

**Quatrième réunion de la Commission spéciale sur le fonctionnement de la
*Convention de La Haye du 25 octobre 1980 sur les aspects civils de
l'enlèvement international d'enfants*
La Haye, 22-28 mars 2001**

**Informations sur l'ordre du jour et l'organisation
de la Commission spéciale
et
Questionnaire sur le fonctionnement pratique de la Convention et avis sur
d'éventuelles recommandations
établi par William Duncan, Secrétaire général adjoint**

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**Fourth Special Commission to review the operation of the
*Hague Convention of 25 October 1980 on the Civil Aspects of
International Child Abduction*
The Hague, 22-28 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**

*Document préliminaire No 1 d'octobre 2000
à l'intention de la Commission spéciale de mars 2001*

*Preliminary Document 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
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**PART A – INFORMATION CONCERNING THE AGENDA AND ORGANISATION OF THE
SPECIAL COMMISSION**

INTRODUCTION

1 The first two Special Commissions to review the operation of the 1980 Convention were held in 1989¹ and 1993.² The third Special Commission took place from 17-21 March 1997.³ At that time, there were forty-five States Parties to the Convention of which thirty-five were represented at the Special Commission. In addition, thirteen States which were not at the time Parties to the Convention (seven Member States of the Hague Conference and six other States participating as observers) attended the Special Commission. Four intergovernmental and seven non-governmental international organisations attended as observers.

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

¹ See Overall Conclusions of the Special Commission of October 1989 on the operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, *International Legal Materials*, Vol. XXIX, March 1990, p. 219. (See Hague Conference website at: <http://www.hcch.net>.)

² See Report of the second Special Commission meeting to review the operation of the Hague Convention on the Civil Aspects of International Child Abduction, *International Legal Materials*, Vol. XXXIII, January 1994, p. 225. (See Hague Conference website at: <http://www.hcch.net>.)

³ See Report of the third Special Commission meeting to review the operation of the Hague Convention on the Civil Aspects of International Child Abduction, drawn up by the Permanent Bureau, August 1997. (See Hague Conference website at: <http://www.hcch.net>.)

⁴ See for example, A Report to the Attorney General on International Parental Kidnapping. *Report of Subcommittee on International Child Abduction of the Federal Agency Task Force on Missing and Exploited Children and the Policy Group on International Parental Kidnapping* (USA, April 1999); Government of Canada, *Government's Response to the Fourth Report of the Standing Committee on Foreign Affairs and International Trade* (International Child Abduction: Issues for Reform), November 1998; Belgian Senate, Seminar on the Application of the Hague Convention on the Civil Aspects of International Child Abduction, Report, Brussels, 29 March 2000.

⁵ See the bibliography on the Convention on the Hague Conference website at: <http://www.hcch.net>.

There are now more non-governmental organisations with a special interest in international child abduction.⁶ A number of international judicial seminars/conferences have been held at which aspects of the operation of the Convention have been reviewed.⁷ The operation of the Convention has also generated a good deal of publicity in several States, as well as a certain degree of political activity in some.⁸

DRAFT AGENDA FOR THE SPECIAL COMMISSION

3 The proposal of the Permanent Bureau to convene a fourth Special Commission⁹ was accepted unanimously by the Special Commission on general affairs and policy of the Conference in May 2000.¹⁰ That Special Commission agreed that the agenda of the Special Commission in March 2001 should concentrate on those aspects of the operation of the 1980 Convention which experience has shown are key to its successful operation, especially those in respect of which there are significant difficulties or differences of approach among States Parties. The following draft agenda was considered and its broad structure agreed to:

⁶ For example, the European Network on Parental Child Abduction which includes Reunite (UK), Bortrovade Barns Forening (Sweden), Com. of Missing Children (Germany), Fondation Pour l'Enfance (France), Missing Children International (Belgium), Child Focus (Belgium), CSME (France), ICPAC (Ireland), SOS International Child Kidnapping (France). The Network's first conference was held in London on 15 April 1999, and the International Centre for Missing and Exploited Children (ICMEC), launched in Washington, DC, in April 1999.

⁷ For example, the Seminar for Judges on the International Protection of Children, held at De Ruwenberg in the Netherlands, 22-25 June 1998 ("De Ruwenberg I"), organised by the Hague Conference, with the support of the Grotius Programme of the European Union, involving 35 judges from 26 States Parties to the 1980 Convention; the Seminar for Judges on the International Protection of Children, held at De Ruwenberg from 3-6 June 2000 ("De Ruwenberg II"), organised by the Hague Conference at the request of the French and German Ministries of Justice, involving nearly 40 judges from France, Germany, Italy and the Netherlands; the Common Law Judicial Conference on International Child Custody, held at Washington, DC, from 17-21 September 2000, organised by the State Department, involving judges, practitioners and Central Authority personnel from the United States, England and Wales, Scotland, Canada, Australia, New Zealand and Ireland, as well as observers from 24 other States; the United Kingdom-Germany Judicial Conference on Family Law, held in Edinburgh 26-28 September 2000 (the third in a series of United Kingdom-Germany judicial conferences).

⁸ See for example, *Déclaration Commune des Ministres Français et Allemand de la Justice sur les Conflits Familiaux des Couples Mixtes Franco-Allemand, Avignon, le 6 mai 1998*; Government Resolution by the House of Representatives (the Senate concurring) Urging Compliance with the Hague Convention on the Civil Aspects of Child Abduction, 23 March 2000, 106th Congress, 2nd Session, H.Con.Res.293; Seminar on the application of the Hague Convention on the Civil Aspects of Child Abduction, organised by the Belgian Senate, 29 March 2000.

⁹ See Preliminary Document No 6 of April 2000, Note "Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction - Preparations for a fourth Special Commission meeting to review the operation of the Convention and a description of the work currently undertaken by the Permanent Bureau in support of the Convention". (See Hague Conference website at: <http://www.hcch.net>.)

¹⁰ See Preliminary Document No 10 of June 2000, Conclusions of the Special Commission of May 2000 on general affairs and policy of the Conference, at p. 19. (See Hague Conference website at: <http://www.hcch.net>.)

(1) The role and functioning of Central Authorities

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

(2) Judicial proceedings, including appeals and enforcement issues, and questions of interpretation

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

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

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

(4) Procedures for securing cross-frontier access/contact between parent and child

- a* the role of Central Authorities and other intermediaries;
- b* promoting agreement by mediation, etc;
- c* jurisdiction, recognition and enforcement in respect of cross-frontier contact.

(5) Securing State compliance with Convention obligations

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

(6) Miscellaneous and general

- a* the role of the Permanent Bureau;
- b* the International Child Abduction Database (INCADAT);
- c* judicial (and other) training and networking;
- d* encouraging further ratifications and accessions;
- e* non-Hague States and bilateral arrangements.

It should be emphasised that this agenda remains in draft form. There are a number of factors which will influence its final shape and content, in particular the responses received by the Permanent Bureau to this document, including the Questionnaire. It may also be necessary to change the order of some of the items on the agenda. However, the broad idea of discussing first items of particular concern to Central Authorities and subsequently matters relating to the judicial process and enforcement (although clearly these matters cannot be entirely separated) will as far as possible be respected.

PARTICIPATION IN THE SPECIAL COMMISSION

4 All Member States of the Hague Conference and States Parties to the 1980 Convention, have been invited to attend the Special Commission. In addition certain intergovernmental organisations and non-governmental international organisations have been invited to send representatives as observers. It is hoped that delegations will, as usual, include Central Authority personnel and other relevant practitioners. In addition it is expected that there will be greater judicial involvement in the fourth Special Commission, particularly in the discussions concerning the judicial process and judicial co-operation/communications.

PART B - QUESTIONNAIRE CONCERNING THE PRACTICAL OPERATION OF THE CONVENTION AND VIEWS ON POSSIBLE RECOMMENDATIONS

INTRODUCTION TO THE QUESTIONNAIRE

5 The questionnaire which appears below is addressed in the first place to States Parties to the 1980 Convention. It has three broad objectives:

- a* to seek information concerning significant developments since 1997 in law or practice surrounding the Convention in the different Contracting States;
- b* to identify current difficulties experienced in the practical operation of the Convention; and
- c* to test opinion in respect of certain possible recommendations.

6 With respect to *a* and *b* above, it should be emphasised that respondents are also invited to identify and comment upon matters concerning the practical operation of the Convention which are not addressed specifically in the Questionnaire.

7 With respect to *c* above, the Special Commission on general affairs in May 2000 broadly supported the idea that the Special Commission of March 2001 should, subject to the necessary consensus, attempt to arrive at recommendations to improve the practical operation of the Convention. With this in view, and in order to begin to determine in what areas a consensus may exist, the Questionnaire seeks the initial reaction of respondents to a number of possible draft recommendations. It is recognised that some States may not be in a position to comment on all of the recommendations at this stage. Also the right of delegations, alone or in combination, to make alternative or additional recommendations, should be emphasised. In this regard, it would add to the efficiency of proceedings if States could as far as possible give advance notification to the Permanent Bureau of any proposed recommendations, preferably in conjunction with their responses to the Questionnaire.

8 The Questionnaire is also being sent to non-Party Member States invited to attend the Special Commission, as well as intergovernmental organisations and non-governmental international organisations invited to attend. All of these are invited to make such submissions in response to the Questionnaire as they deem to be appropriate. In addition, this document will be posted on the Hague Conference website (www.hcch.net).

9 The Permanent Bureau would be grateful if responses to the Questionnaire could be sent to the Permanent Bureau, if possible in electronic form, **by 19 January 2001**.

Questionnaire concerning the practical operation of the Convention and views on possible recommendations

(1) The role and functioning of Central Authorities¹¹

- *General questions:*

- 1 Have any difficulties arisen in practice in achieving effective communication or co-operation with other Central Authorities in accordance with Article 7 of the Convention? If so, please specify.

No difficulties have arisen in practice in achieving communication or co-operation with any of the Central Authorities.

- 2 Have any of the duties of Central Authorities, as set out in Article 7, raised any problems in practice?

Practical problems arise in the exercise of the duty of Central Authorities to establish the whereabouts of a wrongfully removed or retained child, e.g. the German Central Authority is not able to establish the whereabouts of a child within the German territory in the case of a request which does not indicate the exact address of child's residence, whereas in Spain, after a judgement for the release of children to Poland was rendered, the whereabouts of the children have not been established for more than two years, and consequently the judgement has not been executed.

- *Particular questions:*

- 3 What measures are taken by your Central Authority or others to secure the voluntary return of a child or to bring about an amicable resolution of the issues (Article 7 c)? Do these measures lead to delay?

According to the Polish law, only the court has the legal means and the obligation to seek an amicable resolution of a dispute. Those questions are regulated by the provisions of article 10 and article 223 of the Code of Civil Procedure. Moreover, the internal court regulations stipulate that in matters where an amicable resolution of a dispute is possible, the family judge should take appropriate mediation measures and seek an amicable resolution of the matter – as stipulated in paragraph 234 of those regulations.

¹¹ Conclusion IV of the first Special Commission called upon States to:

"... give their Central Authorities adequate powers to play a dynamic role, as well as the qualified personnel and resources, including modern means of communication, needed in order expeditiously to handle requests for return of children or for access". (Overall Conclusions of the Special Commission of October 1989 on the operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, February 1990, Conclusion IV at p. 45.)

Conclusion 3 of the second Special Commission to review the operation of the Convention was as follows:

"The Central Authorities designated by the States Parties play a key role in making the Convention function. They should act dynamically and should be provided with the staff and other resources needed in order to carry out their functions effectively." (Report of the second Special Commission meeting to review the operation of the Hague Convention on the Civil Aspects of International Child Abduction, June 1993, Conclusion 3 at p. 16.)

Such steps do not lead to delays, since they are undertaken during the trial before the court. The family judge persuades the parties to settle the matter amicably, presenting them arguments with particular emphasis being put on the interests of the child.

- 4 What measures does your Central Authority take to provide or facilitate the provision of legal aid and advice in Hague proceedings, including the participation of legal counsel and advisors (Article 7 *g*)? Do these measures result in delays in your own jurisdiction or, where cases originate in your country, in any of the requested jurisdictions?

The Central Authority, in order to facilitate communication for the applicant, provides lists of attorneys who speak foreign languages, which lists are transmitted to the applicant through the Central Authorities concerned. The applicant himself/herself chooses an attorney and enters into an agreement with him/her.

Moreover, each applicant has the right to submit a request for being exempted from the costs and for the appointment of a *pro bono* attorney pursuant to the provisions of articles 113 and 117 of the Code of Civil Procedure. The decision is rendered by the court. The applicant is obliged to prove that he/she is not able to cover such costs without detriment to the necessary maintenance of himself/herself and his/her family. He has the obligation to submit, together with the request, a declaration on his family status, assets and income. The court grants the request if it considers the participation of an attorney in the case necessary. The appointment of an attorney is tantamount to the granting of a power of attorney in the case.

In accordance with article 1129 of the Code of Civil Procedure, foreigners are exempt from the court costs pursuant to the principles stipulated in the Polish law, subject to reciprocity.

The submission of a request for exemption from the court costs and the appointment of an attorney slightly delays the examination of the case, however, on the other hand it makes the proceedings more efficient and speeds them up, since the court does not have to serve documents abroad within the framework of legal assistance.

The practice shows that applicant's request for the appointment of a *pro bono* attorney in the requested State delays the proceedings, e.g. in the United States, in Germany.

- 5 Does your Central Authority represent applicant parents in Hague proceedings? If so, has this role given rise to any difficulties or conflicts, for example with respect to other functions carried out by your Central Authority?

The Polish Central Authority is not applicants' attorney. The provisions of the Polish civil procedure do not stipulate such possibility. According to article 87 of the Code of Civil Procedure, a party may be represented by an attorney or a legal counsel, by the parents, a spouse, its siblings or descendants, as well by persons remaining within the adoption relationship.

- 6 What obligations does your Central Authority have, and what measures does it take, to ensure that a child returned to your country from abroad receives

appropriate protection, especially where issues of (alleged) abuse or violence have arisen?¹² In particular, does your Central Authority:

a ensure that appropriate child protection bodies are alerted;

Yes, we do notify the competent family court. In Poland the family court operated as such a body, and the provisions of article 572 of the Code of Civil Procedure stipulate the obligation to notify the court of an event which justifies the institution of proceedings ex officio. Article 109 of the Family Code provides for the ex officio institution of proceedings by the court where the interests of the child are threatened.

b provide information to either parent in respect of legal, financial, protection and other resources in your State;

The Central Authority informs the parent that the family judge is competent to decide on important matters concerning the child, and has legal means to notify different social and welfare institutions which might provide assistance. The family judge has the possibility to control the activities of those institutions.

c facilitate contact with bodies providing such resources;

We only indicate the competent court to the party concerned.

d assist in providing any necessary care for the child pending custody proceedings;

The Central Authority does not have legal means to provide

¹² Respondents are reminded of the discussions which took place during the third Special Commission (see Report of the third Special Commission, *op. cit.* footnote 3, especially paragraphs 57 to 64 and Annexes I to III). The synthesis of that discussion, as drawn up by the Permanent Bureau (see Annex III), was as follows:

"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.]"

assistance during custody proceedings; it may not be either a party to such proceedings or a party's attorney.

- e provide any other support, advice or information to a parent who accompanies the child on return;

Each parent may obtain information which is provided over the telephone by a staff member of the Central Authority.

- f provide any assistance in ensuring that undertakings attached to a return order are respected.

The obligation of the Polish Central Authority, and the measure it takes, is to inform the parent to whom the child has returned that he/she has the right to apply to the family court competent in respect of his/her place of residence for a decision regarding parental authority, with particular emphasis on child's place of residence, unless such decision had been rendered earlier.

- 7 What arrangements does your Central Authority make for organising or securing the effective exercise of rights of access (Article 7 f)?

The reply concerns all the requests described in footnote 13.

The Central Authority transmits the request to the competent court. Only the court is competent to establish the rights of access, and it also functions as the enforcement body (jointly with the court executive officer acting at the District Court) which conducts the proceedings for the execution of such judgement.

In particular, in the case of an applicant from abroad,¹³ does your Central Authority:

- a provide information or advice;

Each applicant may obtain information over the telephone.

- b facilitate the provision of legal aid or advice;

Yes, see explanations to point 4.

- c initiate or assist in the institution of proceedings, where appropriate, on behalf of the applicant;

The Central Authority provides assistance in the institution of proceedings, but it does not institute the proceedings on behalf of the applicant; this results from the fact that the Central Authority is not applicant's attorney.

¹³ In answering these questions please distinguish where appropriate between:

- a applications pending return proceedings;
- b applications following a refusal to return a child;
- c applications not made in connection with other proceedings; and
- d applications to modify existing access orders.

Please note also that the term "access" should be read as including all forms of contact.

- d assist in ensuring that the terms or conditions on which access has been ordered or agreed are respected;

The Central Authority does not have legal means to provide such assistance.

- e assist in cases where modification of existing access provisions is being sought.

In the case of a request for a change of an existing judgement, the proceedings are analogous to those applicable in respect of a new request.

- 8 Please comment on any developments in relation to the maintenance of statistics concerning the operations of your Central Authority. Has your Central Authority been able to return to the Permanent Bureau annual statistics in accordance with the Hague standard forms? If not, please explain why?

The annual statistics have been made on standard forms and sent.

- 9 Can you affirm or reaffirm, as the case may be, support for the conclusions reached by the first, second and third Special Commissions, as set out in footnotes 11 and 12?

We affirm our support.

- 10 Would you support any other recommendations in respect of the particular functions which Central Authorities do or might carry out, especially with regard to the matters raised in questions 6 and 7 above?

Yes, in particular the necessity to provide assistance to the parent and the child who returned to the country of permanent residence.

(2) Judicial proceedings, including appeals and enforcement issues, and questions of interpretation¹⁴

- 1 How many courts and how many judges potentially have jurisdiction to hear an application for the return of a child? If there is more than one level of jurisdiction at first instance, please specify the number of courts and judges for each level.

At first instance – each district judge in the territorially competent family court, and a judge of the District Court for the capital city of Warsaw if the child's place of residence is not known; at second instance – each judge of the district court competent to hear an appeal.

¹⁴ Delay in legal proceedings has long been identified as a major cause of difficulties in the operation of the Convention. For example, the second Special Commission called upon States Parties to make "all possible efforts ... to expedite such proceedings." (Report of the second Special Commission meeting to review the operation of the Hague Convention on the Civil Aspects of International Child Abduction, June 1993, Conclusion 7 at p. 18.)

The are more than a thousand judges adjudicating at first instance.

- 2 Do you have any special arrangements whereby jurisdiction to hear return applications is concentrated in a limited number of courts? Are such arrangements being contemplated?

There are no such regulations, and no such arrangements are being contemplated; in the Polish legal system there are Family and Juvenile Courts which are competent to decide in cases involving minors.

- 3 What measures exist to ensure that Hague applications are dealt with promptly (Article 7) and expeditiously (Article 11)? In particular:

- a* is it possible for the application to be determined on the basis of documentary evidence alone?

This is possible in legal terms if the participants of the proceedings do not submit other evidence to prove their statements; in practice the court takes evidence at least on the basis of the hearing of the parties.

- b* what special measures/rules exist to control or limit the evidence (particularly the oral evidence) which may be admitted in Hague proceedings?

There are no such special limitations which would be applicable only to the hearing of cases under the Hague Convention.

- c* who exercises control over the procedures following the filing of the application with the court and prior to the court proceedings, and how is that control exercised?

Prior to the trial and after the filing of the application with the court, the President of the court or the division chairman exercises control in respect of the administrative procedure involved.

- d* what appeal is possible from the grant or refusal of a return application, within what time limits do appeals operate, on what grounds and subject to what limitations?

Each party dissatisfied with the decision of the court has the right to file an appeal. In order to lodge an appeal the party concerned, or an attorney acting in its name, may submit a request for drawing up a written justification of the judgement and for its service. Such request is to be submitted within 7 days (a deadline which must not be missed) from the date on which the judgement was announced; within 14 days from the date of service of a certified copy of the judgement together with its justification, the party has the right to file an appeal with the District Court through the court which rendered the judgement at first instance; it should be noted, however, that the judge, as a matter of principle, is bound by the 7-day deadline (instructional norm) within which to prepare a written justification; also a direct appeal may be filed within 21 days from the date on which the judgement was announced; an

appeal lodged after the expiration of the prescribed deadline will be rejected; the appeal should necessarily contain a brief presentation of the pleas together with their justification, and it is also possible, if need be, to invoke new facts and evidence, while proving that they were not capable of being invoked before the first instance court, or that such necessity arose later on.

- 4 In what circumstances, and by what procedures/methods, will a determination be made as to whether a child objects to being returned?

During the trial the court has the right to hear the child. In accordance with article 576 paragraph 2 of the Code of Civil Procedure, the judge may hear the minor outside the courtroom; the child may also be heard by a court-appointed custodian, a psychologist, or during an examination conducted in a specialist family diagnostic and consultative centre.

In what circumstances in practice will the objections of the child be held to justify a refusal to return? (Please indicate the statutory basis, if any.)

In the event the child expresses such conviction, and the level of its maturity, in the opinion of the judge, allows for taking into account the child's view, or if disregarding the child's view might endanger its interests.

The courts adjudicating in those cases apply the provisions of article 12 of the European Convention on the Rights of the Child, as well as the provisions of the European Convention on the Execution of Children's Rights of 25 January 1996 (in particular its article 6), which have the status of national laws. Moreover, article 72 paragraph 3 of the Constitution of the Republic of Poland stipulates that "organs of public authority and persons responsible for children, in the course of establishing the rights of a child, shall consider and, insofar as possible, give priority to the views of the child".

Apart from the above, the Supreme Court in its judgements of 16.12.1997 – III CZP/97 and of 1.10.1998 – I CKN 825/98 expressed the opinion that the court is obliged to hear a child whose level of psycho-physical development enables this.

- 5 Where the person opposing return raises any other defences under Article 13 or Article 20, what are the procedural consequences? What burden of proof rests on the defendant? Does the raising of defences under Articles 13 or 20 in practice lead to delay? What measures, if any, exist to reduce such delay to a minimum?

The procedural consequence of a defence raised under Article 13 or Article 20 results in the necessity for the court to take evidence which has been submitted. Usually, the submission of such defences leads to a delay in the proceedings. However, if the taking of the submitted evidence encounters obstacles of an unlimited time of duration, the court may designate a date, after which evidence may be taken only if it does not lead to a delay in the proceedings.

The provision of article 6 of the Code of Civil Procedure stipulates that the court should counteract delays in the proceedings and seek a

resolution of the case at the first hearing, without detriment, so far as it is possible, to the clarification of the case. Moreover, the Code of Civil Procedure, in its article 103, paragraph 2, stipulates sanctions for taking steps aimed at delaying the proceedings, by enabling the court to impose on the party concerned the obligation to refund the costs incurred due to its irresponsible and obviously improper conduct. Also the provision of article 217, paragraph 2, of the Code of Civil Procedure gives the court the possibility to disregard evidence if the party submits it for the sole purpose of delaying the proceedings. Moreover, in the appellate proceedings the provision of article 381 of the Code of Civil Procedure introduces limitations with respect to invoking new facts (novelties).

However, in the Polish legal system there are no special measures aimed at reducing such delays in cases heard under the Hague Convention.

- 6 Please specify the procedures in place in your jurisdiction to ensure that return orders are enforced promptly and effectively? Are there circumstances (apart from pending appeals) in which execution of a return order may not be effected. Do return orders require separate enforcement proceedings? Is there appeal from such proceedings? Are such enforcement procedures routinely invoked, and are they successful in achieving the enforcement of return orders?

The question of the execution of return orders is regulated by the provisions of articles 1089 – 1095 of the Code of Civil Procedure. Only final judgements are subject to execution. The execution of a judgement falls within the responsibility of the court executive officer, and in the case of a coercive taking of the child, the decision is made by the court. This is a separate enforcement proceeding. There is a possibility to file a complaint against the steps taken by the court enforcement officer as well as a complaint against the decision of the court. Such procedures are applied in each case concerning the recovery of a child and are often successful.

Apart from a pending appeal, the concealment of the child constitutes a circumstance in which the execution of a return order may not be effected.

- 7 Would you support any of the following recommendations?
- a calling upon States Parties to consider the considerable advantages to be gained from a concentration of jurisdiction in a limited number of courts.¹⁵

No, we do not support it.

¹⁵ See, for example, Conclusion No 4 of the "De Ruwenberg II" Judicial Seminar (footnote 7, above):

"It is recognised that, in cases involving the international protection of children, considerable advantages are to be gained from a concentration of jurisdiction in a limited number of courts/tribunals. These advantages include the accumulation of experience among the Judges and practitioners concerned and the development of greater mutual confidence between legal systems."

This conclusion was supported by the judges present at the Washington Judicial Conference (footnote 7, above).

- b* underscoring the obligation of States Parties to process return applications expeditiously, and making it clear that this obligation extends also to appeal procedures.¹⁶

Yes, we support it.

- c* calling upon trial and appellate courts to set and adhere to timetables that ensure the speedy determination of return applications.¹⁷

Yes, we support it.

- d* calling for firm judicial management, both at trial and appellate levels, of the progress of return applications.¹⁸

Yes, we support it.

- e* calling upon States Parties to enforce return orders promptly and effectively.¹⁹

Yes, we support it.

- f* recommending that the "grave risk" defence under Article 13 should be narrowly construed.²⁰

Yes, we support it.

- g* proposing any other measures (please specify) to improve the efficiency and speed with which applications are processed and orders enforced.

We suggest that correspondence between the Central Authorities, instead of being conducted by post, be effected by fax or electronic mail (except for the application itself).

- 8 Please indicate any important developments since 1996 in your jurisdiction in the interpretation of Convention concepts, in particular the following:

- rights of custody (Article 3 *a* and Article 5 *a*);
- habitual residence (Article 3 *a* and Article 4);
- rights of access (Article 5 *b*);

¹⁶ See, for example, Conclusion No 2 of the Washington Judicial Conference:

"Prompt decision-making under the Hague Child Abduction Convention serves the best interests of children. It is the responsibility of the judiciary at both the trial and appellate levels firmly to manage the progress of return cases under the Convention. Trial and appellate courts should set and adhere to timetables that ensure the expeditious determination of Hague applications."

¹⁷ See above, footnote 16.

¹⁸ See above, footnote 16.

¹⁹ See, for example, Conclusion No 4 of the Washington Judicial Conference (footnote 7, above):

"It is recommended that State parties ensure that there are simple and effective mechanisms to enforce orders for the return of children."

²⁰ See, for example, Conclusion No 5 of the Washington Judicial Conference (footnote 7, above):

"The Article 13 *b* 'grave risk' defense has generally been narrowly construed by courts in member states. It is in keeping with the objectives of the Hague Child Abduction Convention to construe the Article 13 *b* grave risk defense narrowly."

- the actual exercise (of rights of custody) (Article 3 *b* and Article 13 *a*);
- the settlement of the child in its new environment (Article 12);
- consent or acquiescence to the removal or retention of the child (Article 13 *a*);
- grave risk (Article 13 *b*);
- exposure to physical or psychological harm (Article 13 *b*);
- intolerable situation (Article 13 *b*);
- fundamental principles relating to the protection of human rights and fundamental freedoms (Article 20).

In the Polish jurisdiction, since 1996, the above specified Convention concepts have been interpreted in a uniform manner, in accordance with the spirit of the Convention, except for the interpretation of article 13, letter b.

In the judgements of 16 October 1967 – I CKN 653/97 and of 16 January 1998 – II CKN 855/97 the Supreme Court put on the same footing the rights of custody and the execution of parental authority, to which both parents are entitled by law, whether by virtue of a foreign or the Polish family code provisions.

The Supreme Court has several times expressed the opinion that article 13 *b* concerns only a situation where the child is exposed to a grave risk, and not only to any risk of harm - e.g. the judgements of 7 October 1998 – I CKN 745/98 and of 1 December 1999 – I CKN 992/99 in which the Court indicated by way of example that article 13, paragraph 1, letter *b*, applies to cases where there is a danger of violence being used against the child or of sexual abuse, or where the applicant is an alcoholic, drug addict, or evades paid work.

The Supreme Court argued also that, in principle, the application of article 13 *b* is not justified by consequences harmful to the child due to it being separated from the abductor, which is often invoked by abductors, since this constitutes the cost involved in the realisation of the Convention's purpose; the abductor's or retainer's decision not to return to the child's place of permanent residence means favouring his own interests over the child's welfare that the perpetrator invokes.

Until 1999, in some cases the courts had applied extensive interpretation of "an intolerable situation", mainly due to the imprecise translation of this provision into the Polish language.

The change of the official translation was published in the Journal of Laws (Dziennik Ustaw).

The remaining concepts have not presented any interpretational problems. The Supreme Court, in its judgements rendered as a result of considering cassation cases, did not question the interpretations made by the courts of lower instances, nor was there any necessity to specify the meaning of those concepts within the Polish legal system.

(3) Issues surrounding the safe and prompt return of the child (and the custodial parent, where relevant)²¹

²¹ The context of these questions is the experience of several States that the majority of return

- 1 To what extent are your courts, when considering a return application, entitled and prepared to employ “undertakings” (*i.e.* promises offered by, or required of the applicant) as a means of overcoming obstacles to the prompt return of a child? Please describe the subject-matter of undertakings required/requested. At what point in return proceedings are possible undertakings first raised, and how?

The Polish legal system does not provide for such solutions.

- 2 Will your courts/authorities enforce or assist in implementing such undertakings in respect of a child returned to your jurisdiction? Is a differentiation made between undertakings by agreement among the parties and those made at the request of the court?

Since there are no such solutions in the Polish law, there is no substantive answer to this question.

- 3 To what extent are your courts entitled and prepared to seek or require, or as the case may be to grant, safe harbour orders or mirror orders (advance protective orders made in the country to which the child is to be returned) to overcome obstacles to the prompt return of a child?

The Polish courts considering applications made under the Hague Convention are not entitled to take the above described measures.

- 4 Is consideration being given to the possible advantages 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*, in providing a jurisdictional basis for protective measures associated with return orders (Article 7), in providing for their recognition by operation of law (Article 23), and in communicating information relevant to the protection of the child (Article 34)?

Poland is not a party to this Convention.

- 5 Have you experience of cases in which questions have arisen as to the right of the child and/or the abducting parent to re-enter the country from which the child was abducted or unlawfully retained? If so, how have such issues been resolved?

There have been problems with obtaining a visa for the parent who wishes to return together with the child. Criminal proceedings are instituted against a person who abducted the child, which constitutes the basis for refusing the issuance to this parent of an entry visa to come the country from which the child had been abducted. This problem has not been solved yet.

- 6 Please comment on any issues that arise, and how these are resolved, when criminal charges are pending against the abducting parent in the country to which the child is to be returned.

applications now concern (alleged) abduction by the child’s primary caretaker, and that these cases often give rise to concerns about supports available for, or even the protection of, the returning child and accompanying parent within the country to which the child is to be returned. The role played by Central Authorities in this context is covered by question 6 of section 1 of the Questionnaire.

There are problems in countries in which the abducting parent commits an offence and is sought by a wanted notice. In the case the court orders the return of the child and the parent who has abducted it wants to return together with the child to the country of the child's permanent place of residence, he/she is exposed to being arrested and to penal sanctions, e.g. Canada, the USA.

- 7 Please comment on any experience, as a requesting or as a requested State, of cases in which the deciding judge has, before determining an application for return, communicated with a judge or other authority in the requesting State and, if so, for what purposes. What procedural safeguards surround such communications?

We do not have any such experiences. The Polish judge does not have such possibilities.

- 8 Has an appointment been made in your country of a judge or other person competent to act as a focus or channel for communication between judges at the international level in child abduction/access cases?²²

In our country no appointment has been made, either of a judge or other person, to act as a focus or channel of communication between judges at the international level in child abduction/access cases.

- 9 Where a child is returned to your Country, what provisions for legal aid and advice exist to assist the accompanying parent in any subsequent legal proceedings concerning the custody or protection of the child?

According to the regulations governing the internal operation of the courts, the family judge co-operates with the organs, institutions and social organisations dealing with family, children's and health problems. A person in need of assistance or support may any time approach the family judge, in urgent cases - also outside court's office hours; the family judge has the legal right to request from the above mentioned institutions explanations regarding the manner in which assistance is being provided.

Apart from the family judge, also court custodians are operating within the family court, their task being to carry out activities of educational and preventive character; they also may provide assistance to a person who approaches the court custodian.

Moreover, as of 1 January 2000, the institution of the Commissioner for Children's Rights has been functioning in Poland, whose responsibility is to provide the child with the possibilities of full and balanced development, as well as to ensure the protection of children's rights, in particular the right to life and health care, to be brought up in a family, to decent living standards, to education; the Commissioner also undertakes measures aimed at protecting the child against violence, cruelty, exploitation, depravity, negligence and other harsh treatment.

- 10 Where a custody order has been granted in the jurisdiction of, and in favour of, the left behind parent, is the order subject to review if the child is returned, upon application of the abducting parent?

²² See footnote 23, below.

Such judgement may be changed, but it is not subject to automatic review after the return of the child. Such solution arises from the procedural norm which stipulates that each judgement on the custody of the child may be changed by the family court upon the request of the parent, or ex officio, if this is justified by child's interests.

11 Would you support any of the following recommendations?

a that Contracting States should consider ratification of or accession to 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*, to provide a basis for jurisdiction, recognition and enforcement, and co-operation in respect of measures of protection of a child which are attached to return orders.

Yes, we support it.

b that Contracting States should provide swift and accessible procedures for obtaining, in the jurisdiction to which the child is to be returned, any necessary protective measures prior to the return of the child.

Yes, we support it.

c that Contracting States should take measures to ensure that, save in exceptional cases, the abducting parent will be permitted to enter the Country to which the child is returned for the purpose of taking part in legal proceedings concerning custody or protection of the child.

Yes, we support it.

d that Contracting States should provide a rapid procedure for the review of any criminal charges arising out of a child's abduction/unlawful retention by a parent in cases where the return of the child is to be effected by judicial order or by agreement.

Yes, we support it.

e that Contracting States should nominate a judge or other person or authority with responsibility to facilitate at the international level communications between judges or between a judge and another authority.²³

²³ See, for example, Conclusion No 1 of the "De Ruwenberg I" Judicial Seminar (footnote 7, above):

"The recommendation was made that, following the example of Australia, judges attending the seminar should raise with the relevant authorities in their jurisdictions (e.g., court presidents or other officials, as appropriate within the different legal cultures) the potential usefulness of designating one or more members of the judiciary to act as a channel of communication and liaison with their national Central Authorities, with other judges within their own jurisdictions and with judges in other states, in respect, at least initially, of issues relevant to the operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction."

This recommendation was endorsed in Conclusion No 5 of the "De Ruwenberg II" Judicial Seminar (footnote 7, above), as follows:

"The need for more effective methods of international judicial co-operation in respect of child protection is emphasised, as well as the necessity for direct communication between Judges in different

Yes, we support it.

- f* that the Permanent Bureau of the Hague Conference on Private International Law should continue to explore practical mechanisms for facilitating direct judicial communications, taking into account the administrative and legal aspects of this development.

Yes, we support it.

(4) Procedures for securing cross-frontier access/contact between parent and child²⁴

- 1 What provisions for legal aid/advice/representation in respect of a foreign applicant for an access order exist in your jurisdiction?

The same as in respect of an application for the return of a child – see the reply to point (1) 2

- 2 On what basis do your courts at present exercise jurisdiction to:

- a* grant and
b modify access/contact orders?

In both cases the Polish courts adjudicate on the basis of article 97, paragraph 2, and article 100 of the Family Code. Anytime child's interests so require, the court may change its order, even a final one, if this is justified by the interests of the child – as stipulated in article 577 of the Code of Civil Procedure.

- 3 What provisions exist for the recognition and enforcement in your jurisdiction of foreign access orders, in particular where the order has been made by a court or other authority of the country of the child's habitual residence? In this context is consideration being given to implementation of the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children*?

jurisdictions in certain cases. The idea of the appointment of liaison Judges in the different jurisdictions, to act as channels of communication in international cases, is supported. Further exploration of the administrative and legal aspects of this concept should be carried out. The continued development of an international network of Judges in the field of international child protection to promote personal contacts and the exchange of information is also supported."

This conclusion was in turn endorsed at the Washington Judicial Conference (footnote 7, above).

Liaison judges have already been appointed for England and Wales, Australia, New Zealand, Hong Kong and Cyprus.

²⁴ The role played by Central Authorities in this context is covered by question 7 of section 1 of the Questionnaire. In answering these questions please distinguish where appropriate between:

- a* applications pending return proceedings;
b applications following a refusal to return a child;
c applications not made in connection with other proceedings; and
d applications to modify existing access orders.

Please note also that the term "access" should be read as including all forms of contact.

Final judgements of foreign courts concerning non-financial matters of foreign citizens issued by the court competent under the relevant national law do not need to be recognised; the only requirement is to ascertain their enforceability in the territory of Poland, subject to reciprocity however. Enforceability of such judgements is decided by the court pursuant to the provisions of the Code of Civil Procedure – articles 1150 – 1153.

According to article 1096 of the Code of Civil Procedure, those provisions are not applied if an international agreement stipulates otherwise.

Poland is not a party to the Hague Convention of 10 October 1996; it is however, a party to the European Convention on Recognition and Execution of Judgements on the Custody of the Child and Restitution of Custody over the Child, made in Luxembourg on 20 May 1980. The provisions of this Convention constitute the basis for considering applications for the execution of judgements concerning both the release of the child as well as the implementation of the right to maintain personal contacts with the child.

- 4 What, if any, provision exists to ensure that cross-frontier access applications (including appeals) are processed expeditiously?

In our legal system there are no special regulations concerning exclusively cross-frontier access applications.

- 5 What facilities/procedures are in place to promote agreement between parents in international access/contact cases?

In our legal system there are no special regulations concerning international access/contact cases.

- 6 Do your courts in practice accept a presumption in favour of allowing access/contact to the non-custodial parent?

Yes, the Polish courts in practice accept a presumption in favour of allowing access/contact to the non-custodial parent.

- 7 What conditions are likely to be imposed on access in respect of a non-custodial abducting parent?

The Polish court may not impose any conditions apart from the obligation to pick up and return the child at a designated time and place.

- 8 What information concerning services and what other facilities are available to overseas applicants for access/contact orders?

There are no special facilities concerning exclusively overseas applicants.

- 9 What problems have you experienced and what procedures exist in your country as regards co-operation with other jurisdictions in respect of:

- a the effective exercise of rights of access in your/in the other jurisdiction;
- b the granting or maintaining of access rights to a parent residing

- abroad/in your jurisdiction;
- c the restriction or termination of access rights to a parent residing abroad/in your jurisdiction.

Problems involved in the effective execution of access rights most often result from a long distance between the child's and parent's place of residence, and therefore the problem of high costs of such meetings arises.

The right to maintain personal contacts with the child, in the light of the Polish law, is even vested in the parent who has been deprived of parental authority; only the court may divest the parent of this right in particularly justified cases.

- 10 What, if any, measures are available to your courts to help guarantee adherence by parents to access conditions (*e.g.* financial guarantees, surrender of passports)?

There are no such measures in the Polish legal system.

- 11 How in practice are access orders enforced?

In practice is it necessary to institute enforcement proceedings if the person with whom the child stays does not comply with the court's order. For details concerning enforcement proceedings – see point (2) 6.

- 12 Would you support recommendations in respect of any of the particular issues raised in the preceding questions? If so, please specify.

Yes, we would.

(5) Securing State compliance with Convention obligations

- 1 Please comment upon any serious problems of non-compliance with Convention obligations of which your authorities have knowledge or experience and which have affected the proper functioning of the Convention.

Serious problems are often posed by protracted proceedings and a lack of efficiency and effectiveness in enforcement proceedings.

- 2 What measures, if any, do your authorities take, before deciding whether or not to accept a new accession (under Article 38), to satisfy themselves that the newly acceding State is in a position to comply with Convention obligations?

When accepting accessions of other states we are seeking to achieve the broadest possible area of the Convention's application, without making any special analysis of the possibilities of those states to comply with the obligations arising from the Convention.

- 3 Would you favour the drawing up of a standard questionnaire to be submitted by Contracting States to each newly acceding State with a view to assisting them to decide whether or not to accept the accession? What questions would you include?

We have doubts as to the purposefulness of submitting such a questionnaire to newly acceding States.

- 4 Are you in favour of an increase in the number of Special Commissions²⁵ (or similar meetings) to review the practical operation of the Convention? Would you also favour the idea that additional Special Commissions should review particular aspects of the operation of the Convention (for example, the problems surrounding the protection of rights of access, or the issues that arise when allegations of abuse or domestic violence are raised in return proceedings or the practical and procedural issues surrounding direct communications between judges at the international level, or the enforcement of return orders by Contracting States)?

We support the idea of conducting a broad review and analysis to cover the functioning of the Convention in individual States.

- 5 Are there any other measures or mechanisms which you would recommend:
- a* to improve the monitoring of the operation of the Convention;
Yes, we suggest that an examination of national legislations be considered.
 - b* to assist States in meeting their Convention obligations;
We do not have any proposals.
 - c* to evaluate whether serious violations of Convention obligations have occurred?
We do not have any proposals.

(6) Miscellaneous and general

- 1 Have you any comments or suggestions concerning the activities in which the Permanent Bureau engages to assist in the effective functioning of the Convention, and on the funding of such activities?²⁶

²⁵ All other things being equal, the approximate additional expenses arising for the annual budget of the Hague Conference would amount to Dfl. 30,000 (for an additional Commission of 3 days every 2 years), or Dfl. 20,000 (every 3 years).

²⁶ The present activities of the Permanent Bureau fall into the following categories:

- a* assisting in the maintenance of good communications between Central Authorities, by inter alia seeking and disseminating (through the Hague Conference website and other means) reliable contact data;
- b* giving informal advice and assistance to Central Authorities and others on matters of interpretation and procedure under the Convention;
- c* drawing the attention of States Parties to, and offering advice about, situations in which obstacles have arisen to the proper functioning of the Convention;
- d* offering advice of a general nature and referrals in individual cases;
- e* advising Contracting States in relation to implementation of the Convention;
- f* organising and supporting training conferences and seminars for judges, Central Authority personnel and practitioners;
- g* gathering and evaluating statistics;
- h* maintaining INCADAT (the international child abduction database of judicial decisions, available at: www.incadat.com);
- i* undertaking preparation and research for the regular periodic reviews of the Convention;

We do not have any comments or suggestions.

- 2 Are there any additional ways in which the Permanent Bureau might provide assistance? Do you favour the preparation of a list of potential Permanent Bureau functions and tasks that could only be performed if the Permanent Bureau were to receive additional financial and human resources either through approval of an increased budget or through voluntary contributions to accounts set aside for that purpose?

In principle we do support the preparation of a list of Permanent Bureau tasks, however, in respect of financial and human resources we do have any definite proposals.

- 3 Would you favour a recommendation that States Parties should, on a regular annual basis, make returns of statistics concerning the operation of the Convention on the standard forms established by the Permanent Bureau, and that these statistics should be collated and made public (for example on the Hague Conference website) on an annual basis?

Yes we support this.

- 4 Would you favour a recommendation supporting the holding of more judicial and other seminars, both national and international, on the subject-matter of the Convention?

Yes, we support this.

- 5 Are there any particular measures which you would favour to promote further ratifications of and accessions to the Convention?

No, there are not.

- 6 Please provide information concerning any bilateral arrangements made with non-Hague States with a view to achieving all or any of the objectives set out in Article 1 of the Convention.

Poland is not bound by any bilateral arrangements made with non-Hague States with a view to achieving the objectives of this Convention.

- 7 Do you have any comments on the following proposition:

*"Courts take significantly different approaches to relocation cases, which are occurring with a frequency not contemplated in 1980 when the Hague Child Abduction Convention was drafted. Courts should be aware that highly restrictive approaches to relocation can adversely affect the operation of the Hague Child Abduction Convention."*²⁷

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

k encouraging wider ratification of the Convention.

With respect to many of these activities, no provision is made in the regular budget of the Hague Conference. They therefore depend largely or entirely on extra budgetary funding.

²⁷ Conclusion No 9 of the Washington Judicial Conference (footnote 7, above). A "relocation" case is one in which a custodial parent applies to a court for permission to move permanently, together with the child, to a new country.

We agree with this proposition. In our opinion an excessively restrictive approach adopted by the courts with respect to relocation adversely affects the operation of the Convention.