognise in the strict sense or to enforce, a foreign access order. On the other hand, general principles of comity as well as considerations of the child’s welfare have sometimes been taken
suggest that considerable respect should be given to orders made by courts in the country of the child’s habitual residence.\(^{53}\)

31 It should be noted finally that, in those countries where applicants are not entitled to proceed before the courts with an access application under Article 21, there is usually an alternative domestic procedure available and certainly this would generally be the case where the child has his habitual residence in the State in which the application is made.\(^{54}\) The difficulty for the applicant, therefore, lies not in the fact that proceedings are not possible under Article 21 but rather in the possibility that, if domestic proceedings have to be used, they may carry certain disadvantages such as the absence of a supporting role by the Central Authority, slower procedures, or less favourable provision for legal aid, assistance or advice.

d Access applications in the context of return proceedings

32 One particular problem has arisen in the context of return proceedings brought under the 1980 Convention. The left-behind parent may, in addition to seeking the return of the child, wish to apply to the court addressed for interim access/contact pending the decision on return. This may be particularly important if there is likely to be any delay in determining the return application. Jurisdiction to make interim contact orders pending a decision on the return application is possible in a number of Contracting States. In some States the authority for this is derived from Article 21 of the Convention.\(^{55}\) Implementing legislation in some countries includes general powers in the court to give interim directions, pending a decision on return, for securing the interests of the child or preventing prejudice to an interested party.\(^{56}\) However, in certain other countries interim applications are not possible and in one State\(^{57}\) Article 16 of the Convention is interpreted as excluding this option.

33 When a return application is withdrawn on the basis of an agreement between the parties that the child should remain in the jurisdiction, but subject to agreed contact arrangements, it appears that a State\(^{58}\) may accept that the court has jurisdiction to enter an agreed order on the issue of contact. It may be argued that this is reasonable in the light of Article 4, Article 7, paragraph 2 c), Article 21 and Article 26, paragraph 4.

34 Where a return application is refused, the question arises whether Article 21 may then be used by the applicant to have rights of access established or recognised. Again there is no consistent practice. In this context it is worth noting that in Australia draft Regulations propose to give the Central Authority express power to apply to the court for a contact order where a return order has been refused.\(^{59}\)

\(^{53}\) See, e.g., Re G (a Minor) (England and Wales), supra note 40, in which Butler-Sloss LJ stated: “The existence of an order of the court where the child was then habitually resident is ... of crucial importance and is a factor to be given the greatest possible weight consistent with the overriding consideration that the welfare is paramount”. Id. at 676. See also Director-General, Department of Families Youth and Community Care v Reissner [1999] 25 Fam LR 330 (Australian Family Court (Brisbane), 1999) [INCADAT cite: HC/E/AU 278] in which Lindenmager J of the Family Court of Australia referred to the need “to have regard to the relative recency and the circumstances of the making of the [foreign access] orders...”. Id. at 17.

\(^{54}\) For example, in England and Wales.

\(^{55}\) For example, in Germany.

\(^{56}\) For example, Ireland and Scotland.

\(^{57}\) Sweden.

\(^{58}\) For example, Germany.

\(^{59}\) Draft Family Law Amendment Regulation 2001, supra note 47, Reg. 25A.
e Provision for legal aid, assistance or advice

35 Perhaps the most important issue is whether the applicant is able realistically to access the legal process in the requested State. How is the Convention concept of "facilitating the institution of proceedings" given expression in the different Contracting States? What provisions exist for legal advice, assistance and representation? At one end of a fairly broad spectrum is the example of Australia, whose Central Authorities have power to apply to the court for a variety of orders to secure the effective exercise of rights of access. As with return applications, there are in Australia no eligibility requirements for legal aid applicants. (It should be pointed out that, as is the case with return applications, the State Central Authorities institute proceedings on behalf of the Commonwealth Central Authority, and the lawyers do not take instructions directly from the left-behind parent, but take into account his or her views.) There are next a substantial number of countries where the Central Authority will not itself be involved in proceedings, but will help to arrange for a lawyer to act for and to advise the applicant. In many of these countries free legal aid is available. Generally speaking, the provision of legal aid is subject to a means and/or a merits test. This contrasts with return applications, in respect of which in a small number of countries legal aid is available without any means testing. The application of means and merits tests sometimes results in the application for legal aid becoming a lengthy process, and this may lead to delays.

36 There is another set of countries, typified by the United States, which do not offer free legal aid but try to identify a private attorney to handle cases on a full fee, reduced fee or pro bono basis. As is pointed out in the response of the United States, this process of identifying a private attorney can be a difficult one in contact cases, which are time consuming, especially where cases involve modification or creation of an access order rather than the simple enforcement of an existing order. This may present a formidable barrier to the applicant.

37 There are of course variations from these standard examples. In Sweden, for example, legal aid is granted to non-resident foreign citizens in contact cases only if there are "special reasons". In Germany, the Central Authority arranges for a lawyer to represent the applicant, or in the event of recourse to legal aid, the Central Authority itself institutes court proceedings and applies for the assignment of counsel to conduct the case. In Manitoba, Canada, the Central Authority, though not representing the applicant, may monitor the progress of court proceedings and appear in the role of amicus curiae. Services may of course differ from one region to another within federal systems. For example, whereas most Provinces in Canada make legal aid available in contact cases, Ontario does not.

f Distinction between access rights and rights of custody

38 Some preliminary remarks about the terminology used in this Report, in particular the use of terms such as access, contact, custody rights and parental responsibilities have
already been made in the introduction.\textsuperscript{63}

\textsuperscript{63} See, \textit{supra}, paragraphs 7 and 12.
39 Under the 1980 Convention, the distinction between rights of access and rights of custody is a crucial one in that a return order can only be made in case of a breach of rights of custody, and not in the case of a breach of rights of access. The definition of the two concepts, which is not comprehensive, appears in Article 5 of the Convention:

“For the purposes of this Convention –

a) ‘rights of custody’ shall include rights relating to the care of the person of the child and, in particular, the right to determine the child’s place of residence;

b) ‘rights of access’ shall include the right to take a child for a limited period of time to a place other than the child’s habitual residence.”

Because the principal remedy under the Convention, the return order, is only available for breach of custody rights, most of the case law concerns the definition of custody rights rather than rights of access. However, the definition of custody rights may itself sometimes involve consideration of access rights. Because Article 5 of the Convention defines rights of custody as including not only “rights relating to the care of the person of the child”, but also “the right to determine the child’s place of residence”, there have been a number of cases in which non-custodial parents (in the sense of parents who are not primary carers) have been able to employ the remedy of the return order in effect to vindicate their access rights. The classic example is where rights of access are combined with an order of the court (a ne exeat order) prohibiting the custodial parent from leaving the jurisdiction with the children without the agreement of the other parent or the permission of the court. The preponderance of the case law supports the view that the existence of a ne exeat order is capable of elevating “rights of access” in effect to the status of “rights of custody”.

In other words, a left behind parent who enjoys only access rights may nevertheless, because of the existence of a ne exeat order, be able to employ the Convention to bring about the return of the child to the country of his or her habitual residence. The opposing view is that this constitutes an improper use of the return order, which was not intended to provide a mechanism for supporting access rights. A full discussion of this problem, which has already given rise to a great deal of debate, is beyond the scope of this paper. However, it is perhaps fair to comment that the failure of the 1980 Convention to provide an effective means of securing access rights in

64 Article 3(a).
65 See, for example, C. v. C. [1989] 2 All E.R. 465 (English Court of Appeal, 1988) [INCADAT cite: HC/E/UKe 34]; Foxman v. Foxman, c.a. 5271/92 (High Court of Israel, 1992); several US cases prior to the decision in Croll v. Croll (infra note 66), including for example, David S. v. Zamira S., 151 Misc. 2d 630, 574 N.Y.S. 2d 429 (Family Court of New York, 1991) [INCADAT cite: HC/E/Us 208]. The broad approach was also followed by the delegates at the Second 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, held at the Hague in 1993. The Report of that meeting is available on the Hague Conference website at <http://www.hcch.net/e/conventions/reports28e.html>.
international
situations has perhaps stimulated the use of the return procedure for this purpose\textsuperscript{68} and may indirectly have reinforced the general judicial tendency to give a broad scope to the concept of custody rights.

40 The issue has also arisen of whether there may be an overlap in the definition of custody and access rights. In particular, does the holder of custody rights by implication also possess rights of access? In the Australian case of Director General, NSW Department of Community Service v. O,\textsuperscript{69} the father had been granted custody of a child by an Italian court. Several years later, the mother, who had rights of access, took the child to Australia and refused to return him. The father, having been unsuccessful in his application for a return order, applied under the Convention for access. As explained above, the Article 21 procedure is only available in Australia in a case where there are pre-existing access rights. The question, therefore, was whether the Italian custody order could also be said to imply access rights in the father. The Australian judge rejected this idea, holding that rights of custody and rights of access were discrete concepts under the Convention. If the idea were accepted that the Italian custody order could also be considered as a species of access order, the Australian court would then have to consider what sort of access the father had a right to. This would be inconsistent with the Australian position that Article 21 may not be used to obtain an order defining access rights.

41 If the proposed amendment to Australian law comes into force,\textsuperscript{70} this problem of defining access rights will be avoided in the form in which it arose in the O case, because it will become possible to use the Article 21 procedure to establish access rights \textit{de novo}. It may be noted that this problem could arise in another context, \textit{i.e.} other than in a case in which a return order has been refused. A custodial parent may, for example, wish to have access to or contact with a child during a long period of visitation with the non-custodial parent.

\textbf{g Some statistics}

42 The statistical analysis of applications made in 1999 under the \textit{Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction}, drawn up by Professor Nigel Lowe, Ms Sarah Armstrong and Ms Anest Mathias for the Special Commission of March 2001,\textsuperscript{71} provides helpful data on the incidence profile and outcome of access applications received by twenty-five Contracting States in 1999. The one hundred and ninety-seven incoming cases reviewed represented the great bulk of the estimated total of two-hundred and twenty access applications brought in all Contracting States in 1999. Several aspects of the statistical analysis are relevant here.

43 The number of access applications was small relative to the number of return applications (17\% : 83\%).

44 The following are the conclusions reached by the authors with regard to the outcome of applications:

\textit{“Overall, 43\% of applications concluded with the applicant gaining access to the child, either as a result of a voluntary agreement or a court order. This}


\textsuperscript{69} 17 March 2000, Family Court of Australia, Justice Lawrie unreported.

\textsuperscript{70} See, \textit{supra}, note 47.

compares with 50% of return applications ending with the return of the child. The high
proportion of applications (13%) that were still pending, as opposed to 9% of return applications, should be noted, though this was perhaps predictable as it generally takes longer to dispose of an access application than it does a return application. It is also to be noted that in some cases where access was judicially granted or refused, the decision was made under the Hague Convention and in others the decision was made according to domestic law. This bears testimony to the differences in interpretation of Article 21 of the Convention. Of the 65 applications that reached the court, 74% resulted in access being granted and 26% in a refusal to grant access. Surprisingly this proportion is the same as in return applications. In contrast, perhaps more predictably, given their generally more protracted nature, proportionately substantially more access applications were withdrawn than return applications (26% as opposed to 14%). Indeed withdrawn applications amounted to the single largest outcome.

45 On the matter of the speed with which access applications were processed, the authors note:

“As the questionnaire was differently phrased on the issue of timing as against return it is only possible to indicate broad time bands as opposed to specific days. Previous research findings found that access applications generally take considerably longer than return applications and this is generally confirmed by these findings with 71% of cases going to court taking over six months. Dispositions within six weeks were relatively infrequent. It is interesting to note that 42% of cases that reached a voluntary settlement took over 6 months and 18% of cases resulting in a voluntary settlement reached a conclusion in less than 6 weeks.

It is evident from these figures that access cases take considerably longer to resolve than return cases. For example, 26% of judicial decisions in return applications were decided within 6 weeks whereas in access applications the figure was just 5%. Considering applications which took over 6 months to reach a conclusion the difference is particularly noticeable, 19% of judicial decisions in return applications took over 6 months compared with 71% of decisions in access applications. Access applications also took longer to reach voluntary conclusions, with 18% being concluded within 6 weeks, compared with 50% of return applications. 42% of voluntary settlements in access applications took over 6 months compared with 14% of voluntary returns.”

46 In their concluding observations, comparing return with access applications, the authors further note:

“The need for the return of the child to be arranged expeditiously is obvious, the sooner the child returns to their State of habitual residence, the less the

72 “Of the 48 applications judicially granted, 12 were known to be granted under the Convention and 25 under domestic law. Of 17 refusals, 5 were known to be refused under the Convention and 8 under domestic law. Our understanding is that all access applications considered by the courts in England and Wales, Germany and the United States of America are decided under domestic law.” Prel. Doc. No 3 of March 2001 for the attention of the Special Commission of March 2001 (Revised version, November 2001), supra note 71, at footnote 46.
73 Id. at 29.
74 Id. at 31.
child will
have settled in their new environment. The need for a fast track system for dealing with access applications under the Hague Convention, however, is not so obvious, for apart from the fact that the applicant is in a foreign jurisdiction, there is arguably no need to treat the application differently from any domestic application for access.**47**

47 In co-operation with the Canadian government the Permanent Bureau is establishing a statistical database (The International Child Abduction Statistical Database - INCASTAT) which will help to maintain up-to-date information on trends concerning access applications under the Convention. It is hoped that INCASTAT will be internet-accessible prior to the end of 2002.**76**

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75 *Id.* at 36.

CHAPTER III – ELEMENTS OF THE FRAMEWORK FOR RESOLVING INTERNATIONAL ACCESS / CONTACT DISPUTES

a  Introduction

This Chapter identifies and surveys the different elements which impact on the resolution of international access / contact disputes. The elements surveyed are diverse. They cover both the concerns of private international law (questions of international jurisdiction, recognition and enforcement and co-operation between authorities in different countries), as well as aspects of national law including matters of substance, procedure and enforcement. The overall picture needs to be explained and understood if attempts to improve the system are to be effective. Most of the elements are interrelated. Reform of isolated parts of the system without regard to the context carries a risk of failure. For example, improvements in the international system for the recognition and enforcement of decisions on access / contact will be undermined if national enforcement procedures are ineffective. Domestic procedures and rules of substance need to be reviewed in terms of their impact on international cases. Improvements in the facilities and services provided to foreign applicants, and in the access which they are given to foreign legal systems, may count for little if the procedures adopted and the substantive rules applied to their cases are insensitive to the special features, including the problems arising from time, distance and language, which are peculiar to international cases.

b  Matters of jurisdiction

The importance of agreed jurisdictional standards

It has been suggested that, while the law itself cannot guarantee the successful development of relations between children and their parents who are in different countries, it should nevertheless be capable of offering a firm legal framework within which agreement is encouraged, unnecessary conflict and litigation is avoided, contact arrangements are secure and unjustified obstructions to contact are deterred. An essential element in this stable legal framework is a set of agreed standards for exercising jurisdiction to make or modify contact orders in cross frontier situations, as well as provisions for the recognition and enforcement of contact orders made on the basis of those agreed standards. A coherent and universal set of jurisdictional standards is essential for three reasons:

(a) To avoid conflicts of jurisdiction when applications for contact are first considered. Where there exists the possibility of the authorities/courts of more than one country exercising jurisdiction, the danger exists of duplicated litigation, with attendant costs and the generation of inconsistent orders. Even if duplication is avoided by a “first come first serve” (lis pendens), this may still be an incentive for a parent to seize rapidly the more convenient forum, an outcome which is in conflict with the principle that parents should be encouraged to settle their differences concerning their children by agreement and without litigation if possible.

(b) To ensure that jurisdiction exists to make contact orders when this is in the interests of the child. Existing gaps, e.g. where jurisdiction to make interim orders is absent, need to be filled.

(c) To circumscribe jurisdiction to modify an existing contact order. If an existing contact order may too readily be modified by the authorities in a country in which the child has a temporary residence, especially where that residence occurs for the purpose of

77 See, supra, paragraph 16.
exercising contact in that country, a situation of uncertainty is created which encourages litigation, promotes conflicting orders, places in jeopardy existing and possibly agreed contact arrangements and acts as a strong disincentive to courts when considering whether to give permission for the exercise of contact abroad. At the same time, it is important to have realistic but closely circumscribed jurisdictional principles, which enable the terms and conditions of contact to be modified in situations of emergency, even by the authorities of a country in which a child is merely present.

50 Some of the more specific issues which should be capable of resolution through agreed jurisdictional standards are illustrated by the example cases set out above, and include the following:

(a) Does the authority seized with a return application have jurisdiction to make interim orders concerning contact?

(b) Does an authority which has refused a return application have competence to determine issues of contact between the child and the left-behind parent? How does one deal with a potential conflict arising from the exercise of jurisdiction by the authorities of the State of the left-behind parent?

(c) In the case of a de novo application for a contact order by a foreign applicant, what jurisdictional standards apply? Are they to be based primarily on the habitual residence or the presence of the child or on some other basis?

(d) What are the jurisdictional standards applying to applications for modification of a contact order? To what extent, if at all, do the authorities which have made the original order retain jurisdiction following a change, e.g. in the habitual residence of the child?

(e) Do the authorities in a country which the child is to enter for the purpose of visitation with the non-custodial parent have jurisdiction to make any necessary advance orders to help in securing the conditions on which contact is to take place (e.g. mirror orders or orders for the advance recognition of an existing contact order)?

The existing framework

51 We have already seen that the 1980 Convention itself does not contain explicit jurisdictional standards, although it is implicit that the authorities of the State of the child’s habitual residence should exercise a general jurisdiction with regard to disputes concerning rights of custody. It has also been explained that, even in relation to those access applications which are closely connected with return applications and which are made to the court or authority dealing with a return application (e.g. applications for interim access or applications for access by the unsuccessful applicant for a return order), there are diverging views as to whether the court may exercise jurisdiction under the Convention. For the most part, courts have not treated the 1980 Convention as being determinative of jurisdiction. Even in those countries which regard Article 21 as providing a basis for application to the courts to secure access rights, the precise circumstances in which this can be done remain unclear. Generally in such cases, the child in question will

78 It is this consideration which inspires Article 15 of the Council of Europe draft Convention on Contact Concerning Children. “Article 15 – Conditions for implementing transfrontier contact orders: The judicial authority of the State Party in which a transfrontier contact order made in another State Party is to be implemented may, when recognising or declaring enforceable such contact order or at any later time, fix or adapt the conditions for its implementation, as well as any safeguards or guarantees attaching to it, if necessary for facilitating the exercise of this contact, provided that the essential elements of the order are respected and taking into account, in particular, a change of circumstances and the arrangements made by the persons concerned. In no circumstances may the foreign decision be reviewed as to its substance.” Supra note 13.

79 See, supra, paragraph 11.
be either present or habitually resident in the country of the court or authority addressed, and this will be the real basis for
the exercise of jurisdiction, just indeed as this is generally the basis of jurisdiction in those countries where application can only be made through domestic procedures rather than under the Convention.

52 Quite apart from the 1980 Convention, the jurisdictional rules with respect to transfrontier contact cases diverge widely from one country to another. In several European States (particularly those which are Parties to the Hague Convention of 5 October 1961 concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Minors), the primary basis of jurisdiction is the habitual residence of the child. Simple residence of the child may also be a basis in some countries, particularly when the case is one of urgency. The Brussels II Regulation gives a limited competence, also in contact matters, to a court which is exercising jurisdiction to grant a divorce, judicial separation or annulment of marriage under the Regulation. The provision was inspired by, and is almost identical to that contained in the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children.

53 In the United States, on the other hand, jurisdiction is in the "home state", i.e. the state where the child has been resident for six months before the initial filing of the action and was living with a parent or other person acting in loco parentis. The home state retains exclusive jurisdiction, even though the child and the custodial parent may have moved permanently to another jurisdiction, so long as one of the parties (e.g. the non-custodial parent with contact rights) continues to live there. This concept of a continuing home state jurisdiction (which, it should be remembered, developed in the context of a multiple jurisdiction federal State under one Constitution) is in direct contrast to the principle accepted by many Contracting States that jurisdiction follows changes in the habitual residence of the child. This may give rise, particularly in cases where modification of an existing order is sought, to the exercise of competing jurisdiction by authorities in two States.

54 Finally, the issue of whether jurisdiction exists in the authorities of a country which the child is to enter in the future for the purpose of visitation, but in which the child at present has no habitual residence or even presence, is a matter of some doubt in several countries.

55 In summary, it may be said that the international picture with regard to jurisdiction to make or modify contact orders has up to now been a rather unsatisfactory one. There has been a great deal of uncertainty on many issues, as well as the potential for competing jurisdictions. It was against this background that negotiations began in 1994 at The Hague for what was to become 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.

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80 States Parties to the 1961 Convention: Austria, China (Macau Special Administrative Region only), France, Germany, Italy, Latvia, Lithuania, Luxembourg, Netherlands, Poland, Portugal, Spain, Switzerland and Turkey.
82 Uniform Child Custody Jurisdiction and Enforcement Act § 201. UCCJEA § 201, 9 U.L.A. at 671. Section 105 of the UCCJEA provides that a court of the United States should treat a court of a foreign country as if it were a State of the United States for the purpose of applying the jurisdiction and co-operation sections of the Act. See further Robert G. Spector, "International Child Custody Jurisdiction and the Uniform Child Custody Jurisdiction and Enforcement Act", New York University Journal of International Law and Politics, Vol. 33, No 1 (Fall 2000) at 251.
83 See e.g., Re P (a child) (minor orders) 2000 1 FLR 435 (England and Wales), where the child in respect of whom an order was sought was not habitually resident nor physically present in England and Wales at the time the order was made. See further Mr Justice Singer, "Mirror Orders: Some Reflections", a paper presented to the United Kingdom Family Law Conference, London, 8 & 9 October 2001.
The Hague Convention of 1996

56 One of the objectives of the 1996 Convention, with regard to the protection of children generally in international situations, is to avoid conflicts between their legal systems in respect of jurisdiction. This is achieved by providing rules, which determine "the State whose authorities have jurisdiction to take measures of protection of the person or property of the child". ⁸⁴

57 It should be explained first that the scope of the 1996 Convention clearly includes contact orders. The Convention deals with all measures directed towards the protection of the person or property of the child, ⁸⁵ and covers specifically "rights of access, including the right to take a child for a limited period of time to a place other than the child's habitual residence". ⁸⁶ It covers any measures taken by "an authority" (judicial or administrative), which establishes rights of access / contact or which limits or attaches safeguards to their exercise. The term "access" encompasses contacts at a distance, which a parent is authorised to maintain with his or her child by correspondence, telephone or other means. ⁸⁷ It applies to children up to the age of 18 years. ⁸⁸ There is no definition, and therefore no explicit limitation, of the persons in favour of whom a contact / access order may be made. The matter is left to the applicable law, which will usually be the law of the forum. ⁸⁹

58 With regard to jurisdiction, the primary rule of the Convention is that the judicial or administrative authorities of the State of the child’s habitual residence have jurisdiction to determine issues relating to access / contact. ⁹⁰ In the case of refugee children, or children whose habitual residence cannot be established, the authorities of the State where the child is present have jurisdiction. ⁹¹

59 Where a child’s habitual residence changes, the authorities of the new habitual residence usually have jurisdiction. ⁹²

**Example:** Following the breakdown of their marriage, Mr and Mrs X obtain a divorce in Canada, the State of their matrimonial residence. Custody of their child is awarded to Mrs X with rights of access / contact to Mr X. Mrs X moves to and settles in Poland lawfully taking the child with her.

Following the change of the child’s habitual residence to Poland, the access provisions ordered in Canada will remain in force (and be enforceable in Poland) until such time as the authorities in Poland modify, replace or terminate them (Article 14).

60 However, if a new habitual residence is established following the unlawful removal of a child, jurisdiction will remain with the authorities of the former habitual residence until

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⁸⁴ Article 1(1)(a).
⁸⁵ Article 1.
⁸⁶ Article 3(b).
⁸⁸ Article 2.
⁸⁹ See Chapter III of the 1996 Convention.
⁹⁰ Article 5.
⁹¹ Article 6.
⁹² Article 5(2).
certain conditions are satisfied.\textsuperscript{93} In the meantime, the authorities of the new habitual

\textsuperscript{93} Article 7.
residence may only take urgent or provisional measures.\footnote{Article 11.} or provisional measures.\footnote{Article 12.}

**Example:** Mr and Mrs X have their matrimonial home in New York. Their marriage breaks down and, without Mr X’s consent or the benefit of a court order, Mrs X removes herself and their child to Sweden, the State of her former residence and nationality.

The New York authorities will continue to have jurisdiction to determine matters of contact/access, unless Mr X acquiesces in the removal (Article 7, paragraph 1a), or until a year has passed, there is no application for the child’s return pending and the child has become settled in the new environment (Article 7, paragraph 1b). In the interim period, the Swedish authorities may take any urgent or provisional measures necessary, but these will lapse as soon as the New York authorities have taken measures required by the situation.

\footnote{Articles 8 and 9.}

61 In exceptional circumstances, and where it is in the best interests of the child, jurisdiction in respect of access/contact may be transferred with the agreement of the authorities of the child’s habitual residence, to the authorities of another State, for example that of the child’s nationality, or any State with which the child has a substantial connection.

**Example:** Mr X has his habitual residence in France and his wife has her habitual residence in the Netherlands. Mrs X has custody of their eleven-year-old son, who is also habitually resident in the Netherlands but who attends boarding school in France. An order made by the authorities in the Netherlands gives to Mr X limited contact rights with his son. With the consent of his wife, Mr X wishes to apply to the French authorities for more extensive contact arrangements. The Netherlands court is of the opinion that the French authorities are well positioned to make the best judgment on the particular arrangements.

In these circumstances, the Netherlands authorities may give their consent to a transfer of jurisdiction which may occur either at their own request, provided also that the French authorities consider that this is in the child’s best interests (Article 8), or at the request of the French authorities (Article 9).

These provisions offer a structure for judicial co-operation which may be helpful in other contexts.

**Example:** A court in Argentina is considering making an order to allow a child habitually resident with his mother in Argentina to travel during school holidays to visit his father who is living in Brazil. The court has some concern that the father may use the opportunity to abduct the child to a third State. The court is prepared to make the contact order, but only if certain protective measures are put in place in advance by a court in Brazil.

Article 8 provides the mechanism for achieving this, and for establishing the jurisdiction of the Brazilian court despite the fact that the child is not habitually resident, nor even present, in Brazil.

62 Authorities of a State exercising jurisdiction to decide upon the divorce (or legal separation or annulment of the marriage) of a child’s parents may, with the consent of the parents, determine issues of custody and access, provided that one of the parents had his/her habitual residence in that State when proceedings were commenced and provided that one of the parents had parental responsibility in respect of the child concerned at that
time.
Example: Mr and Mrs X have two children, a twelve-year-old boy and a six-year-old girl. Following the breakdown of their marriage, and by agreement, Mr X is living in Germany with the boy and Mrs X is living in Denmark with the girl. Mrs X has applied to the Danish courts for a divorce by consent, and the parents are agreed the Danish court should be asked to determine all matters relating to the custody of and the access to the two children.

63 The authorities of the State where the child is present have jurisdiction to take measures in cases of urgency\(^\text{97}\) or to take provisional measures with territorially limited effect.\(^\text{98}\) One example is given in paragraph 60 above.

Example: Mr and Mrs X were living in Norway. Mrs X has abducted their six-year-old son and is living in New South Wales. Mr X has applied for a return order. He has travelled to New South Wales for this purpose and pending the outcome of these proceedings has applied to the court there for an interim access / contact order.

The New South Wales authorities have jurisdiction to make such an order on an urgency basis but any order made will lapse as soon as the Norwegian authorities have taken measures required by the situation.

c Assistance to foreign applicants

64 A foreign applicant, seeking to enforce an existing contact order or applying for a contact order \textit{de novo}, whether or not under the umbrella of the 1980 Convention, faces a range of difficulties over and above those confronting an applicant in a purely domestic case. The difficulties arise from distance, from lack of familiarity with language, legal system and other relevant services, and from the probable absence of any personal or familial support network in the foreign country. Without appropriate support, the struggle by an applicant to obtain transfrontier contact can be very costly and often proves to be overwhelming. The issue therefore arises of the level of services which it is possible or appropriate for the authorities in the requested State to make available, bearing in mind that those services are provided not only for the benefit of the applicant but also in the interests of the child or children concerned. Some of the specific issues that arise are as follows:

(a) What information should be provided (and in what languages)?
(b) What legal advice should be made available?
(c) What degree of assistance in accessing the legal system is appropriate and in particular should there be some level of free legal aid or assistance?
(d) What facility should exist to promote an agreed outcome?\(^\text{99}\)
(e) What supports should be provided for contact arrangements which are agreed or ordered, e.g. to facilitate supervised contact or to assist with travel arrangements for the child?

The Hague Conventions

65 These issues have already been examined from the point of view of practice under the 1980 Convention.\(^\text{100}\) The survey of practices under the 1980 Convention reveals substantial differences in the levels of support for foreign applicants offered by different

\(^{97}\) Article 11.

\(^{98}\) Article 12.

\(^{99}\) This matter is discussed in, \textit{infra}, Chapter III, section g.

\(^{100}\) See, \textit{supra}, Chapter II, section e.
Contracting States. Reciprocity for the most part does not exist. This applies to the collection of information.
available, to the levels of support given to agreed arrangements between the parties, to
the provision of legal advice, assistance or aid, as well as to the practical facilities made
available to support particular contact arrangements.

66 The Hague Convention of 1996 does not significantly add to the provisions of the
1980 Convention in this respect.\(^{101}\) Article 30, paragraph 2, imposes an obligation on
Central Authorities “in connection with the application of the Convention, to take
appropriate steps to provide information as to the laws of, and services available in, their
States relating to the protection of children”. It also contains provisions relating to co-
operation between Central Authorities.\(^{102}\) In particular, under Article 35, paragraph 1, the
authorities of one Contracting State may request authorities in another to “assist in the
implementation of measures of protection taken under this Convention, especially in
securing the effective exercise of rights of access as well as of the right to maintain direct
contacts on a regular basis”. The Convention contains no additional provisions concerning
the provision of legal aid or advice.

Other instruments and draft instruments

67 The Council of Europe draft Convention on Contact concerning Children\(^{103}\) confines
itself to the general prescription that “in transfrontier cases, Central Authorities shall assist
children, parents and other persons having family ties with the child, in particular, to
institute proceedings regarding transfrontier contact”.\(^{104}\) The Explanatory Report to the
Convention states that assistance under this Article implies “not only the provision of a list
of lawyers, but also the provision of assistance in order to obtain, for instance, legal
aid”.\(^{105}\) It appears, however, that this is not intended to impose an obligation on the
Central Authority itself to institute proceedings, nor to impose an obligation on States
Parties to provide free or assisted legal aid for that purpose.

68 The proposal of the Commission of the European Communities for a Council
Regulation concerning jurisdiction and the recognition and enforcement of judgments in
matrimonial matters, and in matters of parental responsibility,\(^{106}\) which provides
inter alia for the mutual enforcement of judgments on rights of access to children, provides in more
detail for co-operation between Central Authorities on specific cases.\(^{107}\) There is also an

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101 See, supra, Chapter II, sections b and e.
102 See, infra, Chapter III, section f.
103 Supra note 13.
104 Article 13, paragraph 3.
105 Supra note 13, at paragraph 107.
107 *Article 57 - Cooperation on specific cases
The Central Authorities shall cooperate on specific cases, in particular for the purpose of ensuring the effective
exercise of parental responsibility over a child. To this end, they shall, acting directly or through public authorities
or other bodies in accordance with their laws:
(a) exchange information:
   (i) on the situation of the child,
   (ii) on any procedures under way, or
   (iii) on decisions taken concerning the child;
(b) make recommendations, as appropriate, in particular with a view to coordinate a protective measure taken
   in the Member State where the child is present with a decision taken in the Member State that has
   jurisdiction as to the substance of the matter;
(c) take all necessary measures for locating and returning the child, including instituting proceedings to this end
   pursuant to Articles 22 to 24;
(d) provide information and assistance to holders of parental responsibility Seeking to recognize and enforce
decisions on their territory, in particular concerning rights of access and the return of the child;
(e) support communications between courts, in particular for the purpose of transferring a case pursuant to
Article 15 of deciding in cases of child abduction pursuant to Articles 22 to 24; and
(f) promote agreement between holders of parental responsibility through mediation or other means, and
obligation, in organizing cross-border cooperation to this end.”
proceedings for the recognition or enforcement of an access order, to provide legal aid to an applicant, who in the State of origin has benefited from complete or partial legal aid or exemption from costs or expenses. Such an applicant is entitled to benefit from the most favourable legal aid and the most extensive exemption from costs and expenses provided for by the law of the State of enforcement.\textsuperscript{108}

d Recognition and enforcement

69 The recognition and enforcement of contact orders which have been made on a substantial jurisdictional basis is an important element in achieving some order within the international system. The absence of recognition principles may lead to re-litigation, to disadvantages for the left-behind or non-custodial parent, and it may act as a disincentive when a court is considering an application by the custodial parent for relocation. However, there are a very broad range of different circumstances that need to be taken into account in considering appropriate recognition and enforcement procedures and standards. On the one hand there is the relatively simple case where the court of the child's habitual residence has made a relocation order combined with contact provisions, and the custodial parent, immediately following relocation, refuses to comply with the access conditions.\textsuperscript{109} Here there is a strong case for a simple and speedy procedure for recognition and enforcement. Contrast this with a case in which the contact order was made several years ago by the authorities of the State in which the child had a former habitual residence. Assume that the contact provisions have worked reasonably well in the meantime and have been somewhat modified over time by agreement between the parents. However, circumstances have changed; the child has grown older and has begun to form his or her own views. A dispute then arises which the parents are unable to resolve, as in the past, by agreement. The issues here relating to enforcement of the original contact order are far more complicated. The swift and unreflective enforcement of an ageing contact order may be inappropriate. There may be good reasons not to enforce the original order or at least to allow some modification of it, particularly where the requested State is the jurisdiction in which the child now has his or her established home. Cases of this kind point to the need for a careful balance between the principle of automatic recognition and questions concerning jurisdiction to modify a contact order. Put another way, it is important that recognition principles should be underpinned by clear and coherent jurisdictional standards. This is the philosophy underlying 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.

The Hague Convention of 1996

70 "Chapter IV [of the 1996 Convention] supplies a detailed set of rules which were lacking in the 1961 Convention for the recognition and enforcement in a Contracting State of measures of protection taken in another Contracting State."\textsuperscript{110} Orders relating to access / contact made by an authority exercising jurisdiction under the Convention are entitled to be recognised by operation of law in all other Contracting States.\textsuperscript{111} The grounds for refusing recognition are narrowly drawn,\textsuperscript{112} and the recognising State is bound by the findings of fact on which jurisdiction was based in the State of origin.\textsuperscript{113} Provision is made for

\begin{flushright}
\textsuperscript{108} Article 52.\textsuperscript{109} See, e.g., Gumbrell v Jones (New Zealand), supra note 42.\textsuperscript{110} Lagarde Report, supra note 87 at paragraph 6.\textsuperscript{111} Article 23(1).\textsuperscript{112} Article 23(2).\textsuperscript{113} Article 25.\
\end{flushright}
determination of whether access / contact orders made in one State may or may not be recognised in another.\textsuperscript{114} Enforcement of access / contact orders in the State addressed takes place, in accordance with the procedure provided for in the law of that State,\textsuperscript{115} as if those measures had been taken by the authorities of that State and to the extent provided by its law.\textsuperscript{116} The procedure by which the order is declared enforceable or registered for enforcement must be simple and rapid.\textsuperscript{117}

**Other instruments**

\textbf{71} There exist certain regional instruments providing for recognition and enforcement of contact orders. In Europe, for example, there is the \textit{Council of Europe Convention of 20 May 1980 on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children} (sometimes referred to as the Luxembourg Convention).\textsuperscript{118} This Convention does not contain a comprehensive set of indirect principles of jurisdiction\textsuperscript{119} and has a relatively broad range of grounds of non-recognition.\textsuperscript{120} There is also the Brussels II Regulation,\textsuperscript{121} which provides for recognition of contact orders made in the context of divorce, separation and marriage annulment. A 1931 Nordic Convention operates among Nordic countries.\textsuperscript{122} As between States where no international instrument operates, practice varies. In many States, reciprocal arrangements are required for enforcement to be possible. In the United States under the UCCJEA,\textsuperscript{123} the principle is that a foreign contact order is enforceable in the US if made in factual circumstances in substantial conformity with the jurisdictional standards of Article 2 of the UCCJEA.\textsuperscript{124}

\textbf{72} The fact that enforcement may be sought in some countries within the context of the 1980 Hague Convention, does not entail a right to the enforcement of a foreign order. For example, as we have seen in Australia, even though principles of comity result in considerable respect being given to foreign orders, they are not, in the absence of reciprocal arrangements, enforceable as such, though they may prompt the making of a mirror order by the Australian court.\textsuperscript{125}

\textbf{73} One of the principal objectives of the European Commission’s current proposal for a regulation concerning parental responsibility\textsuperscript{126} is to improve the system within Europe for the recognition and enforcement of contact orders, as well as other decisions concerning parental responsibility. This is part of a broader strategy within the European Communities to create “a genuine judicial area based on the principle of mutual

\footnotesize{\textsuperscript{114} Article 24.  
\textsuperscript{115} Article 26(1).  
\textsuperscript{116} Article 28.  
\textsuperscript{117} Article 26(2).  
\textsuperscript{118} Luxembourg, 20.V.1980.  
\textsuperscript{119} Some negative principles are contained in Articles 9.1.b and 10.1.c.  
\textsuperscript{120} See Articles 9 and 10.  
\textsuperscript{122} Nordic Convention of 6 February 1931 between Denmark, Finland, Iceland, Norway and Sweden.  
\textsuperscript{123} Uniform Child Custody Jurisdiction and Enforcement Act, 9(1A) U.L.A. 657 (1999), which has been adopted in 21 states and is gradually replacing the Uniform Child Custody Jurisdiction Act (UCCJA), 9(1A) U.L.A. 271 which had been adopted in 50 States.  
\textsuperscript{124} UCCJEA, id., at § 105(b), 9 U.L.A. at 662.  
\textsuperscript{125} See, supra, paragraph 26.  
\textsuperscript{126} Supra note 13.}
recognition of judicial decisions”, a principle which applies also to other civil and commercial matters. In the family law area, the first step was taken, as described above, in the Brussels II Regulation.

127 Conclusions of the Tampere European Council, October 1999, point 33.
Under the proposed regulation on parental responsibility rights of access granted in one Member States will be entitled to be recognised and enforced in other Member States "without any special procedure being required", provided that the judgment has been appropriately certified by the court of origin. Certification requires that the judgment was not given in default of appearance and that the child was given an opportunity to be heard, unless a hearing was considered inappropriate having regard to his or her age or degree of maturity.

74 The Council of Europe draft Convention on contact concerning children does not contain specific rules governing recognition and enforcement but it does include an obligation on States Parties to "provide, including where applicable in accordance with relevant international instruments: (a) a system for the recognition and enforcement of orders made in other States Parties concerning contact and rights of custody; (b) a procedure whereby orders relating to contact and rights of custody made in other States Parties may be recognised and declared enforceable in advance of contact being exercised within the State addressed".

75 The primary remedy provided by the 1980 Convention – the return order – provides strong support for access / contact arrangements. The wrongful retention of a child in breach of custody rights is placed on the same level as wrongful removal of the child. An order for the return of the child “forthwith” applies. The Convention thus contains the primary sanction against the most serious abuse of rights of access / contact across international frontiers, namely the unlawful retention of the child following a period of agreed or court ordered access. At the same time the existence of this sanction supports the child’s right of contact by creating a situation in which a custodial parent or a court may feel more secure in agreeing to or approving arrangements for overseas contact with the non-custodial parent. The order for return in the case of unlawful retention is subject to the same carefully balanced defences as apply to unlawful removal.

76 When the provisions of the 1980 Convention are combined with those of the 1996 Convention, the position of the custodial parent is further strengthened in a case of unlawful retention. The 1996 Convention confirms the primary jurisdiction enjoyed by the authorities of the child’s habitual residence, and Article 7 ensures that in a case where a child has been unlawfully retained following a period of access in another jurisdiction, the authorities in the country where the retention has occurred will not acquire general jurisdiction, even if they have refused to return the child, until a number of strict conditions are satisfied. Until these conditions are met, the authorities of the habitual residence will retain jurisdiction and any order made by them will be entitled to recognition and enforcement. “The combined effect of the two Conventions is to make it completely clear that wrongful behaviour should not be rewarded, and that the best interests of the child are served by following the [1980] Convention’s mandate and returning the child. Non-return is the last resort, not the acceptable alternative.”

128 Article 46.1. The so-called abolition of exequatur. See the Explanatory Memorandum of the Commission of the European Communities at p. 5.
129 Article 46.2(a)(b).
130 Article 14.1.
131 Article 1.
132 Under Article 12.
133 See Article 5.
134 For example under Article 13 of the 1980 Convention.
135 Article 13.
136 Article 23.
The Commission of the European Communities proposal for a Council Regulation concerning parental responsibility also contains certain provisions whose objective is, like that of the 1996 Convention, to re-enforce the primacy of the jurisdiction of the authorities of the child’s habitual residence in cases where abduction or wrongful removal are concerned. The precise mechanisms to be included in the Regulation are still being debated. One element which appears likely to remain is that an order for the return of a child made by the authorities where the child is habitually resident will be entitled to be recognised and enforced without any special procedure being required. The ability of the authorities in the country where the child has been unlawfully retained to delay the return through the taking of provisional measures will be limited to cases of “grave risk” or “the child’s objections.”

Co-operation between authorities

The issue of co-operation between authorities, especially Central Authorities, in international access disputes has been emphasised in some of the responses to the Questionnaire and Consultation Paper. One respondent mentioned that the provisions of the Hague Convention of 1961 on the Protection of Minors may be invoked in support of the 1980 Convention where the States concerned are Parties to both Conventions. The 1980 Convention itself requires, under Article 7, co-operation between Central Authorities to secure the prompt return of children and to secure the other objectives of the Convention, including the effective respect of access rights. However, the Convention is not explicit on the forms which co-operation should take in respect of the securing of access / contact rights.

Co-operation and the 1996 Hague Convention

The 1996 Hague Convention, on the other hand, which complements the 1980 Convention, specifies a range of subject matters on which Central Authorities are required to co-operate. Under the Convention, the Central Authorities have a general obligation to co-operate with each other to achieve the objects of the Convention, and they are required to provide information on their respective laws and services relating to child protection, which of course includes laws and services pertaining to matters of access / contact. They have a duty, either directly or through public authorities or other bodies, to facilitate by mediation, conciliation or other means, agreed solutions to disputes concerning access in situations to which the Convention applies. They also have a duty upon request to assist in discovering the whereabouts in their several jurisdictions of any child in need of protection.

In a particular case, e.g. when contact issues are giving rise to difficulties, the authorities of the State where the child is habitually resident may be requested by the authorities of any other State having a substantial connection with the child to provide a report on the child’s situation, and to take measures for the child’s protection.

Example: Mrs X has custody of her five-year-old daughter and is living in Hungary. Mr X, who lives in South Africa and has the right under an order made there to...
contact his daughter regularly by telephone, has found it impossible to do so.
The South African authorities may, in this case, contact the Hungarian authorities to seek a report on the child’s situation\textsuperscript{145} and if necessary, may ask for assistance in enforcing the order or otherwise securing the effective exercise of the father’s contact rights.\textsuperscript{146}

81 Where an authority having jurisdiction under the Convention (usually the authority of the child’s habitual residence) is considering making an appropriate contact order, it may request the authorities of any other Contracting State which has information relevant to the matter to communicate such information to it.

\textbf{Example:} Ten-year-old Mark is living with his custodial mother in Finland. His father, who lives in Scotland, has applied to the Finnish authorities to permit Mark to visit him during his school holidays.

The Finnish authorities may call on the assistance of the Scottish authorities to provide information concerning the living conditions etc. of Mark’s father in order to assess the merits of his application for contact/access.

82 In order to assist a parent in one State who is seeking to obtain or maintain access to a child in another State, the authorities of the State in which that parent resides may make a preliminary finding on the suitability of that parent to exercise access and on the conditions of its exercise. The authorities having jurisdiction to make the decision on access must admit and consider such finding and may adjourn proceedings to await such a finding.\textsuperscript{147}

\textbf{Example:} Mr Y and Ms X were living in England with their ten-year-old daughter. The marriage broke down two years ago. The English court awarded custody to Ms X and, on the basis that she would be returning to her native Hong Kong, ordered that the daughter should spend at least two weeks of each school holiday with her father in England. The mother is now claiming that continuing contact with the father is having an adverse effect on the girl, and that the father has during periods of contact, displayed abusive behaviour towards the girl.

In this case, the father may seek from the English court a preliminary ruling on his suitability which the Hong Kong authorities would be bound to take into account before deciding whether to restrict or terminate his access rights. This rule recognises the legitimate interest which the authorities of the father’s residence have in the question of his fitness to exercise contact in that country. The rule also helps to remove inhibitions that the court of the parents’ common residence may have when asked by one parent for permission to relocate with the child to another country.

83 In the case of a child who is exposed to serious danger, and in respect of whom protective measures have been taken or are under consideration, there is an obligation to inform the authorities of any Contracting State to which the child has moved, or has been moved, of that danger, and of the measures taken or under consideration.\textsuperscript{148}

\textbf{Example:} Joan, a seven-year-old girl who is resident in Belgium and is in the custody of her mother, has been physically abused by her father. An order of the Belgian court permits contact between Joan and her father subject to strict supervision. The Belgian authority receives information that Joan is now on holiday with her father in Luxembourg.

The Convention places an obligation on the Belgian authorities to inform the

\textsuperscript{145} Article 32(a).
\textsuperscript{146} Article 35.
\textsuperscript{147} Article 35.
\textsuperscript{148} Article 36.
Luxembourg authorities of the danger to which Joan is exposed and of the measures of protection taken by them.
The proposed European Regulation

Co-operation between Central Authorities under the Commission of the European Communities proposal for a Council Regulation on parental responsibility will include an obligation to establish an information system on national laws and procedures and the development of cross-border mechanisms on mediation. The requirements of co-operation in individual cases cover the exchange of information relevant to the child, the proceedings and any decision concerning the child, the co-ordination of protective measures between different jurisdictions, the taking of necessary measures to locate and return the child, the provision of information and assistance, support for judicial communications, and the promotion of agreed solutions.

Co-operation at a general level

More general co-operation between National Authorities, not only Central Authorities, to improve structures and remove obstacles to the resolution of International Access disputes may take various forms. At the multilateral level, the general review meetings, meetings of Central Authorities and international judicial seminars are all mechanisms used by the Hague Conference on Private International Law. At the regional level, similar methods have sometimes been used.

Also at a bilateral level, regular discussion between countries which experience particular problems in their mutual relations have been employed. A good example is the series of bilateral meetings which have taken place in the form of a German / United States of America working group which was established by President Clinton and Federal Chancellor Schröder following discussions held between them on June 1, 2000. Meetings of the working group have focused on a number of mutual problems in the operation of the 1980 Convention. In relation to access / contact cases there have been discussions e.g. on problems of inadequate orders, delay, non-enforcement, location of children, legal aid and the organisation of courts. The discussions have also included reference to a number of individual cases.

149 Article 56.
150 Article 57. See, supra, note 107.
151 The First (October 1989), Second (June 1993), Third (March 1997) and Fourth (March 2001) Meetings of the Special Commission to Review the Operation of the 1980 Convention.
152 Where asked to do so, the Permanent Bureau is willing to facilitate meetings between Central Authorities or groups of Central Authorities in order for discussions to take place on particular operations problems. Meetings between Central Authorities offer opportunities, not only for dealing with specific problems, but also for sharing ideas and thereby spreading good practice. This was evident in the very successful meeting of Central Authorities hosted by the Permanent Bureau in The Hague in April 2002 to discuss a first draft of part of the Good Practice Guide – See Prel. Doc. No 3 of September/October 2002, Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction – Part I – Central Authority Practice, drawn up by the Permanent Bureau.
153 The Permanent Bureau of the Hague Conference has been involved in facilitating several judicial seminars including, inter alia, the First De Ruwenberg Judges' Seminar on International Protection of the Child (June 1998) (involving judges from Australia, Austria, Canada, China (Hong Kong Special Administrative Region), Cyprus, Czech Republic, Finland, France, Germany, Greece, Hungary, Ireland, Israel, Mexico, Norway, Netherlands, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States of America); the Second De Ruwenberg Judges’ Seminar on International Protection of the Child (June 2000) (involving judges from France, Germany, Italy and the Netherlands); and the Third De Ruwenberg Judicial Seminar on the 1980 Hague Convention (October 2001) (involving judges from France, Germany, Sweden, the Netherlands, the United Kingdom and the United States). The Permanent Bureau publishes the conclusions and recommendations from the international judicial seminars and conferences on its website. To facilitate the distribution of this information, the Permanent Bureau appreciates receiving information on the conferences that take place.
154 E.g. the Meeting of Government Experts on International Abduction of Minors by One of the Parents, organised by the Inter-American Children’s Institute on behalf of the Organization of American States, Montevideo, August 12-13 2002.
One particular outcome of the talks was the decision to organise, under the auspices of the Hague Conference, an international judicial seminar involving both US and German judges and judges from other jurisdictions, with a special focus on problems of access/contact. This resulted in the third of the De Ruwenberg seminars.\textsuperscript{155}

**Judicial co-operation and communication**

The importance cannot be overemphasised of judicial co-operation and communication between judges, both on a general level, and sometimes, in relation to individual cases. This is the subject of a separate report.\textsuperscript{156}

**g Promoting agreement and mediation**

Arrangements concerning contact which are agreed between the parties have several advantages over arrangements which are ordered by a court. They are more likely to be adhered to by the parties; they establish a less conflictual framework for the exercise of contact and are therefore strongly in the interests of the child; and once a certain level of co-operation between the parents is established, the painful and expensive pattern of re-applications to the court for orders for modification or enforcement is less likely to become established.

The need to promote agreed solutions was recognised by the framers of the 1980 Convention, which in Article 7, paragraph 2c) requires Central Authorities to take all appropriate measures to secure the voluntary return of the child or to bring about an amicable resolution of the issues. In practice, in contact cases under the 1980 Convention, most Central Authorities try to achieve an agreed settlement as a first step (the survey of applications which were made in 1999 shows that 20\% of applications under the 1980 Convention were resolved by voluntary agreement). This will typically involve at least a letter to the custodial parent, and may sometimes involve attempts to negotiate an amicable settlement. However, the precise supports given to the negotiating process differ from country to country. In a few jurisdictions, mandatory mediation applies to contact disputes, as well as to other family law cases. In some other States, mediation services are available though not mandatory. Mediation may be in-court or out-of-court. In a small minority of jurisdictions, conciliation / mediation services are provided free of charge. There is little evidence of mediation facilities which have been developed with the special requirements of international cases in mind. The services of the International Social Service may sometimes be invoked.

The patchwork nature of the supports available to promote agreement in international contact cases is not surprising, and reflects the fact that domestic systems are at different stages of development, particularly with regard to the provision of mediation services. Whether the special requirements of promoting agreement in international cases would benefit from additional provisions within international instruments is a matter for discussion. The Hague Convention of 1996 contains a provision which is more explicit than that of the Hague Convention of 1980, but which still leaves much to the discretion of States Parties. Article 31b) mandates Central Authorities, directly or indirectly, to "take appropriate steps ... to facilitate, by mediation, conciliation or similar means, agreed solutions ... in situations to which the Convention applies."\textsuperscript{157}

\textsuperscript{155} The Third De Ruwenberg Judicial Seminar on the 1980 Convention (October 2001).
\textsuperscript{157} The proposed European Council Regulation on parental responsibility also gives Central Authorities a role in promoting agreement through mediation or other means. See, supra, note 107.
An important initiative was the establishment in December 1998 of the Franco-German Mediation Commission, consisting of three Members of Parliament from each of the two States, appointed by the respective Ministers of Justice. The Commission has mediated in a number of difficult disputes involving French and German parents, with the objective of restoring personal relations between the two parents concerned and their children. The Joint Report of the Commission, published in May 2002, indicates that most of the 41 cases referred to the Commission have involved disputes over access/contact and in 9 of these cases the Commission was able to organise, or was on the point of organising, access for the applicant parent. In a further 4 cases a similar outcome appeared possible, and there are 8 files currently under consideration. Once the parents have agreed to undergo mediation, two members of the Commission, one from France and one from Germany, are assigned to the case. It is possible for the mediators to propose the use of experts, in particular psychologists. The work of the Members of the Commission has been personally time consuming, but their successes have led them to raise the possibility of putting in place a professional mediation system to deal with transfrontier cases which might work under their authority.

The mediation project which the UK non-governmental organisation “Reunite” is about to embark on is worth noting. It is directed particularly towards those cases where a return order is sought primarily for the purpose of securing rights of access. The typical case is where the abductor is the primary carer of the child, and (usually) the father is relying on his joint rights of custody to apply for a return order, not so much because he wishes to have custody transferred to him, but because he views the return application as the best available means of preserving contact with his child. Cases of this sort seem to be an appropriate target for mediation in that for both parties there are strong incentives to reach agreement over the terms of access. The mother may be able to avoid the return order; the father for his part may be able to achieve his real wishes without the costs and delays involved in further litigation in his home country. Quite apart from this, the project may help in a more general way to identify the main issues which need to be addressed in developing an effective system of international mediation.

National laws and procedures

It is as well to be aware of differences in the approaches of domestic systems to the substantive issues surrounding contact, and of the possible impact of these differences on the possibilities for international co-operation.

Certain fundamental principles are subscribed to by almost all States. Under Article 9, paragraph 3 of the UN Convention on the Rights of the Child:

"States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interests."

158 The establishment of the Commission was agreed between the Ministers of Justice of France and Germany at a Franco-German summit meeting in Potsdam, Germany. See the Joint Report of the French and German Parliamentary members of the Franco-German Mediation Commission, 2 May 2002.


160 Supra, note 20.
In addition, under Article 10, paragraph 2:

“A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents ...”

96 The European Court of Human Rights has asserted on several occasions that the right of contact belongs to the parent as well as the child, and that it is a fundamental right, shared mutually between parent and child, and protected under Article 8 of the European Convention on Human Rights. In its decision in the case of Elsholz v. Germany the Court stated as follows:

"The mutual enjoyment by parent and child of each other’s company constitutes a fundamental element of family life, even if the relationship between the parents has broken down, and domestic measures hindering such enjoyment amount to an interference with the right protected by Article 8 of the Convention."

97 The rights enjoyed under Article 8 are not absolute and each State has a margin of appreciation in deciding whether limits, within the meaning of Article 8, paragraph 2 of the European Convention on Human Rights, are “necessary in a democratic society”, e.g. to protect “the health and morals” or “the rights and freedoms” of the child. However, strict scrutiny is required in respect of restrictions on parental rights of access. The Court has recognised that unreasonable restrictions on visiting rights may lead to the increased alienation of a child from his or her parent. The basis for this approach is Article 8 of the European Convention on Human Rights and the case law developed under it by the European Court of Human Rights, including the principle that the State has a positive obligation, inherent in an effective respect for family life, to maintain and develop family ties. The idea of “necessity” when applied to restrictions on contact implies the further principles that there should be no other less restrictive method available of protecting the interests of the child and that the restrictions should be proportionate.

98 The first objective of the Council of Europe draft Convention on Contact concerning Children is “to determine general principles to be applied to contact orders.” These principles are to be implemented in the internal laws of States Parties and are to be applied by the judicial authorities. The intention is that the adoption of common standards should also facilitate co-operation and the mutual recognition of contact decisions at the international level. Article 4 affirms the right of the child and both his or her parents to maintain regular contact. Contact may be restricted or excluded only where necessary in the best interests of the child.

99 Despite the broad acceptance of certain fundamental principles, it is clear that the application in practice of these fundamental principles varies in different countries. The responses to the Questionnaire asking whether there exists a presumption in favour of access by the non-custodial parent within particular national systems confirmed that significant differences exist. There are differences with respect to the focus of access /

162 Id.
163 See for example, Kutzner v. Germany, Judgment of 26 February 2002.
165 Article 1(a).
166 See the Preamble to the Convention and the Explanatory Report on the Convention at paragraph 10. Supra note 13.
contact rights. Is the focus the parent, the child, or both? There are differences in the

1999.
definition of the class of persons entitled to claim or exercise access / contact rights. 168
There are differences in the starting points from which access determinations are made; some systems accept a more or less strong presumption in favour of access / contact between the child and the non-custodial parent, while others regard the interests of the child as the primary or paramount consideration. These differences become more apparent and pronounced when issues of child abuse or domestic violence are involved. In several countries the development of an appropriate approach to access / contact in cases where there has been a history of domestic violence has been a subject of debate for a number of years.169

100 There are other differences in the substantive rules applied to access / contact cases, which are more specifically related to international situations. There are, for example, some jurisdictions where the judicial practice is not to allow the child to travel abroad to enjoy a period of contact with the non-custodial parent in the latter's country of residence.170 Sometimes also, the conditions attached to access are restrictive, particularly in a case where there is a risk of abduction. Our consultations have revealed some concerns that the conditions imposed on access do not always take into account the special difficulties experienced by parents who have to travel long distances to enjoy access. The principle enjoined by the European Court of Human Rights, that restrictions on access should be no more than necessary to achieve their objective (usually the safety of the child) appears not always to be respected in practice. More will be said about safeguards and guarantees in a separate section below.171

101 Other frequent causes of complaint are the costs, inadequacies and delays which may arise from national procedures, applicable prior to a decision on access / contact, as well as from the enforcement stage which follows. Separate sections below deal with the issues of speed172 and enforcement.173 Pre-trial procedures are in many countries often the same for both international and national cases,174 and allowances are not necessarily made for the additional difficulties faced by applicants abroad.

102 Procedural obstacles and inadequacy can often present the most serious threat to the effective exercise of rights of access / contact. It is significant that the European Court of Human Rights has in a series of cases decided over recent years paid particular attention to this issue, and has in a number of decisions found breaches of Article 8 of the European Convention on Human Rights arising from the decision-making processes in certain European States. In particular, the Court has held that the applicant parent must be able to be involved in the decision-making process sufficiently to provide him or her with the

168 Article 4 of the Council of Europe draft Convention on Contact with Children, which is based on the jurisprudence of the European Court of Human Rights, allows persons other than parents having "family ties" (e.g. close family relations or persons having a defacto family relationship with the child) with a child the right to apply for contact with that child. See Scozzari and Giunta v. Italy (2000), Series A, paragraph 221 and Boyle v. United Kingdom (1994), Series A, No 282/B.

169 See e.g. the Advisory Board on Family Law: Children Act Sub-Committee (England and Wales), A Report to the Lord Chancellor on the Question of Parental Contact: Cases where there is Domestic Violence, Lord Chancellor's Department, Spring 2000, and the decision of the Court of Appeal (England) in Re L, V, M and H (Contact: Domestic Violence) [2000] 2 F.L.R. 334. For a recent comment on the debate, particularly in Australia, see Helen Rhoades "The 'No Contact Mother': Reconstructions of Motherhood in the Era of the New Father", International Journal of Law Policy and the Family 16, (2002), at 71-94; see also Family Law Council (Australia), Child Contact Orders; Enforcement and Penalties, June 1998. In New Zealand there is now a presumption against contact where domestic violence is established.

170 For example, Chile.

171 See, infra, Chapter III, section j.

172 See, infra, Chapter III, section i.

173 See, infra, Chapter III, section k.

174 See, supra, Chapter II, section c.
requisite protection of his or her interests. "The decision-making process leading to measures of interference must be fair and such as to afford due respect to the interests safeguarded by Article 8." The Court has also been concerned to ensure that procedures are such that accurate information is obtained concerning the views of the child and the relationship between the child and the applicant parent.

i  Speed and delay

103 Article 2 of the 1980 Convention requires Contracting States to use "the most expeditious procedures available" to secure within their territories implementation of the objects of the Convention, one of which (Article 1 b) is to ensure that rights of access under the law of one Contracting State are effectively respected in the other Contracting States. On the other hand, the explicit requirement of Article 11 to act expeditiously in proceedings for the return of children does not find a parallel in Article 21, which deals with applications for organising or securing the effective exercise of rights of access. It appears from the responses to the Questionnaire that in most Contracting States, which have introduced special expedited procedures for return applications, these do not extend to access applications. This is for example the case in States such as the United States and England and Wales, where in any case access applications have to be made under the domestic procedures.

104 On the other hand, many Contracting States have general rules requiring some level of expedition in access cases, whether domestic or international, and a few Contracting States do in fact apply special expedited procedures to international access cases dealt with under the 1980 Convention. In the case of Scotland it should be recalled that this would only apply where urgent action is required following a breach of existing access rights.

105 The statistics confirm that access cases under the Convention take on average longer to process to the stage of judicial determination than do return applications. In 71% of access cases the period was more than six months compared with 19% in return cases. Some respondents to the Questionnaire called for the introduction of fast-track procedures and several respondents to the Consultation Paper regarded delays as a serious problem.

106 It is relevant to note that the European Court of Human Rights has taken the view

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175 See Elsholz v. Germany, supra note 161. In the Elsholz case the combination of a refusal to order an independent psychological report and the absence of a hearing before the relevant Court revealed insufficient involvement by the applicant in the decision-making process and led to a breach of both Articles 8 and 6 of the European Convention on Human Rights.

176 See Ciliz v. Netherlands, Judgment of 11 July 2000, in which a failure to co-ordinate the decision-making processes: (a) involving the applicant’s expulsion from the country concerned, (b) concerning access to his child, constituted a breach of Article 8.

177 In Sahin v. Germany, Judgment of 11 October 2001, the failure of the relevant Court to obtain correct and complete information on the child’s relationship with the applicant parent (including a failure to hear the child) revealed that the applicant was not sufficiently involved in the access proceedings. The Court should not have been satisfied with the expert’s vague statements about the risks inherent in questioning the child. There was a breach of Article 8. See also Sommerfeld v. Germany, Judgment of 11 October 2001, in which the Court affirmed that correct and complete information on the child’s relationship with the applicant parent was an indispensable prerequisite for establishing a child’s true wishes and thereby striking a fair balance between the interests at stake. In the circumstances, hearing the child without having available psychological expert evidence in order to evaluate the child’s seemingly firm wishes was not satisfactory on the part of the deciding Court.

178 See also, for example, Chile, Iceland (Act on the Administrative Procedure No 37/1993, Article 9), Sweden and Switzerland.

179 For example, Australia, New Zealand and Scotland.

180 Supra paragraph 27.

181 See, supra, paragraph 45.

182 For example, Argentina, Sweden and Switzerland.
that
custody cases generally should be dealt with speedily.\textsuperscript{183} Some delays can be tolerated provided that the overall duration of proceedings cannot be deemed excessive.\textsuperscript{184} Article 6, paragraph 1 of the European Convention on Human Rights, which entitles everyone “in the determination of his civil rights”, to a hearing “within a reasonable time” by a tribunal established by law, has been used as a basis for condemning delays in national access procedures. Whether the length of the procedures is reasonable is considered in the light of a number of criteria, in particular, the complexity of the case, the conduct of the applicant and that of the relevant authorities. Interestingly, the court has expressed the view that the requirements of Article 6, paragraph 1 of the European Convention apply to the totality of the proceedings including the enforcement stage, and that the responsibility for ensuring compliance with the requirements of Article 6, paragraph 1, rest ultimately with the courts.\textsuperscript{185}

107 There are perhaps two questions of principle, which should be separated. First, should there be a requirement of reasonable expedition in all access cases, whether domestic or international? Existing practice in many States, child psychology with its understanding of the child’s sense of time, human rights jurisprudence, as well as common sense, all suggest that the law should as far as possible seek to avoid any prolonged disruption in the relationship between a child and a parent. The second more difficult question is, whether international access cases present special features, which require even more expedition than domestic cases. The response of the International Centre for Missing and Exploited Children (ICMEC) to the Consultation Paper contains the following argument supporting a positive answer to this question.

“Each country must have an expedited process both for recognising existing contact orders of another State and creating contact orders under the Hague Convention. Because the distance involved in international contact cases results in fewer opportunities for children to visit and have access to the parent residing in another country, these cases deserve to be handled on an expedited basis. If the distance parent is unable to enforce their access, they may not have another opportunity to do so for many months. The unique circumstances of these cases justify institution of an expedited process applying to international cases even when the internal law of a country may not allow for expedited proceedings in a domestic case."

108 Perhaps the underlying principle reflected in this approach, and also in the new Scottish procedure,\textsuperscript{186} is that special procedures should be available where, having regard to the international character of the case, any delay is likely seriously to prejudice the possibility of access / contact taking place.

j Prior guarantees and safeguards

109 Measures under national law to help guarantee, in advance, adherence to the terms and conditions of contact orders are of great importance. They may be particularly helpful when the child is to travel to another jurisdiction for the exercise of contact with the non-custodial parent. They are also useful when the child is to relocate to another jurisdiction with the custodial parent to ensure that the custodial parent abides by the terms and conditions of any contact order. Guarantees and safeguards are part, along with firm provision to deal with unlawful retention, of the legal background against which the

\textsuperscript{183} See Hokkanen v. Finland, Judgment of 23 September 1994, Series A No 299-A.
\textsuperscript{184} See Pretto and Others v. Italy, Judgment of 8 December 1983, Series A No 71.
\textsuperscript{185} See Nuutinen v. Finland, Judgment of 27 June 2000.
\textsuperscript{186} See, supra, paragraph 27.
custodial parent may feel safe in releasing a child for contact.\textsuperscript{187} Though it is appropriate to

\textsuperscript{187} See, \textit{supra}, paragraph 16(c).
recall, where prior guarantees and safeguards constitute restrictions on the exercise of access / contact, that such restrictions should be proportionate in the sense of not going beyond what is necessary to secure the protection and well being of the child.\textsuperscript{188} Prior guarantees and safeguards may also be ordered for the benefit of the party exercising access to help to ensure that the custodial parent does not block the access rights of the non-custodial parent. They are, in this context part of the "framework within which the non-custodial parent may with confidence expect contact arrangements to be respected by the custodial parent".\textsuperscript{189}

110 Responses to the Questionnaire revealed that courts in some jurisdictions already have available a wide range of measures which may be used to guarantee the terms and conditions of contact, but the situation is not uniform, and most of the measures focus on the risks emanating from the contact parent rather than the custodial parent. Among the measures mentioned were:

(1) the surrender of passport or travel documents,
(2) the deposit of a monetary bond or surety,
(3) supervision of contact by a professional or a family member,
(4) various other restrictions attached to contact; \textit{e.g.} forbidding overnight visits or extended visits, restricting the locations where visitation may occur, etc.,
(5) requiring that the requesting parent report regularly to the police or some other authority during a period of contact,
(6) requiring that the requesting parent provide the custodial parent with a detailed itinerary and contact details, etc.,
(7) requesting that foreign consulates / embassies should not issue new passports / travel documents for the child,
(8) requiring that a mirror order should be made in the country where contact is to be exercised.

111 Another important guarantee is the recognition in the country where access / contact is to be exercised of a contact order, including its terms and conditions, made in the country where the child has his or her habitual residence. It has already been explained how this is achieved under various international and regional instruments.\textsuperscript{190} There will also be circumstances in which it will be helpful, if the additional security is needed, to have a procedure making it possible for the authorities of the country where access is to be exercised to declare in advance that the contact order made by the court of the habitual residence of the child will be respected. This facility is provided for in Article 24 of the Hague Convention of 1996, and an obligation to provide such a facility is set out in the Council of Europe Convention on contact concerning children.\textsuperscript{191} Another mechanism for achieving the same result is the obtaining of a mirror order\textsuperscript{192} (\textit{i.e.} reflecting the terms of

\textsuperscript{188} See, supra, paragraph 97.  
\textsuperscript{189} See, supra, paragraph 16(d).  
\textsuperscript{190} See, supra, Chapter III, section b.  
\textsuperscript{191} Article 14.1.b.  
\textsuperscript{192} For an example of the use of a mirror order in guaranteeing that the “custodial” parent will respect the access rights granted to the “non-custodial” parent, See Gumbrell v. Jones [2001] NZFLR 593, supra note 42. In that case, the English High Court granted the mother a residence order in respect of 2 children, with leave to remove the children from the UK permanently to New Zealand, subject to a number of undertakings designed mainly to ensure respect for the fathers access rights. The mother also undertook to obtain orders in New Zealand which would mirror the orders of the English court. The mother did not obtain the mirror orders in New Zealand, but, on the application of the father, the New Zealand court made an access order in terms which gave effect to the English order.
the order made by the authorities of the habitual residence of the child) in the country where access is to take place, though this can raise jurisdictional issues which are referred to above.  

112 One of the objectives of the Council of Europe Convention on contact concerning children is to establish appropriate safeguards and guarantees for both national and international cases to ensure the proper exercise of contact and to ensure the return of the child at the end of a period of contact. A non-exhaustive list of safeguards and guarantees is set out in Article 10, paragraph 2, and States are obliged to provide under their laws for at least three categories of safeguards and guarantees. The safeguards to ensure that a contact order is carried into effect include supervised contact, the obligation of a person (either the parent seeking contact or the person with whom the child lives, or both) to provide for travelling and accommodation expenses for the child, the deposit of a security to ensure that contact is not frustrated, or the imposition of a fine. Safeguards to ensure that the child is not improperly removed or retained when contact occurs include the surrender of passports or identity documents, the provision of financial guarantees, and charges on property. Other safeguards or guarantees mentioned are undertakings (i.e. specific promises or assurances given to a court by a litigant), a requirement that the person having contact report regularly to a competent body, the issuing of a certificate in the country in which contact is to take place recognising in advance the custody or residence order in favour of the parent with whom the child usually lives, an advance declaration of enforceability of the contact order in that State, and restrictions as to the place where contact is to be exercised.

k  Enforcement under national law

113 Neither the automatic recognition of contact orders, nor indeed their enforcement "without any special procedure being required", can guarantee a uniform approach to, or a uniform standard of, enforcement. The reason for this is that it is the national law of the State where enforcement is to take place, which will be likely, finally, to determine what methods of enforcement are available, and on what conditions and according to what procedures and time frame they may be applied. For example, the Hague Convention of 1996 provides that enforcement should take place "in accordance with the law of the requested State to the extent provided by such law, taking into consideration the best interests of the child".

114 It is clear from the responses to the Questionnaire that the approach to enforcement of contact orders under national law differs markedly from one country to another. The most important differences lie perhaps in the processes of enforcement and their time frames, rather than in the precise sanctions, which may ultimately be applied for breach of a contact order. In some States, for example, non-compliance is met first with attempts at mediation; in others, by contrast, even a risk of non-compliance may result in a detailed court order. Opposition by the child to the contact arrangements produces different consequences in different States. In some, the opposition of a child may render enforcement impossible; in others, it may give rise to attempts to mediate. Rights of

193 At paragraph 54.
194 Article 1.b.
195 Article 10(2)(a).
196 Article 10(2)(b).
198 Article 28. Article 50 of the proposed Council Regulation on parental responsibility provides similarly that "the enforcement procedure is governed by the law of the Member State of enforcement". See, supra, note 107.
appeal
against an enforcement order differ. In general, there are important differences in the opportunities afforded to the custodial parent to delay enforcement and, therefore, there are often considerable differences in the period of time that elapses between breach of a contact order and the application of a sanction. There is no doubt that the problems in this area constitute one of the major causes of friction, frustration, expense and complaint on the part of parents who are trying to maintain contact with their children across international borders. On the other hand, efforts are being made in several countries to improve the situation.\(^\text{199}\)

115 Research carried out by other bodies\(^\text{200}\) and in various countries confirms the wide variety of approaches to enforcement. It is also evident that many systems find it difficult to handle the problems of enforcing access / contact orders, and several countries have reviewed or are currently reviewing the situation.\(^\text{201}\) For example, “a brief comparative analysis of methods of enforcement in other jurisdictions“\(^\text{202}\) has recently been carried out by the Lord Chancellor’s Department in England and Wales, based on information received from 22 European jurisdictions, Australia, Canada, New Zealand and the United States of America (State of California). The following are some of the overall conclusions of that study:

"5.57 Generally, the emphasis appears to be on finding a family-friendly and indeed, child-friendly, approach to dealing with enforcement. The majority of colleagues who provided the information in Appendix A expressed concern about the difficulties which their authorities (including courts) have in relation to the handling of these matters.

5.58 The enforcement / facilitation of contact orders is dealt with by invoking a range of solutions from penalties such as imprisonment or fines, to the transfer of custody to the non-custodial parent, to the ‘persuasiveness’ of education programmes and the facilitative use of mediation. An increasing number of countries appear reluctant to resort to sanctions such as imprisonment as this is rarely seen to be in the best interests of the children concerned. The best interests of the child is, as might be expected, the main principle, and of particular relevance when

\(^{199}\) In this context, it is interesting to note that the German Federal Supreme Court, in a decision of 19 June 2002, awarded damages to a father entitled to have contact with his child, because the custodial mother had not complied with the terms of the contact order. The significance of the judgment in general terms goes beyond the individual case because the court clearly states that, where there is a contact order specifying details on how contact is to take place, it is not for the custodial parents to replace the court’s considerations of the child’s best interests by his or her own (Bundesgerichtshof [Federal Supreme Court], 19 June 2002 – XII ZR 173/00). Also of interest is a Resolution (No. 3) on the general approach and means of achieving effective enforcement of judicial decisions, of the Ministers participating in the 24\(^{\text{th}}\) Conference of European Ministers of Justice (Moscow, October 2001). The Resolution invites the Committee of Ministers of the Council of Europe to instruct the European Committee on Legal Co-operation (CDCJ) to identify common standards and principles at a European level for the enforcement of court decisions.


\(^{202}\) Section 5 of Making Contact Work, a Consultation Paper issued by the Children Act sub-committee of the Lord Chancellor’s Advisory Board on Family Law, March 2001. This has been followed by the publication in 2002 of a Report to the Lord Chancellor by the advisory board, also entitled Making Contact Work, which contains, inter alia, a recommendation for legislation allowing for two different approaches or stages to enforcement. The first would be essentially non-punitive, involving the compulsory use of different services offering e.g. information or advice on parenting or psychiatric advice; the second would involve penal sanctions such as community service or probation. Fines or imprisonment would be measures of last resort.
considering transfer of custody to the non-custodial parent because of the refusal of the other parent to comply with an access order. In consequence most jurisdictions seem to resort to this 'remedy' only in exceptional circumstances, and where there has been a material change of circumstances rather than non compliance per se.

5.59 An increasing number of jurisdictions, in particular Australia and New Zealand, seem to be currently considering how to resolve the dilemma of demonstrating that the law has 'teeth' and must be obeyed, whilst, at the same time, acting in the best interests of the child and ensuring protection of that child.

5.60 The problem is being considered in Europe and it remains to be seen whether any innovative ideas of dealing with enforcement are brought forward by Council of Europe Member States. There are some current provisions which are worth noting such as those in the Netherlands and Belgium providing for fines to be paid by the defaulting parent to the other parent. It is also worth noting that an increasing number of jurisdictions are favouring mediation as the way forward with the majority offering disputing parties access to mediation.”

116 There is a developing jurisprudence in the European Court of Human Rights on the question of a State’s obligation with regard to the enforcement of orders concerning responsibility. With respect to the measures which a State is obliged, by virtue of Article 8 of the European Convention on Human Rights, to take to enforce access orders, the Court has adopted a cautious approach, emphasising the need to balance the interests of all of those involved.

"128. The obligation of the national authorities to take measures to facilitate meetings between a parent and his or her child is not absolute, especially where the two are still strangers to one another. Such access may not be possible immediately and may require preparatory measures being taken to this effect. The nature and extent of such preparation will depend on the circumstances of each case, but the understanding and co-operation of all concerned will always be an important ingredient. Whilst national authorities must do their utmost to facilitate such co-operation, any obligation to apply coercion in this area must be limited since the interests as well as the rights and freedoms of all concerned must be taken into account, and more particularly the best interests of the child and his or her rights under Article 8 of the Convention. Where contact with the parent might appear to threaten those interests or interfere with those rights, it is for the national authorities to strike a fair balance between them. What is decisive is whether the national authorities have taken all necessary steps to facilitate access as can reasonably be demanded in the special circumstances of each case (cf., for instance, the Hokkanen judgment, loc. cit., § 58)." 204

117 The issue of speed in relation to access procedures generally has already been referred to, and the fact that the Court has taken the view that the requirement of

203 In Hokkanen v. Finland, Judgment of 23 September 1994, Series A No. 299-A, the Court found a violation of Article 8 of the European Convention on Human Rights because Finnish law did not provide for sufficiently effective means of enforcing a contact order.

204 See Nuutinen and Finland, Judgment of 27 June 2000, paragraph 128. In Nuutinen the enforcement court decided that it would be against the child’s interests to order that the bailiff should fetch the child from the custodial parent. In the circumstances, this was not considered to be a violation of Article 8, though in view of the length of the proceedings, there had been a violation of Article 6.
reasonableness in respect of the length of any proceedings, which derives from Article 6 of the European Convention on Human Rights, applies to the whole proceedings including the enforcement.
stage. In the case of Ignaccolo-Zenide v. Romania, in the context of a complaint concerning a States’ failure to enforce a return order under the 1980 Convention, the Court made the following observation:

"In a case of this kind the adequacy of a measure is to be judged by the swiftness of its implementation. Proceedings relating to the granting of parental responsibility including execution of the decision delivered at the end of them, require urgent handling as the passage of time can have irremediable consequences for relations between the children and the parent who does not live with them."

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205 See, supra, paragraph 106.
207 Id. at paragraph 102.
CHAPTER IV – LOOKING TO THE FUTURE

a  A summary of shortcomings

118 The survey in the previous Chapter of the elements, which impact on the resolution of international access / contact cases, together with Chapter II which examined practice under the 1980 Convention, has presented a broad picture of the existing international framework and of its shortcomings. The attempt has been made to identify areas in which further work or reform may need to be considered, either because of the absence of appropriate rules or structures, or because of unacceptably wide divergences in State practice under existing instruments, and in particular under the 1980 Convention.

119 The principle shortcomings, which have all been mentioned in responses to the Questionnaire and the Consultation Paper, may be summarised as falling within the following broad areas:

(1) The failure to have in place uniform rules determining the jurisdiction in international cases of authorities to make or modify contact orders and adequate provisions for the recognition and enforcement of foreign access / contact orders.

(2) The absence of agreement among States on the nature and level of the supports, which should be made available to persons seeking to establish or secure access / contact rights in a foreign country. This refers inter alia to information and advice, including legal advice, assistance in gaining access to the legal system, facilities to promote agreed outcomes, and the physical or financial supports, which are sometimes necessary to enable access / contact which has been agreed or ordered to take place.

(3) The operation in some countries of procedures, both at the pre-trial and enforcement stages, which are not sufficiently sensitive to the special features and needs of international cases, and which are the cause of unnecessary delays and expense.

(4) An inadequate level of international co-operation at both the administrative and judicial levels.

120 It is clear from the responses to the Questionnaire and the Consultation Paper that Member States of the Hague Conference and States Parties to the 1980 Convention want action to be taken at the international level, and that the problems surrounding transfrontier access / contact are serious and require urgent attention. It is also clear that the Hague Conference is not the only actor in the field and that proper account should be taken of the work that has been and is being carried out particularly by regional organisations such as the Organisation of American States (OAS), the European Union and the Council of Europe.

b  Some possible strategies

121 The Consultation Paper on Transfrontier Access / Contact,208 which was circulated at the beginning of 2002, had as its primary objective to canvas views on what should be the future strategic approach of the Hague Conference. The two main questions asked were:

(1) Which are the issues connected with transfrontier access / contact which in practice cause your country most concern and which may benefit from further discussion within a multilateral setting?

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(2) In respect of the issues you have identified, do you have any views on the technique or techniques (a Protocol to the 1980 Convention, non-binding Recommendations, a Good Practice Guide, Model Agreement or any other approach) which appears or appear to you at this stage most likely to effect improvements?

122 The Consultation Paper also outlined four possible techniques for amending or reinforcing the 1980 Convention and provided brief comments on their implications. It may be helpful to set these out in full (re-numbered):

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

123 A Protocol to amend or to supplement the 1980 Convention would involve participation in negotiations of all the existing States parties to the 1980 Convention, as well as other Member States of the Hague Conference on Private International Law. Any such Protocol would not bind a Party to the 1980 Convention, which does not become a Party to the Protocol. As between a State, which becomes a Party to the Protocol and one which does not, the un-amended Convention would continue to apply. Negotiations for a Protocol are likely to take some time. The process of adherence to the Protocol by individual States Parties will take much longer. It is also possible that some States Parties may wish to seize the rare opportunity afforded by negotiations on a Protocol, to raise, in addition to issues surrounding contact / access, other Articles within the 1980 Convention which in their view require to be amended or supplemented.

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

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

125 It should be added that some of the matters, which fall under 1, 2 and 4 above implicate the Hague Convention of 1996. In other words, some of the problems find their solution in whole or in part in the provisions of that Convention. This obviously raises the question of whether a Protocol to the 1980 Convention is necessary in the areas covered by the 1996 Convention, and whether it would not be better policy to encourage ratification of or accession to that Convention. In any event, it would obviously be important in devising any Protocol to the 1980 Convention, to avoid conflict with the 1996 Convention.

210 On this matter, see the comments in the Preliminary Report on Transfrontier Access / Contact, supra note 3.
(ii) Recommendations

126 The employment of recommendations has been a feature of Special Commission Meetings to Review the Operation of the 1980 Convention. The Special Commission of March 2001 agreed no less than 57 recommendations.\textsuperscript{211} Recommendations cannot of course amend the 1980 Convention. Recommendations have usually been geared towards making more effective the operation of existing Convention provisions, or suggesting a particular approach to the interpretation of existing Convention principles. There is no doubt that recommendations of Special Commissions have had some influence on the manner in which the 1980 Convention has been implemented in certain countries, as well as on the interpretation of and practices adopted under the Convention. On the other hand, there is no guarantee of universal adherence to recommendations. They are not legally binding and the mutual confidence, which arises from a guarantee of reciprocity is lacking.

127 The list of matters, which might be the subject of recommendations, is perhaps wider than in the case of a Protocol. For example, in addition to the matters set out in paragraph 124 above, recommendations might cover:

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

(iii) A Guide to Good Practice

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

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

129 Already the Permanent Bureau has begun work on the development of the Good Practice Guide. In the first instance, work is proceeding on two areas – matters, which may need to be addressed when implementing the Convention within national systems, and Central Authority practices.\textsuperscript{212} These areas will involve some reference to matters of access.


However, there are obvious limitations within this approach. First the Good Practice Guide will not be binding. Its objective will be to draw to the attention of States Parties arrangements, practices and procedures which have been found in practice to be useful in implementing and operating the 1980 Convention successfully in different jurisdictions. In some matters it will be appropriate to indicate more than one possible approach: in others one approach may be recommended, e.g. where it has already been endorsed by a Special Commission. The matters to be covered by a Good Practice Guide include those mentioned above under paragraph 127. A Guide could in fact cover much broader ground than a set of Recommendations, including options and precedents, which may be instructive rather than persuasive. Its distribution might also be broader.

(iv) Model Agreements

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

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

The idea of a Model Agreement may also be helpful in relation to the problems of cross-frontier access / contact where they concern States, which are not Parties to the 1980 Convention. Already there exist a number of bilateral agreements involving on the one hand a State Party to the 1980 Convention and on the other one of the Islamic States. The experience already gained under these agreements would of course assist in the process of establishing an effective model. Some scepticism has been expressed about the effectiveness of some of these bilateral arrangements. It is possible that the development and use of an internationally agreed model could add some weight to purely bilateral arrangements. No doubt any model adopted in this context would be different from one applicable between States Parties to the 1980 Convention.

213 See Preliminary Report on Transfrontier Access / Contact, supra note 3, paragraph 60.
214 See sub-paragraphs a) and b).
c Responses to the Consultation Paper

133 The responses to the Consultation Paper with regard to the appropriate techniques to be employed by the Hague Conference, which are available in full in Prel. Doc. No 8,\(^{216}\) may be summarised as follows:

(i) A binding instrument. A Protocol to the 1980 Convention

134 Several respondents were of the opinion that a Protocol to the 1980 Convention should be contemplated.\(^{217}\) The primary reason is concern about the wide divergences in the interpretation of and practice under Article 21 of the 1980 Convention, and a view that a clear set of common binding rules is needed. There was general recognition at the same time that the development of a binding instrument would be a lengthy exercise, and most of those who favour the idea of a Protocol were prepared also to consider other techniques, either in their own right or as a first step.

135 On the other hand, a number of respondents expressed opposition to the development of a Protocol.\(^{218}\) Among the reasons given were doubts about the feasibility of achieving agreement, given the differences among judicial systems and the uneven enforcement of orders under the 1980 Convention, the danger that work on a new instrument might inhibit States from ratifying the 1996 Convention, concern that it would take many years before a Protocol could be become effective in the relationships among the 73 States Parties to the 1980 Convention and that the exercise might weaken the Convention itself, and hesitations about the wisdom of European States entering into another set of negotiations while the outcome of current negotiations on a regional instrument at the European level remains unclear.

136 One of the responses opposed the idea that the opportunity for negotiations on a Protocol concerning access / contact might be used as an opportunity to consider other Articles of the 1980 Convention. It was felt that this would introduce unnecessary confusion and risk diverting resources away from the urgent questions surrounding access / contact.\(^{219}\)

(ii) Non-binding recommendations. A Guide to Good Practice

137 Most respondents felt that work on the development of non-binding recommendations or a Guide to Good Practice would be useful, at least as an interim measure or even as a first step in the process of preparing for a Protocol.\(^{220}\) The shortcomings of non-binding recommendations in terms of their inability to guarantee uniform practice were acknowledged. One response stressed the value of a Guide to Good Practice both in encouraging States to take realised and practical steps to assist the implementation of the Convention, and in making available examples of valuable work in the area already being carried out by Central Authorities in different countries.

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\(^{217}\) Including Argentina, Canada, Denmark, France, Iceland, Switzerland and the United Nations High Commission for Human Rights (UNHCHR).

\(^{218}\) Austria, Germany, Netherlands, the United Kingdom and the United States of America.

\(^{219}\) A proposal for a Protocol covering a broad range of issues is made by Professor Linda Silberman in "Patching up the Abduction Convention. A call for a new international Protocol and a suggestion for amendments to ICARA", supra, note 66.

\(^{220}\) Austria, Canada, Germany Netherlands, Sweden, Switzerland, the United Kingdom, the United States, ICMEC and UNHCHR.
(iii) Model agreements

138 Several respondents recognised the potential of model bilateral agreements, but as one among several options. In one case this was because such a model would provide a clear set of rules. Another respondent thought that a model agreement could be used to establish a mediation procedure in particularly difficult cases.

(iv) The 1996 Hague Convention

139 A large majority of the respondents expressed support for the 1996 Convention, and there was recognition of its potential to make a significant contribution to the solution of some of the problems surrounding international access / contact. One respondent felt that provisions of the 1996 Convention concerning recognition and enforcement might be included in a Protocol to the 1980 Convention, but that the grounds for refusing recognition should be limited or narrowly construed.

(v) Other ideas

140 Among the other ideas expressed by respondents were the development of interstate mediation services, the need to encourage judicial training in matters of international access / contact, and approval for the idea that the Hague Conference on Private International Law should begin consultations with certain Islamic States in relation to problems of international access / contact at an appropriate time. One response suggested the development by the Hague Conference of a set of principles (including substantive principles), which would offer parents support as they present their cases for resolution within judicial systems. Such a framework of principles might also be of value in providing a context within which any possible bilateral mechanisms could operate.

d A possible programme of action for the Hague Conference on Private International Law

141 In the light of responses to the Questionnaire and Consultation Paper and other consultations carried out by the Permanent Bureau, the following programme of action is suggested for consideration by the Special Commission on the 1980 Convention, which is to meet at The Hague from 27 September to 1 October 2002.

(i) A Guide to Good Practice

142 Work should continue on a Guide to Good Practice in relation to access / contact cases arising in the context of the 1980 Convention. This should proceed on the understanding that it is not possible by means of the Guide to resolve the major differences of approach to the interpretation to Article 21. The purpose of the Guide would be two-fold, (a) to promote consistent and best practices in relation to those matters which it is agreed fall within the competence and obligations of States Parties under the Convention, (b) to provide examples of practice even in relation to matters which fall within the disputed areas of interpretation.

143 In relation to the first of these objectives, the Guide would concentrate in particular on the role of Central Authorities, co-operation between Central Authorities, the provision

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221 Czech Republic, Iceland and Italy.
222 Argentina, Czech Republic (already Party to the 1996 Convention), Canada, Netherlands, Sweden, Switzerland, the United Kingdom, ICMEC and UNHCHR.
of information and services to assist foreign applicants in securing and exercising access /
contact, procedures for promoting agreement, and assistance in removing obstacles to the exercise of access/contact rights. As with other parts of the Guide, the concentration should be on what is practical and feasible, and account should be taken of differences in the resourcing levels of different Central Authorities.

144 In relation to the second objective, examples should be provided of different ways in which Contracting States have implemented Article 21. In the case of States, which have accepted that Article 21 may be a basis for legal proceedings, examples should be provided of the nature of and conditions attached to such proceedings. Examples should also be provided of different approaches to enforcement. If it is possible to secure agreement on any recommendations in respect of these matters, these should be included.

145 As to the manner of developing the Guide, it is suggested that the Permanent Bureau should adopt the procedures, which have been used successfully in relation to the section of the Guide relating to Central Authority practices generally. On the basis of further consultations, the Permanent Bureau would make a preliminary draft, which would then be considered by a Working Group comprising mainly Central Authority personnel drawn from a representative group of Central Authorities. A draft of the Guide would then be submitted for consideration and approval to a future Special Commission meeting.

(ii) General principles relevant to international access/contact cases

146 Work should begin on the formulation of general principles relevant to international access/contact cases. The idea is not to create a set of principles applying to access cases generally, but rather to draw attention to certain general considerations and special features, which need to be borne in mind by Contracting States and their authorities when formulating policies in respect of international access/contact cases. These general principles would not be binding; they would be advisory in nature. As well as offering general advice to States in formulating policy in this area, the general principles could be helpful to Central Authorities in informing their practice, they could possibly be helpful to the courts and other authorities, as well as to applicants as they present their cases, and they could provide a context within which any future bilateral mechanisms might operate. It should also be possible to incorporate these principles within the Guide to Good Practice.

147 The general principles would have a bearing on Central Authority practices, procedures for promoting agreement, pre-trial and trial procedures and enforcement procedures. Although these principles would therefore have application to both private international and domestic laws and procedures, it is emphasised that their focus would always be on international cases.

148 The development of such a set of principles would require careful consultations. It is suggested that the process might begin with the circulation by the Permanent Bureau of some preliminary suggestions, with a request for responses and further ideas. It might also be appropriate then to establish a representative group of experts to work further on the principles, which ultimately would be submitted to a future Special Commission meeting for consideration and approval.

(iii) Judicial education and co-operation

149 Much work has been done nationally and internationally to foster judicial awareness of the problems of protecting children in international situations. The Permanent Bureau has played its part by, inter alia, participating in and organising international judicial seminars.
such as those in “De Ruwenberg” in June 1998, June 2000 and October 2001, the last of which had as a focus problems of international access. The meetings of judges from different jurisdictions foster international understanding, they promote judicial cooperation and they help to spread helpful practices and precedents across jurisdictions. The Hague Conference should continue to remain active in this area, providing assistance where it is requested, supporting the development of judicial co-operation and communications, both generally and in the context of individual cases where required, and continuing publication of Judges’ Newsletters on International Child Protection.

(iv) The 1996 Hague Convention

150 Support for 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 has been growing, and consultations indicate a wide-spread view, that its ratification will contribute significantly to providing the necessary international structure for resolving disputes over access / contact, as well as custody issues and other measures of protection. Four States have ratified the Convention, three more have signed it, and several States are preparing to implement it. Consultations among the fifteen States of the European Union have led the European Commission to conclude that:

"It is widely recognised that the Convention would make a valuable contribution to the protection of children in situations that transcend the boundaries of the Community and thus usefully complement existing and future Community rules in the same area." 228

151 The Committee on the Rights of Child established under the 1989 UN Convention on the Rights of the Child has recently indicated to the Permanent Bureau its resolve to recommend to individual States Parties to the UN Convention, as the occasion arises, that they should consider implementation of the 1996 Convention. Calls have been made in many national and international meetings, including judicial gatherings, for the implementation of the 1996 Convention.

152 There is one State for whom, one commentator has suggested, implementation of the 1996 Convention, as a whole, would present complex problems. The possibility has been mooted of including, in a Protocol to the 1980 Convention, elements of the 1996 Convention.

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223 See, supra, note 153.
225 Czech Republic, Monaco, the Slovak Republic and Morocco.
226 Latvia, Netherlands and Poland.
227 For example in Ireland, implementing legislation has already been approved by the Parliament; in Australia implementing legislation has recently been passed by the House of Representatives; and in Canada steps are being taken to prepare the necessary implementing legislation. A uniform implementing act for the 1996 Convention was drafted and adopted by the Uniform Law Conference of Canada in November 2001. It will serve as a model for the Canadian provinces and territories that wish to implement the Convention (available at <http://www.ulcc.com>).
229 Supra note 20.
231 See Linda Silberman, supra note 66. For a US view in favour of ratification see Gloria F. De Hart, supra note 137.
Convention which deal with jurisdiction, recognition and enforcement. On the other hand, the process of negotiating and putting into effect a Protocol is itself likely to be lengthy, and if elements of the 1996 Convention were put in issue within that process, this would probably have a negative impact on the prospect of achieving speedy and widespread ratification of the 1996 Convention itself. In the opinion of the Permanent Bureau therefore, what is needed most of all is a renewed commitment to the widespread ratification of the 1996 Convention as a matter of urgency.

(v) Mediation

153 The Permanent Bureau will keep under review the development of mediation schemes applicable to international access/contact disputes and will continue to provide information about them to Contracting States through the Guide to Good Practice, the Judges’ Newsletter and by other means.

(vi) The idea of a Protocol

154 The primary mandate of the Permanent Bureau was to report on the desirability and potential usefulness of a Protocol to the 1980 Hague Convention that would provide in a more satisfactory and detailed manner than Article 21 for the effective exercise of access/contact between children and their custodial and non-custodial parents in the context of international child abductions and parent relocations, and as an alternative to return requests. The conclusion of the Permanent Bureau, based on the consultations, is that the idea of a Protocol should not be ruled out but that the intermediate steps outlined above should be undertaken as a matter of urgency, before the complex and difficult process of negotiating a Protocol is considered further. If the steps outlined above do not appear likely to lead to significant improvements in practice, then the issue of a Protocol should be revisited. In that case, the work carried out in developing both the Guide to Good Practice and the basic principles applicable to international access/contact cases would provide a helpful basis on which work on a Protocol might begin.

232 The Judges’ Newsletter on International Child Protection, now published bi-annually by the Permanent Bureau of the Hague Conference, has the objective of promoting co-operation, communication and the exchange of ideas between judges and others who deal with international child protection cases. The Newsletter is now distributed to more than 300 judges and Central Authorities appointed under the 1980 Convention around the world. See Prel. Doc. No 10 for the attention of the Special Commission of September/October 2002, supra note 76, for further details.