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ENLÈVEMENT D'ENFANTS
CHILD ABDUCTION

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Rapport de la troisième réunion de la Commission spéciale sur le fonctionnement de la Convention de La Haye sur les aspects civils de l'enlèvement international d'enfants (17-21 mars 1997)

établi par le Bureau Permanent

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Report of the third Special Commission meeting to review the operation of the Hague Convention on the Civil Aspects of International Child Abduction (17-21 March 1997)

drawn up by the Permanent Bureau

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INTRODUCTION

The Special Commission studying the operation of the *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* held its third meeting at the Peace Palace 17-21 March 1997. Of the 42 States represented, 35 were Parties to the Convention under study (six being non-Members of the Conference) and the other seven Member States of the Hague Conference which were not yet Parties to the Convention. Six additional States, non-Members of the Conference, participated as observers. Thirty-two Member States and thirteen non-Member States, totalling forty-five, were Parties to the Convention at the time of this meeting.

Intergovernmental organisations represented by observers included the United Nations Committee on the Rights of the Child, the Commonwealth Secretariat, the Council of Europe and the European Parliament. International non-governmental organisations represented included the International Bar Association, International Social Service, the International Society of Family Law, the International Association of Juvenile and Family Court Magistrates, the International Union of Latin Notaries, Defence for Children International and the International Academy of Matrimonial Lawyers.

Mr P.H. Pfund, Delegate of the United States, was elected Chairman of the Special Commission, while Mrs A. Borrás, Delegate of Spain, was elected Vice-Chair. The Permanent Bureau served as Reporter for the Special Commission.

The documents on which the Commission based its work were as follows:

– Preliminary Document No 1: Checklist of issues to be considered at the third meeting of the Special Commission, drawn up by the Permanent Bureau;
– Preliminary Document No 2: Statistics submitted by the Governments;
– Preliminary Document No 3: Bibliography.

The discussions ranged over a broad group of issues posed in the Checklist and the responses to the issues posed are reflected in a question-by-question report, which follows this introduction. Twenty-four working documents were submitted and of these two, which were the subject of detailed discussion, have been included as annexes to the Report. The following Report has been drawn up by the Permanent Bureau, which was asked to do so by the Special Commission.

REPORT ON THE ISSUES POSED BY THE CHECKLIST

TITLE OF THE CONVENTION

Question 1: Have the reference to "civil aspects" or the use of the term "international child abduction" in the title of the Convention given rise to any questions in practice?

Response:
1 In the early years of the Convention's operation, in a number of Contracting States, the reference to "civil aspects" and/or the use of the term "international child abduction" in its title had given rise to questions in practice as regards the exact scope of application of the Convention. Nowadays, however, this is no longer the case.

Question 2: To what extent do criminal proceedings and extradition proceedings intersect with the operation of the Convention?

Response:
2 In a number of States Parties to the Convention, including Canada, Denmark, France, Germany, Israel, the United Kingdom and the United States, international child abduction by a parent can constitute a criminal offence. Certain States Parties, including Australia and New Zealand, are contemplating making parental child abduction across international borders a criminal offence under their national law, and in Ireland legislation to criminalise parental child abduction is underway.

3 In December 1996 the Australian Central Authority sought information from a number of other Central Authorities on whether under their law it was a criminal offence for a parent to remove a child from the country without the consent of the other parent. Working Document No 5 contains the responses received from Austria, Canada, France, Germany, Greece, Ireland, Mexico, the Netherlands, New Zealand, Poland, Spain, Sweden, the United Kingdom and the United States.

4 There are divergent views on the criminalisation of international child abduction by a parent, and the possibility for an applicant to institute both criminal proceedings against the abducting parent and proceedings under the Convention. On the one hand, there is strong opposition against the criminalisation of parental child abduction, also considering the growing percentages of reported abductions by mothers in comparison with abductions by fathers, shown by statistics from certain countries where the Convention has been actively applied for a significant number of years. It is argued that criminal proceedings against the abducting parent can be counter-productive and can hamper the return of the child under the Convention. On various occasions the return of a child has been denied due to the threat of criminal proceedings against the abducting parent. Criminal proceedings against the abducting parent can also deter him or her from returning the child voluntarily. Furthermore, they can create among family members a climate inappropriate to the long lasting nature of family relationships and may unduly prevent the abducting parent from being granted custody, even if that would be in the child's best interests. On the other hand, there is support for the criminalisation of parental child abduction, the main purpose of which should be to deter such abductions, including abductions concerning States which are not Parties to the Convention.[1] Furthermore, the institution of criminal proceedings is needed, in some countries, for police action which could be vital in preventing a domestic abduction from becoming an international one (*e.g.* the stopping of an aeroplane before take off) and in locating the child. In certain other countries, however, police action is allowed for in cases of parental child abduction under civil law and the institution of criminal proceedings is therefore not necessary for such action.

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[1] *Note by the Permanent Bureau:* an instructive case is *United States of America v. Ahmed Amer*, decided by the United States Court of Appeals for the Second Circuit on 26 March 1997, Docket No 96-1181.

5 Experience with Interpol has shown that it will act on the basis of a missing persons report as well as a criminal complaint. In some cases Interpol has played a helpful role in locating the child.

PREAMBLE

Question 3: Has the Preamble of the Convention given rise to any questions in practice?

Response:
6 There was no discussion on this point.

CHAPTER I – SCOPE OF THE CONVENTION

Article 1 – The aims of the Convention

Question 4: Have the objects of the Convention as set out in Article 1 given rise to any questions of interpretation?

Response:
7 In some States Parties, including England and Wales, Germany, Scotland and the United States, useful brochures have been developed to set out the purposes and objects of the Convention. The Permanent Bureau is contemplating a project to set up a database on case-law under the Convention.

Article 2 – General obligation of States Parties

Question 5: Have any problems of implementation arisen under Article 2?

Response:
8 Question 5 related mainly to three matters: (1) implementation measures for the operation of the Convention, (2) legal aid for applicants, and (3) awareness of the courts or other competent authorities of Contracting States of the Convention's principles and provisions.

9 In view of the fact that, on occasion, acceding countries still lack the necessary implementing legislation at the point in time when other States Parties accept their accession, it was suggested that the Permanent Bureau take on the responsibility of informing the Contracting States of the measures that an acceding country has taken to fulfil its obligation to secure the implementation of the Convention. On behalf of the Permanent Bureau, it was stated that it was not within the powers of the Permanent Bureau, for any reason whatsoever, to slow down a country's accession to the Convention. The Permanent Bureau could, however, enquire about implementing legislation, including the designation of a Central Authority, and inform other States Parties thereof. Not every country had to have implementing legislation, however. Those countries in which the Convention's provisions are self-executing, for example, do not require such legislation. Nonetheless, implementing legislation was desirable in practically all cases, in particular for the designation of Central Authorities, the designation of the courts which will exercise jurisdiction at first instance and the necessary exceptions to the right of privacy. Several experts expressed their agreement with the views of the Permanent Bureau, and stated that there was no place for formal involvement of the Permanent Bureau in such matters. Some experts also stated that the Permanent Bureau was too overburdened to take on such a task, and that it was already possible to approach the Permanent Bureau on an informal basis for information on the measures that a State had taken to secure the implementation of the Convention.

10 There is a need, especially by new States Parties, for information on measures to implement the Convention, including information for judges. A compilation of implementing

legislation should be made by the Permanent Bureau, possibly in the form of a flow chart of the various implementation measures taken by States Parties. In addition, a short document should be drawn up for countries considering accession, possibly in the form of a checklist of issues to be considered as regards implementation.

Question 6: What are "the most expeditious procedures available" in your country?

Response:
11 Some feel that provision should be made for all Convention cases to go to specially designated courts, in order to ensure that the judges involved have adequate knowledge of the Convention's provisions (see also paragraph 46 below). In Finland, for example, one court is designated to deal with cases under the Convention, which may be a good idea for other small countries. The importance of providing for summary proceedings is generally recognised, including a speedy appellate procedure.

12 Because of the isolated geographical position of Australia, the legal requirement, in some countries, of the applicant's personal appearance at the proceedings in the requested State is burdensome for Australian applicants. In the Netherlands the applicant's presence is not legally required. Nevertheless, the Dutch Central Authority does recommend to applicants to join in the proceedings to present their arguments. In Germany, Canada and the United States the applicant's presence is also not required. In Scotland, for example, it is possible for Convention cases to be decided on affadavits only. It may be useful to design other means of making testimony available, such as depositions and electronic transmissions. There is a European Recommendation concerning this issue.

Article 3 – The wrongful nature of a removal or retention

Question 7: Have the terms "rights of custody", "under the law of the State", "habitually resident" or "actually exercised" in Article 3 been interpreted by the courts in your country?

Response:
"Rights of custody"
13 An unmarried father who actually takes care of the child might nonetheless be denied the return of the child because the law of the child's habitual residence denies him custody rights. Such a decision might be found to be in violation of Article 8 of the European Convention on Human Rights, however (see *Keegan* case). A theory as to "inchoate" rights of custody has emerged in one country, whereby a violation of rights of custody under the Convention is recognised due to the already existing possibility for the unmarried father to start custody proceedings.

14 Joint custody is now recognised by law in Germany, and a proposed law would provide for joint custody between unmarried parents. Problems have arisen in Italy as regards joint custody of unmarried couples that separate. Such couples have been treated differently from married couples that separate, who are always allowed to agree upon joint custody.

15 In 1994 the Supreme Court of Canada considered the Convention for the first time in *Thomson v. Thomson*. The Supreme Court held that the removal of a child from Scotland by his custodial parent, contrary to a non-removal clause in an interim or temporary order, was wrongful because the removal breached the custody rights retained by the Scottish Court. The Supreme Court examined and rejected wider interpretations that the removal breached the custodial parent's own custody rights or those of the access parent, and stated that a non-removal clause in a final order could result in a different finding, noting that such provisions are intended to protect access rather than custody rights. Finally, it emphasised the different treatment accorded to custody and access rights under the Convention (see also Work. Doc. No 9).

"Habitual residence"
16 Alternating custody agreements, or "shuttle agreements" might give rise to problems in determining the habitual residence of the child. The question arises whether such agreements may determine habitual residence in a way that would be binding on courts requested to order the return of the child, *e.g.* by including an additional clause that non-return of the child on the

date agreed upon constitutes unlawful retention under the Convention or other kinds of choice of court clauses. Such choice of court clauses do not fall to be recognised under the Convention, however, and parties to such an agreement should not have the power to create a habitual residence that does not match with the factual habitual residence of the child. This is, firstly, because the concept of "habitual residence" under the Convention is regarded as a purely factual matter and, secondly, because the Convention provides for a very specific remedy applicable in cases of emergency and is not meant to solve parental disputes on the merits of custody rights.

"Under the law of the State"

17 The words "by operation of law" were included in Article 3 in order to cover agreements between parents which had not been approved by, or subjected to, a court (see also Pérez-Vera Report, paragraph 68). Compare Article 16 of the Convention of 19 October 1996, referred to in paragraph 20 below.

"Actually exercised"

18 The *Barbee v. Barbee* case was decided by the Israeli Supreme Court in 1994. The parents divorced in 1990 and the father was attributed temporary custody rights, until the mother would be able to take care of their child, when she would be given the permanent custody. In 1991 the mother resumed taking care of the child and, in 1993, she took the child to Israel. The court refused to order the return of the child to the father because he was not actually exercising his rights of custody but only visitation rights (see Work. Doc. No 12). In an Australian case the child had been given to the care of the grandparents. The grandparents took the child to New Zealand. When the mother applied for the child's return, it was argued by the grandparents that the mother had not been exercising her custody rights. The court disagreed and held that the mother had been exercising her custody rights by discharging them.

19 There have been a number of cases where the return of the child to a parent with custody rights was denied because that parent had not actually been living with the child for a certain period of time. However, some parents might understand their custody rights as mainly allowing them to object to a future change of residence of the child. Under the aforementioned case law such parents would be precluded from requesting the return of the child at the time they intended to exercise their rights of custody. At the time the Convention was drafted, "rights of custody" under Article 5 were deemed to cover cases where a parent had rights of access and the right to be consulted before a change of the child's place of residence. The requirement of actual exercise of custody rights under Article 3 *b* of the Convention in effect demands that the parent has maintained some contacts with the child.

Article 4 – Convention's scope **ratione personae**

Question 8: Has the age-limit of 16 years under Article 4 given rise to any problems in practice?

Response:

20 The forthcoming Explanatory Report,[2] by Professor Lagarde, will also address the interface between the Child Abduction Convention and the new Protection of Children Convention (*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*).

21 Article 7 of the new Protection of Children Convention does not provide for the same radical remedy as the Child Abduction Convention but, rather, sets out rules of the latter Convention on jurisdiction, applicable law and recognition and enforcement of measures. Under the second sentence of Article 50 of the new Protection of Children Convention, States Parties to both Conventions are allowed to apply the new Convention rather than the Child Abduction Convention in cases where the former is more favourable to return of the child than the latter.

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[2] *Note by the Permanent Bureau:* a provisional edition of this Report was issued in the spring of 1997

The new Protection of Children Convention could be applied, for example, in abduction cases involving children between the ages of 16 and 18, considering that the new Convention applies to children up to the age of 18 years and the Child Abduction Convention applies to children up to the age of 16 years.

Article 5 – Certain terms used in the Convention

Question 9: Have the definitions in Article 5 of the terms "rights of custody" or "rights of access" given rise to any questions of interpretation or application?

Response:
22 There was no discussion on this point (see paragraphs 13 to 19 and paragraphs 79 to 82).

CHAPTER II – CENTRAL AUTHORITIES

Article 6 – Creation of Central Authorities

Question 10: Have any problems arisen in practice concerning the designation of Central Authorities under Article 6?

Response:
23 Bosnia and Herzegovina has had difficulties in designating a Central Authority. Once the transformation of the administrative authorities is finished, however, the Ministry of Civil Affairs and Communication will most likely be designated as Central Authority. The completion of the transformation of the court system is also expected very soon, which is of importance for pending cases.

Article 7 – Obligations of Central Authorities

Question 11: Have any of the duties of Central Authorities, as set out in Article 7, raised any problems in practice?

Response:
24 In Spain it is difficult to locate abducted children because they usually are taken to crowded touristic areas. Use is therefore frequently made of Interpol. The Central Authorities of requesting States should therefore supply as much information as they can to help the Spanish authorities locate the abducted child.

25 Problems may arise in locating abducted children with the removal of border controls between States Parties to the Schengen Agreement. The elimination of border controls within "Schengenland" will greatly facilitate child abduction within that area.

26 When the child cannot be found in the requested State and the Central Authority has reason to believe the child is in another Contracting State, under Article 9 of the Convention, the application can be sent on to the Central Authority of that State.

27 Ms Mary Banotti, MEP, is the European Parliament's mediator for child abduction. Various resolutions have been adopted by the European Parliament concerning the institution within Europol of a registry of missing children. They have been transmitted to the Council of Ministers of the European Union but no final decision has yet been made. On 18 March 1997 an official meeting took place on the role of Europol in locating abducted children, the results of which will be issued in the near future.

28 Interpol has played a constructive and helpful role in locating abducted children.

29 A requested Central Authority should always acknowledge receipt of an application, also in connection with the one-year-period referred to in Article 12 of the Convention.

30 As regards the right of the applicant or of the requested Central Authority, on its own initiative or if asked by the Central Authority of the requesting State, to request a statement of the reasons for the delay, if the court concerned has not reached a decision within six weeks

from the commencement of the proceedings (see Article 11, second paragraph), it is sometimes burdensome to receive requests by the requesting Central Authority before this term of six weeks has expired. This is so, in particular, because they have to be responded to, resulting in extra work, and, in most cases, no status report can yet be given. Furthermore, where no decision has yet been made after six weeks, the onus should lie with the requested Central Authority to assist in expediting proceedings without waiting for the requesting Central Authority to ask it to do so.

Question 12: What can be done to improve co-operation between Central Authorities?

Response:
31 Working Documents Nos 15 (Reunite, Sweden, United States), 17 (United Kingdom) and 18 (Australia) are information documents containing emergency and telefax numbers of Central Authorities which can be used out of office hours.

32 The Expert from the United Kingdom suggested that, in cases where contacts between Central Authorities had become strained, mediation by a member of the Permanent Bureau might be sought. This suggestion gave rise to considerable discussion, in particular concerning what was meant by "mediation". In order to allay the concerns expressed over the involvement of the Permanent Bureau in private cases, it was explained that it referred to good offices between Central Authorities and not between litigants. The latter role could be played by organisations such as the International Social Service (ISS) (see Work. Doc. No 1). It was generally agreed that there was a role for the Permanent Bureau to facilitate co-operation between Central Authorities, including in particular the provision of information on newly created Central Authorities. (The Expert from Austria suggested that Mr Adair Dyer, Deputy Secretary General, after his retirement in October 1997, could perhaps be requested in a personal capacity to be involved in providing good offices between Central Authorities, when this is needed.)

33 The Permanent Bureau receives a considerable number of letters from private persons involved in child abduction cases for legal or other advice, and, in some instances, concerning complaints about Central Authorities. Its general response to such letters is that it does not have the authority to act or to advise in private legal disputes involving Contracting States of the Convention. On occasion, information is provided on appropriate bodies to contact, *e.g.* a Central Authority, or a national support organisation such as Reunite in London or IAF in Frankfurt-am-Main.

CHAPTER III – RETURN OF CHILDREN

Article 8 – Applications to Central Authorities

Question 13: Have any questions arisen as to who may make an application under Article 8?

Response:
34 One expert stated that, under Article 8 of the Convention, you don"t have to possess – or claim to possess – custody rights to be entitled to submit an application. This was important because it would allow children to submit applications. Another expert stated that he was against this interpretation of Article 8.

Question 14: Has the form or content of applications made under Article 8 given rise to any problems?

Response:
35 Handwritten applications, as well as court decisions in manuscript, frequently cause problems, mainly because they are difficult to read. Where available, an authenticated copy of the child's birth certificate should be attached to the application, and attached statutes should be translated.

36 Frequently, not enough information is contained in the application, particularly concerning the grounds on which the applicant's claim for return of the child is based. The delegation of Australia submitted a working document containing a directive on the content of applications (see Work. Doc. No 4). The Canadian Central Authority uses a standard form letter, showing the information necessary for the court, which has proved to be particularly helpful. Other Central Authorities could possibly adopt this practice. (The basic recommended form for applications was drawn up in 1980 and published with the Pérez-Vera Report.)

37 Sufficient information regarding custody rights or habitual residence can usually be provided by declaratory judgments, or by certificates or affadavits from the requesting Central Authority (see Article 15 of the Convention, as well as Article 40 of the *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 idea of a central file, to be held at the Permanent Bureau, recording the contents of national laws on custody was rejected.

Question 15: Have any questions arisen as regards the Central Authority to which an application should be made?

Response:
38 Working Document No 7, submitted by the delegation of the United States, clarifies the relationship between the Central Authority of the United States and the National Center for Missing and Exploited Children.

Question 16: Do you have statistics concerning applications handled under the Convention?

Response:
39 Preliminary Document No 2 and Addenda I to III contain statistics submitted by Central Authorities prior to the Special Commission. It may be useful if the Permanent Bureau develops common definitions of the terms used in the chart which was sent to the Central Authorities, for use in the future.

Article 9 – Transmission of the application to the Central Authority of the State where the child is located

Question 17: Has any application received by the Central Authority in your country been transmitted to the Central Authority of another Contracting State because there was reason to believe that the child was located in that State?

Response:
40 There was no discussion on this point (see paragraph 26 above).

Article 10 – Voluntary return of the child

Question 18: What types of measures are used by the Central Authority in your country pursuant to Article 10 to obtain the voluntary return of children?

Response:
41 In Romania exposure of a case by the local media was instrumental in bringing about the voluntary return of the child to her mother in the United States.

42 Because the ideas behind the provisions of Article 26, paragraph 2, concerning the payment of expenses incurred or to be incurred in implementing the return of the child could be counter-productive, a proposal to provide for cost-free voluntary returns is being considered by the Finnish Government. In Canada it is possible to get transportation for the return of the child, including a free plane ticket, if the return of the child has been ordered by the court. In Australia and New Zealand a scheme to assist parents exists, under which the Government covers the costs incurred in both the voluntary and non-voluntary return of children, including airfare for the abducting parent where necessary.

43 Some Central Authorities, including those of Austria, Cyprus, Israel, New Zealand, and the United Kingdom, prefer to institute judicial proceedings immediately after the application is filed and concurrently to take measures to facilitate the voluntary return of the child. They are of the opinion that, in this way, the judge can explain the legal situation to the abducting parent and, when no voluntary return follows, the judge can make a court order for return, the reasons for which will be plain. Furthermore, to seek outright a friendly settlement might cause delay in the proceedings and give the abducting parent time to hide the child. Other Central Authorities, including those of Germany, France and the Netherlands, prefer to undertake immediate measures to obtain the voluntary return of the child, including the sending out of a letter to the abducting parent promptly after an application is filed. They are of the opinion that this procedure does not cause unnecessary delay for the applicant because, in the meantime, the Central Authority continues to work on the case, *e.g.* finding a lawyer for the case and, perhaps, trying to obtain additional information for the application form. Only a short time, *e.g.* no more than two weeks, is usually spent in determining whether the parent is willing to seek a friendly settlement. In Germany, for example, more friendly settlements have been brought about out of court than in court.

Question 19: To what extent have voluntary returns of children been obtained under Article 10?

Response:
44 The format used by the Central Authorities to submit their statistics to the Special Commission includes a column on the voluntary return of the child or other amicable solutions (see paragraph 39 above).

Article 11 – The use of expeditious procedures by judicial or administrative authorities

Question 20: Has the first paragraph of Article 11 led to any problems of application?

Response:
45 The Council of Europe Recommendation No R(91)9 on Emergency Measures in Family Matters may be of relevance to the provisions of Article 11.

46 In some States, including Finland and Ireland, provision is made for all Convention cases to go to specially designated courts, in order to ensure that the judges involved have sufficient knowledge of the Convention's provisions and to expedite proceedings (see also paragraph 11 above). Furthermore, it is more likely that the resulting judgments will be published, which does not always happen, in some countries, with decisions on custody. In other States, including France, Germany, Spain, Sweden, Switzerland and the United States, there is no centralisation of jurisdiction in Convention cases. In a number of countries, including Spain and Sweden, such decentralisation is felt to have a good effect, because of the proximity of the child to the judge dealing with the case. Difficulties have arisen, however, because of the length of time it can take for local judges to gain experience with the Convention. This is felt to be more a problem of insufficient dissemination of information on the Convention than one of the decentralisation itself. However, in widely decentralised systems a judge may only handle one Hague Convention application during his or her career on the bench; this makes it difficult to accumulate expertise. There is therefore a need to inform the courts, also on the part of Central Authorities and State prosecutors, about the provisions of the Convention (see also paragraph 10 above). In France, for example, the General Prosecutor gives information on the Convention to the court when a case starts.

Question 21: Have the procedures of the second paragraph of Article 11 been employed?

Response:
47 See paragraph 30 above.

Article 12 – Duty to return the child

Question 22: Have any questions arisen in practice concerning the application of the first paragraph of Article 12?

Response:
48 The Convention is framed to allow the return of a child to a State other than that of its habitual residence, though certain States Parties have adopted a more strict interpretation in their implementing legislation or in their case law.

Question 23: Have any questions arisen in practice concerning the determination of the beginning date of the one-year period referred to in the first and second paragraphs of Article 12?

Response:
49 There was no discussion on this point.

Question 24: Has the second paragraph of Article 12 been interpreted or applied?

Response:
50 There was no discussion on this point.

Question 25: Have any problems been experienced in enforcing orders for the return of children?

Response:
51 In Finland only one court deals with Convention cases, and one can only appeal, within 14 days of the court's decision, to the Supreme Court. The order for return is immediately and automatically enforceable, and only the Supreme Court can make an order that it be postponed. This enforcement system is in accordance with paragraph 6 of the 1991 European Recommendation No R(91)9 on Emergency Measures in Family Matters (see also paragraphs 45 and 46 above).

52 Working Document No 13 explains the enforcement procedure in Israel, which is also aimed at improving police involvement. Sweden has adopted a new Act, which hopefully will improve the enforcement of orders for the return of children.

53 There is strong support for strict enforcement mechanisms.

Article 13 – Possible exceptions to the return of the child

Question 26: Have the courts of your country refused to order the return of any child on grounds set out in Article 13 a*? If so, was the refusal based on:*
a *Failure actually to exercise the custody rights?*

Response:
54 Article 13 merely accords judicial and administrative authorities in the requested State a discretion to decline return. The burden of proof under Article 13, first paragraph, falls on the person opposing return, which is also inferred by the use of the word "establish" in its introductory clause. The burden of proof is higher under Article 13, paragraph 1 *a*, than under Article 3. Under the latter an applicant only has to establish a *prima facie* breach of custody rights, while under the former the individual opposing the return of the child is required to fulfil the standard burden of proof required in civil proceedings, and not only offer proof but also meet the burden of persuasion.

55 See also paragraphs 13 to 15 and 18 to 19 above.

b *Consent to, or subsequent acquiescence in the removal or retention?*

Response:
56 There was no discussion on this point.

Question 27: Have the courts in your country refused to order the return of any child on grounds set out in Article 13 b?

Response:
57 Some are of the opinion that Article 20 has caused problems and that States Parties should delete it from their implementing legislation. In this connection, it was contended that Article 20 is not necessary, in view of the fact that its subject matter is already covered by Article 13, paragraph 1 *b*.

58 Article 13, paragraph 1 *b*, forms a sensitive part of the Convention. It must be given a restrictive interpretation. If misused, it could destroy the effectiveness of the Convention. Nonetheless, some argue that courts should show greater sensitivity to the dangers a child may face upon return. Others feel that courts should not commence a detailed social enquiry solely on the basis of an allegation that the child would be harmed if returned, as such proceedings hold the danger of leading to a decision on the merits of the case. It has been suggested that a higher burden of proof should be required where substantive proceedings are already pending in the State of habitual residence.

59 Because Article 13, paragraph 1 *b*, should only be used in exceptional cases, the issue of the safety of returning children, also considering the trend towards a larger percentage of mothers abducting children, is very important. Questions in this regard concern the role to be played by the Central Authorities upon the return of the child, pursuant to Article 7 *h*, and the scope for judicial co-operation, even when no proceedings have been started in the requesting State, including, in such co-operation, the putting into place of protective measures.

60 Working Document No 3, submitted by the delegation of Australia, contained a proposal on increased co-operation between Central Authorities in order to ensure the welfare of the child (and the abducting parent) upon return (see Annex I). There was general agreement with the spirit of the proposal, and that it fell within the wording of Article 7 *h*. Nonetheless, a number of qualifications were put forward. First, Article 13, paragraph 1 *b*, should continue to be interpreted very restrictively. Secondly, the courts of the child's habitual residence are the most appropriate to adjudicate custody and related claims. Thirdly, the Central Authorities cannot formally undertake responsibilities beyond their powers, as defined by the national law of their countries. The Central Authorities of many countries would not be able to provide for services, though they could provide returning parents with information on social, welfare and legal aid services in the country of habitual residence, and could even initiate contact with such services in order to help the returning parent. Fourthly, a case-by-case approach would be more appropriate, in order to avoid overburdening the Central Authorities, than an institutionalised general obligation of Central Authorities to exchange information.

61 Working Document No 20 contains a revised proposal, submitted by the delegations of Australia, the United Kingdom, Monaco, New Zealand, Norway, Sweden and Switzerland (see Annex II). All experts agreed with the spirit of the proposal contained in this document. It was further agreed that the Permanent Bureau would report suggested changes in the wording of the proposal (see Annex III). The delegation of Canada questioned the assumption, implicit in the wording of the proposal, that all abducting parents are victims and expressed the concern that liabilities might be imposed on the Central Authorities. The experts also suggested that "adverse public reaction" should not be allowed to influence Central Authorities or courts. The following changes were thus suggested:

– Proposal 1: the words "in order to avoid both adverse public reaction and a reluctance of judges" are replaced by the words "in order to alleviate possible concerns and the reluctance of judges".

– Proposal 2: after the words "strengthening the role of Central Authorities in co-operating to", the proposal should read: "facilitate awareness of government or public resources available to parents and children. In that context, Central Authorities should be prepared and encouraged to adapt a flexible approach ..." (the words between "protect children and parents on return" and "administrative arrangements" are deleted, as well as the word "nevertheless" between the words "Central Authorities should" and the words "be prepared"; the rest of the paragraph remains unchanged).

– Conclusion 1: between the words "under Article 7 *h* to" and the words "protect the welfare of children", the words "ensure appropriate child protection bodies are alerted so they may act to" are added; add a comma, followed by the words "in certain cases" after the words "has been effectively invoked".

– Conclusion 2: the wording should be the following: "It is recognised that *in most cases, a consideration of* the child's best interest *requires that both parents have the opportunity to participate and be heard in* custody *proceedings*. Central Authorities should therefore co-operate to the fullest extent possible *to provide information respecting legal, financial, protection and other resources in the requesting State, and facilitate contact with these bodies in appropriate cases*" (modified text in italics).

Finally, the Canadian delegation suggested that Conclusion 3 *c* be deleted and preferred information to be exchanged on an informal basis. The delegation of Ireland was also concerned about the wording of the conclusions, as imposing a direct legal obligation on Central Authorities to protect the child. The following suggestions were thus made:

– that the "obligation under Article 7 *h*" be "*to take or cause to be taken an action* to protect the welfare of children" (modified text in italics);

– that it be made clear that the proposal is mainly aimed at cases where the abducting parent is the primary care-taker;

– that Conclusion 3 *c* be deleted;

– that in Conclusion 3 *b* the requested State be advised not only of "protective measures available in the requesting State", but also of "services".

The delegation of Italy agreed with the suggested changes regarding Conclusion 1. The Italian Experts did not object to the wording of Conclusions 2 and 3. They suggested, regarding Conclusion 3, that one item be added to provide that applications for return should include, whenever possible, a description of the services or measures available in the requesting State for the protection of the child or the returning parent. The delegation of Austria with respect to Conclusion 2, preferred the wording suggested in Working Document No 20 to that suggested by the Canadian Experts. In addition, the Austrian Experts wished Conclusion 2 to specify that returning parents should be given assistance even when *ex parte* custody orders have been issued after the abduction and that such orders should not prejudge the final outcome of the proceedings. The experts also wished that Conclusion 3 *c* be deleted and that it be clearly stated, under Conclusion 3 *b*, that information was only required upon request. The delegation of France, with respect to Conclusions 1 and 2, reminded the meeting that the French Central Authority could not ensure that custody proceedings would be instituted upon return, although it could commit to assist the parent in all possible ways, in particular by contacting other authorities or services. The French experts found Conclusion 3 to be too specific and would prefer it more open-ended. Regarding Conclusion 3 *c*, it was pointed out that the French Central Authority could not provide information beyond the measures taken upon the return, for it lacked the resources needed for a long-term follow-up. Other experts expressed similar concerns as those mentioned above, including those regarding Conclusions 3 *b* and 3 *c*. Experts also wished that it be made clear that the purpose of the proposal was to protect the child and not to reward the abducting parent.

62 Under Article 32 of the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*, after this Convention enters into force for the States in question, authorities of the requested State will be able to request the Central Authority seeking return of the child to provide a "report on the situation of the child", or apply for specific protective measures from other authorities in the State of habitual residence.

63 Working Document No 2, submitted by the delegation of the United States, and Working Document No 8, submitted by the delegation of the United Kingdom, concern "undertakings".

64 On the one hand, "undertakings" are seen as mere proposals agreed upon by the parties and submitted to the requested judge. They are limited in scope to the protection of the child for a limited time and allow the child to be returned sooner, and should therefore be enforced by

requesting States as valid under the Convention, on the basis of comity. On the other hand, it is felt that undertakings are used too broadly and allow abducting parents to gain significant advantages from the abduction. Furthermore, if such undertakings are mere agreements between the parties, they can be entered into before a judge in the requesting State and thus be incorporated in a "safe harbour" order, which is more readily enforceable. According to some, undertakings incorporated in the return order cannot be enforced as such in the country of habitual residence, short of additional proceedings normally required to recognise foreign judgments.

Question 28: Has the return of the child been refused based on an objection by the child under Article 13, second paragraph? If so, what was the age of the child(ren)?

Response:
65 Placing a child at too young an age in a situation where his or her opinion is being ascertained may create an intolerable situation for the child.

66 Under Swedish law children of 12 years of age and above must be heard in custodial decisions.

67 Some feel that the Convention gives too much weight to the opinion of the child, considering that what is involved is just a matter of determining the forum. However, certain experts thought that the child's views should be ascertained when the defences under Article 13 are invoked, because they could also serve as evidence.

Question 29: Has the third paragraph of Article 13 entered into play in any cases where Article 13 has been invoked?

Response:
68 See paragraph 58 above.

Article 14 – Relaxation of the requirements of proof of foreign law

Question 30: Have any questions arisen in practice concerning the application of Article 14?

Response:
69 There were no comments concerning this provision.

Article 15 – The possibility of requesting a decision or other determination from applicants by the competent judicial or administrative authorities

Question 31: Have any determinations as envisaged in Article 15 been requested from applicants by the competent judicial or administrative authorities in your State?

Response:
70 See paragraphs 36 and 37 above.

Question 32: Is any special legislation or court rule required in your State to authorise the competent judicial or administrative authority to make such a determination?

Response:
71 See paragraphs 36 and 37 above.

Article 16 – Prohibition against deciding upon the merits of the case

Question 33: Has Article 16 been applied in your country?

Response:
72 Article 16 can be considered essentially as a jurisdictional provision.

73 The Central Authority of Israel has taken an active role in the implementation of Article 16 by notifying the court of its provisions (see Work. Doc. No 19). The Central Authority of Germany follows a similar procedure.

Article 17 – The existence of a decision on custody in the requested State

Question 34: Has Article 17 been applied or interpreted in your country?

Response:
74 One expert pointed out that this provision might not be applicable if, while the Convention proceedings were pending, the abductor was awarded custody by a court in the State of the child's habitual residence.

Article 18 – Power to return the child

Question 35: Have any questions arisen in practice concerning Article 18?

Response:
75 There were no comments on this point.

Article 19 – Scope of the decisions on the return of the child

Question 36: Has Article 19 been cited or interpreted in your country?

Response:
6 For most States Parties, it is not possible to give a definitive answer to the question whether or not the abduction is used as an argument for refusing custody or access upon return. In any event, each case should be decided on its own merits and in the best interests of the child.

Article 20 – Possible exceptions to the return of the child

Question 37: Has Article 20 been interpreted or applied in your country?

Response:
77 Article 20 serves a separate function from Article 13, paragraph 1 *b* (compare paragraph 57 above). It was included in the Convention to avoid including a public policy clause.

78 Due to its reference to the protection of human rights and fundamental freedoms, Article 20 has been useful in two cases, in Ireland, where the constitutionality of the Convention had been put into question.

CHAPTER IV – ACCESS

Article 21 – Rights of access

Question 38: Have any applications been made to your Central Authority under Article 21? If so, what were the results?

Response:
79 A working group has been set up by the Council of Europe on the operation of Article 11 of the 1980 European Convention on Recognition and Enforcement of Decisions Relating to Custody and on Restoration of Custody.

80 Article 21 was incorporated into the Convention to allow the Central Authorities to deal with applications for the exercise of access rights in another country, even if no wrongful removal had occurred. It was generally felt that abductions might even be prevented by helping parents to gain proper access to their children. Whether or not, in a given case, a Central Authority should help a parent seeking access was meant to be left to its discretion, as shown by the phrase "in a proper case", in Article 7 *f*.

81 The requested judge denying return can decide upon access rights, to the extent that the habitual residence of the child has shifted to the requested State. In the event a return order is issued, the requesting State remains the State of habitual residence. Under 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*, access falls within the jurisdiction of the State of habitual residence. However, the requested judge could issue a declaratory statement under Article 35 of said Convention, which would not be binding for the judge of the requesting State but might have a persuasive value.

82 In the Netherlands, Article 21 combined with Article 11 of its implementing legislation gives jurisdiction to deal with access cases. There have been a growing number of applications under the Convention dealing with access (nine out of eleven access cases are under the Hague Convention). For the Central Authority of the United Kingdom, applications concerning access represent approximately 10% of its caseload.

CHAPTER V – GENERAL PROVISIONS

Article 22 – Cautio judicatum solvi

Question 39: Have any questions arisen in practice concerning the prohibition set forth in Article 22?

Response:
83 There were no comments on this provision.

Article 23 – Exemption from legalisation

Question 40: Have any questions arisen in practice concerning the prohibition set forth in Article 23?

Response:
84 There were no comments on this provision.

Article 24 – Translation of documents

Question 41: Have any problems arisen concerning the translation requirements under Article 24?

Response:
85 The second paragraph of Article 24 has been misunderstood on occasion. In particular, reservations excluding the use of both English and French are not allowed. Venezuela might therefore need to rectify its reservation.

Article 25 – Legal aid and advice

Question 42: Have any problems arisen in the application of the provisions of Article 25 concerning the availability of legal aid and advice?

Response:
86 See paragraphs 87 to 90 below.

Article 26 – Costs arising out of the Convention's application

Question 43: Have any problems arisen concerning the provision under the first paragraph of Article 26 that each State Central Authority shall bear its own costs in applying this Convention?

Response:
87 Several States Parties have entered a reservation under Article 26, paragraph 3, but nonetheless provide legal aid.

88 A number of States Parties have entered unrestricted reservations to Article 26, without indicating whether the benefit of legal aid is denied to applicants due to the reservation. It may be useful for explanations to be requested from these States, possibly by the depositary of the Convention.

89 Even if a reservation is made under Article 26, paragraph 3, the obligation of Central Authorities imposed by Article 7 *g* remains applicable, namely "to provide or facilitate the provision of legal aid and advice".

90 Working Document No 6, submitted by the delegation of the United States, describes the situation in the United States as regards legal assistance, and the attempts made to improve that situation.

Article 27 – Possible rejection of an application

Question 46: Have any applications been refused by the Central Authority in your country under Article 27?

Response:
91 Central Authorities very rarely reject an application. Applications are rejected only when they manifestly fall outside the scope of the Convention, for instance when the age requirements are not met or when the removal has taken place before the Convention's entry into force.

92 Any doubt regarding an application, as to the rights of custody or the habitual residence of the child, should be left for the court to dispel.

Article 28 – Authorisation required by the Central Authority

Question 47: Does the Central Authority in your country require a written authorisation as envisaged in Article 28?

Response:
93 There were no comments on this point.

Article 29 – Direct application to the competent internal authorities

Question 48: Have any questions arisen in practice concerning the application of Article 29?

Response:
94 There were no comments on this point.

Article 30 – Admissibility of documents

Question 49: Have any problems arisen as regards the admissibility of applications, as well as documents and any other information appended thereto or provided by Central Authorities, in the courts or administrative authorities in your country?

Response:
95 There was no discussion on this point.

Articles 31 to 33 – Application of the Convention in relation to States with more than one system of law

Question: Have any questions arisen in practice concerning the application of Articles 31 to 33?

Response:
96 There was no discussion on this point.

Article 34 – Relationship to other conventions

Question 51: Have any questions arisen concerning the relation between the Convention and any other international convention as is dealt with in Article 34?

Response:
97 There were no comments on this point.

Article 35 – Scope of the Convention ratione temporis

Question 52: Have any questions arisen concerning the application of Article 35, particularly as regards the application of the Convention to wrongful removals or retentions of children which were carried out before the Convention entered into force between the States in question?

Response:
98 Certain requested States had applied the Convention with respect to removals which had occurred before the Convention had entered into force for them.

Article 36 – Possibility of limiting by agreement the restrictions on the return of the child

Question 53: Has your country entered into any agreement with other Contracting States as envisaged in Article 36?

Response:
99 There were no comments on this point.

ANNEX I

Working Document No 3
distributed 17 March 1997

Document submitted by the delegation of Australia

(Traduction du Bureau Permanent)

Le Service de l'*Attorney-General* d'Australie présente ses compliments au Bureau Permanent de la Conférence de La Haye de droit international privé et répond par la présente à la note du Bureau datée du 18 novembre 1994 dans laquelle sont demandées des suggestions sur le travail à inclure au calendrier des travaux futurs de la Conférence.

Le Gouvernement australien propose que soit organisée une réunion des Etats parties à la Convention sur les aspects civils de l'enlèvement international d'enfants, pour pouvoir discuter des mesures prises pour s'assurer du bien-être des enfants qui sont, en application de la Convention, revenus dans l'Etat de leur résidence habituelle.

L'application de la Convention fait aujourd'hui l'objet d'un examen minutieux en Australie et dans d'autres pays en raison des critiques apportées au fait qu'elle ne prévoit aucune mesure pour la protection tant physique que financière des parents ravisseurs et des enfants, lorsque le retour de ceux-ci est ordonné en application de la Convention. En remplissant leurs obligations nées de la Convention, les Autorités centrales australiennes sont aujourd'hui confrontées à des difficultés de plus en plus grandes pour démontrer à l'opinion publique australienne et aux tribunaux que parents et enfants pourront trouver, lors de leur retour dans l'Etat de la résidence habituelle, une protection contre d'éventuelles violences, une assistance financière suffisante et la possibilité effective d'être représentés en justice. Le Gouvernement australien a à coeur de ne pas ruiner le système de la Convention par une réticence à ordonner le retour des enfants lorsque de tels problèmes sont soulevés.

Le Gouvernement australien envisage deux possibilités pour résoudre ces inquiétudes:

1 Les dispositifs de coopération dans le cadre de la Convention de La Haye pourraient être étendus pour prévoir:

– que l'Autorité centrale de l'Etat requérant doit envoyer à l'Autorité centrale de l'Etat requis des informations sur les questions relatives au bien-être de l'enfant qui ont pu se poser lors de la procédure en retour et,
– qu'il faut s'accorder sur le fait qu'il pèse une obligation pesant sur l'Autorité centrale de l'Etat requérant de prendre des mesures positives de protection du bien-être de l'enfant lors de son retour.

Le Gouvernement australien estime que, au moins en tant que mesures provisoires, de telles actions pourraient être considérées comme des mesures pour s'assurer du retour sans danger de l'enfant au sens de l'article 7 *h* de la Convention.

2 La reconnaissance formelle par les Etats parties à la Convention que la pratique s'est développée dans les tribunaux d'exiger du demandeur un engagement sur les conditions dans lesquelles le retour de l'enfant peut être ordonné.

Le Gouvernement australien estime que ces mesures rejoignent les buts de la Convention d'une part si elles permettent à un Etat partie d'ordonner le retour de l'enfant dans l'hypothèse où, en l'absence de telles mesures, le retour de l'enfant serait refusé sur le fondement de l'article 13 de la Convention ou, d'autre part, lorsque ces mesures sont temporaires et visent à s'assurer du retour sans danger de l'enfant.

Le Service de l'*Attorney-General* d'Australie saisit cette occasion pour renouveler au Bureau Permanent l'assurance de sa haute considération.

CANBERRA, avril 1995.

ANNEX II

Working Document No 20
distributed 20 March 1997

Document submitted by the delegations of Australia, the United Kingdom, Monaco, New Zealand, Norway, Sweden and Switzerland

Working Document No 3 sets out a proposal by the delegation of Australia on ways in which the welfare of children can be protected when returning to the country of habitual residence.

Following discussion of Australia's proposal, delegations appeared to accept the following proposals:

1 It is essential to the integrity of the Convention to ensure the safety of children on their return to their country of habitual residence, in order to avoid both adverse public reaction and a reluctance of judges to order the return of children where issues of abuse or violence arise.

2 An increase in the number of refusals to return, in cases where such issues arise, would not be desirable. Accordingly, a narrow interpretation of Article 13 *b* of the Convention should be encouraged by strengthening the role of Central Authorities in co-operating to protect children and parents on return. It is recognised that the ability of Central Authorities to take action to protect returning children and parents is limited by each Contracting State's system of domestic law and administrative arrangements. Central Authorities should, nevertheless, be prepared and encouraged by their respective States to adopt a flexible approach to their obligations under Article 7 *h* of the Convention.

Conclusions

In view of the above proposals, delegations are urged to adopt the following conclusions:

1 To the extent permitted by the powers of their Central Authority and by the legal and social welfare systems of their country, Contracting States accept that Central Authorities have an obligation under Article 7 *h* to protect the welfare of children upon return until the jurisdiction of the appropriate court has been effectively invoked.

2 It is recognised that the child's best interests are not protected by this Convention if the abducting parent cannot safely return to participate effectively in a custody hearing. Central Authorities should therefore also co-operate to the fullest extent possible to assist and protect returning parents.

3 The measures which may be taken in fulfilment of these obligations will vary according to the circumstances of each particular case. They may include, for example:

a alerting the appropriate protection agencies or judicial authorities in the requesting State of the return of a child who may be in danger;
b advising the requested State of the protective measures available in the requesting State to secure the safe return of a particular child;
c providing the requested State with a report on the welfare of the child after return;
d encouraging the use of Article 21 of the Convention to secure the effective exercise of access or visitation rights.

ANNEX III

Synthetic revision of Working Document No 20
as drawn up by the Permanent Bureau
in the light of comments and suggestions made by experts

Working Document No 3 sets out a proposal by the delegation of Australia on ways in which the welfare of children can be protected when returning to the country of habitual residence.

Following discussion of Australia's proposal, delegations appeared to accept the following proposals:

1 It is essential to the integrity of the Convention to ensure the safety of children on their return to their country of habitual residence, in order to alleviate possible concerns and the reluctance of judges to order the return of children where issues of (alleged) abuse or violence arise.

2 An increase in the number of refusals to return, in cases where such issues arise, would not be desirable. Accordingly, a narrow interpretation of Article 13 *b* of the Convention should be encouraged by strengthening the role of Central Authorities in co-operating to facilitate awareness of government or public resources available to parents and children. In that context, Central Authorities should be prepared and encouraged by their respective States to adopt a flexible approach to their obligations under Article 7 *h* of the Convention.

Conclusions

In view of the above proposals, delegations are urged to adopt the following conclusions:

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

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

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

a alerting the appropriate protection agencies or judicial authorities in the requesting State of the return of a child who may be in danger;
b advising the requested State, upon request, of the protective measures and services available in the requesting State to secure the safe return of a particular child;
[*c* providing the requested State with a report on the welfare of the child;]
d encouraging the use of Article 21 of the Convention to secure the effective exercise of access or visitation rights.]

Note by the Permanent Bureau

The delegation of Italy agreed with the suggested changes regarding Conclusion 1. The Italian experts did not object to the wording of Conclusions 2 and 3. They suggested, regarding Conclusion 3, that one item be added, to provide that applications for return, should include, whenever possible, a description of the services or measures available in the requesting State for the protection of the child or the returning parent. The delegation of Austria with respect to Conclusion 2, preferred the wording suggested in Working Document No 20 to that suggested by the Canadian experts. In addition, the Austrian experts wished Conclusion 2 to specify that returning parents should be given assistance even when *ex parte* custody orders have been issued after the abduction and that such orders should not prejudge the final outcome of the proceedings. The experts also wished that Conclusion 3 c), be deleted and that it be clearly stated, under Conclusion 3 b, that information was only required upon request. The delegation of France, with respect to Conclusions 1 and 2, reminded the meeting that the French Central Authority could not ensure that custody proceedings would be instituted upon return, although it could commit to assist the parent in all possible ways, in particular by contacting other authorities or services. The French experts found Conclusion 3 to be too specific and would prefer it more open ended. Regarding Conclusion 3 c), it was pointed out that the French Central Authority could not provide information beyond the measures taken upon the return, for it lacked the resources needed for a long term follow-up. Other experts expressed similar concerns as those mentioned above, including those regarding Conclusions 3 b) and 3 c). Experts also wished that it be made clear that the purpose of the proposal was to protect the child and not to reward the abducting parent.

The square brackets around Conclusion No 3 reflect the doubts of certain experts as to whether this provision should be retained and the internal square brackets around sub-paragraph *c* reflect particular doubt as to the acceptability of this provision.