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COMMITTEE ON INTERNATIONAL FAMILY LAW

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REPORT ON TRANSFRONTIER CONTACT WITH CHILDREN

Section I - Introduction

1 Problems surrounding transfrontier contact or access between a child and a parent or other close family member are, with the growth of international marriage as well as non-marital unions, and their breakdown, increasing in number. The right of the child to maintain personal relationships with both parents, even when the parents live in different States, is now an almost universally accepted norm.¹ However, the practical mechanisms for supporting this right remain defective, and the failure to put in place a coherent international structure to support the effective exercise of rights of contact constitutes not only a failure to children and their parents but also a source of aggravation in the relationships between a number of States.²

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

3 The law can be a somewhat blunt instrument when applied to the maintenance of long-term human relationships. In the area of parent/child contact, one of its principal functions is to provide a framework, which will encourage and support agreed solutions. Unless parents can achieve a minimum level of co-operation, disputes on the terms of contact tend to occur time and time again and may result in costly and ineffective litigation. This introduces another preliminary consideration, that of cost. The provision of services, whether they be judicial or administrative, to assist in resolving frequently occurring transfrontier contact disputes can be extremely costly.³

¹ See *UN Convention of 20 November 1989 on the Rights of the Child*, Article 10, paragraph 2. The Convention has 181 States Parties.

² For example, between the United States and a number of European countries and, within Europe between France and Germany in particular. Contact issues have been the subject of discussion at the highest level between the United States and Germany, and are currently the subject of regular bilateral meetings. Problems between France and Germany have led to the establishment of a joint Parliamentary Commission, which attempts to mediate in some of the more chronic Franco-German cases.

³ See Hague Conference on Private International Law, *Transfrontier Access/Contact and the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, Preliminary Report, drawn up by William Duncan, Deputy

Section 2 – Some matters of terminology

4 The word “contact” is used throughout this Report in the widest sense to include the various ways in which a non-custodial parent (and sometimes another relative or established friend of the child) maintains personal relations with the child, whether through periodic visitation or access, by distance communication or by other means. It has been suggested that the use of the word “contact”, in preference to a term like “access”, reflects a child-centred approach and is more in line with modern concepts such as “parental responsibility” or “parental responsibilities”.⁴

5 Although in this Report the distinction between contact and custody is frequently used, it should be noted that the difference between the two concepts is not always clear-cut. Nor does it fit readily with those national systems, which have moved away from the concept of custody towards the concept of parental responsibility. For practical purposes, the terms “custodial parent” should be read as referring to the parent with whom the child has his or her normal or habitual residence. There will, of course, be cases in which residence or custody rights are so equally shared that the distinction between custody and contact breaks down. There will also be cases where the custodial parent may himself or herself wish to exercise contact rights, as for example where the child is enjoying an extended visit to the non-custodial parent. Finally, it should be noted that existing international instruments may have specific definitions of custody and contact or access, as is the case with the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*.⁵

Section 3 - Some fundamental and practical considerations

6 The issue of contact will usually arise in the context of the breakdown of the marriage or other relationship of the parents. In the international context the parents will often have different national origins. The question of contact may have to be considered in the light of other problems arising from the breakdown. The custodial parent may, for example, be applying to a court for permission to relocate⁶ to another country (usually his/her country of origin). One parent may have abducted or unlawfully retained the child, or be alleged to have done so, in another jurisdiction. There may be allegations of violence or abuse either in respect of the child or the other parent. The circumstances of the parents following the breakdown of the marriage or other relationship are often subject to rapid and unexpected changes.⁷

Secretary General. Preliminary Document No 4 of March 2001 for the attention of the Special Commission of March 2001, at paragraph 10. This Report is henceforth referred to as the Hague Preliminary Report.

⁴ See the Explanatory Report on the draft Convention on Contact Concerning Children, as approved by the European Committee on Legal Co-operation (CD-CJ) of the Council of Europe, 4-7 December 2001, CD-CJ (2001) 33 addendum, at paragraph 6. See below Section 6.

⁵ The 1980 Convention itself, in Article 5, defines rights of custody as including not only “rights relating to the care of the person of the child”, but also “the right to determine the child’s place of residence”. This has meant that in certain cases it has been possible for non-custodial parents (in the sense of parents who are not the primary carers) to avail of the return remedy provided by the Convention essentially to vindicate access rights. There are divergences in the case law with respect to the precise definition of rights of custody in this context. It is perhaps fair comment that the shortcomings in the Convention regime with regard to the protection of contact rights may have stimulated the use of the return application for this purpose and may in turn have had some influence on the general judicial tendency to give a broad scope to custody rights”, Hague Preliminary Report, *supra* footnote 2, at paragraph 9.

⁶ As, for example, where a mother applies to a court for permission to take a child out of the jurisdiction against the objections of a father whose rights (by operation of law or by court order) include a veto on removal of the child.

⁷ For a description of some typical cases, see the Hague Preliminary Report, *supra* footnote 2, at paragraph 8.

- 7 Among the fundamental principles involved are the following:
- a The right of a child whose parents reside in different States to maintain on a regular basis, save in exceptional circumstances, personal relations and direct contacts with both parents.⁸
 - b The right of the child who is capable of forming his or her own views to express those views freely, those views to be given due weight in accordance with the age and maturity of the child.⁹
 - c The right of all family members to have their family relationships respected by the law.¹⁰
 - d The right of the child to protection in the case of dissolution of the parents' marriage.¹¹
 - e The right of all persons, especially children, to be protected from physical or other abuse.¹²
 - f The common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.¹³
- 8 Among the practical considerations, when considering appropriate legal regimes, are the following:
- a The need as far as possible to promote agreement between the parties concerned.
 - b The importance of reducing incentives to abduct or unlawfully retain children. This requires both positive and negative action. On the positive side, legal systems should facilitate contact by the non-custodial parent; an unreasonably restrictive approach to contact may provoke a sense of despair and the possibility of unilateral action by the non-custodial parent. On the negative side, it may sometimes be necessary to prevent abuse of a contact facility by placing restrictions on the manner or the place of contact, by the employment of prior guarantees or assurances, or by putting in place other protective measures.
 - c The importance of facilitating relocation by a parent, particularly where this is necessary for economic or other pressing reasons. An unreasonably restrictive approach to permitting relocation by the custodial parent, while it may be motivated by a wish to protect contact rights, may sometimes precipitate unilateral action (*i.e.* abduction) and result in a situation in which it becomes even more difficult to maintain contact between a child and both parents.
 - d The need to discourage action by the custodial parent designed to block the legitimate exercise of contact.

Section 4 – Some of the legal and related issues, which have been considered by the Committee

- 9 - Which country's courts should have jurisdiction: (a) to make, and (b) to modify contact arrangements?
- What law should be applied?
 - What principles should apply to the recognition and enforcement of a contact order?
 - What advance guarantees should be available to help secure contact arrangements?

⁸ Article 10, paragraph 2 of the *UN Convention of 20 November 1989 on the Rights of the Child*.

⁹ Article 12, paragraph 1 of the *UN Convention of 20 November 1989 on the Rights of the Child*.

¹⁰ See for example, Article 8 of the *European Convention on Human Rights and Fundamental Freedoms*, and the judgments of the European Court of Human Rights cited below, at footnote 16. See also Article 10 of the *International Covenant on Economic, Social and Cultural Rights*, 1966.

¹¹ Article 23, paragraph 4, of the *Covenant on Civil and Political Rights*, 1966.

¹² See Article 19 of the *UN Convention of 20 November 1989 on the Rights of the Child*.

¹³ Article 5 *b* of the *Convention on the Elimination of all forms of Discrimination against Women*, 1979.

- What remedies should be available when contact arrangements are abused?
- What provision should exist for administrative and judicial co-operation between the two countries concerned? In particular, should such co-operation extend to matters such as locating the child, providing advice and legal assistance, exchanging information, reporting or providing evidence on the situation of the child or the parent, providing opportunities for mediation, etc.?
- Is a mediation system in respect of transfrontier contact feasible and how should it be structured?

Section 5 – Existing international instruments

*Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*¹⁴

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

11 Article 21 provides for application to be made to a Central Authority “to make arrangements for organising or securing the effective exercise of rights of access”.¹⁵ The Central Authorities are bound by the Article 7 obligations of co-operation “to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject”. They are bound to take steps “to remove, as far as possible, all obstacles to the exercise of such rights”, and they may directly or indirectly initiate or assist in the institution of proceedings “with a view to organising or protecting those rights and securing respect for the conditions to which the exercise of those rights may be subject”.

12 As the Pérez-Vera Report points out (at paragraph 127), the precise ways in which the Central Authorities are required to co-operate under Article 21 (with the exception of removing obstacles as far as possible), in securing the exercise of access rights is “left up to the co-operation among the Central Authorities”, and the specific measures which Central Authorities are able to take “will depend on the circumstances of each case and on the capacity to act enjoyed by each Central Authority”.

13 Experience has shown that Chapter IV of the 1980 Convention has not always in practice provided an effective means by which rights of access/contact may be established, protected or regulated. The requirements of co-operation are very broadly defined leaving much to the discretion of Central Authorities, whose powers are often limited under their national laws. Explicit duties on Central Authorities are lacking, and the Convention places no obligation with respect to the recognition of foreign access orders (see, for example, *Re G (A Minor)*, English Court of Appeal, [1993] *FAM.* 216, [1993] 2 *WLR* 825). Thus, while Article 21 provides a basic structure and the potential for improving the effective exercise and control of international access/contact, its lack of specificity and absence of provision for enforcement has in practice in some countries reduced its effectiveness and led to differing interpretations.¹⁶

¹⁴ Seventy-one States have ratified or acceded to the 1980 Convention. For details see the website of the Hague Conference at: <http://www.hcch.net>.

¹⁵ This mirrors Article 7(f) which requires Central Authorities, either directly or through any intermediary, to take “all appropriate measures”, “in a proper case”, to make such arrangements.

¹⁶ See, for example, the report of the second Special Commission meeting to review the operation of the Convention of 1980, June 1993, at Question 32.

“Question 32: Have any applications been made under Article 21? What were the results?”

It was noted that, whilst Article 21 recognises rights of access, it has no firm legal provisions to enforce such rights. A number

14 One particular problem has arisen in the context of return proceedings brought under the 1980 Convention. The left-behind parent may, in addition to seeking the return of the child, wish to apply to the court addressed for interim access/contact pending the decision on return. This may be particularly important if there is likely to be any delay in determining the return application. In some countries (*e.g.* Scotland) such an application may be made, but in others (*e.g.* Sweden) Article 16 of the Convention is interpreted as precluding this option.

15 The 1980 Convention's primary remedy provides strong support for access/contact arrangements. The wrongful retention of a child in breach of custody rights is placed on the same level as wrongful removal of the child (Article 1). An order for the return of the child "forthwith" applies (under Article 12) in either case. The Convention thus contains the primary sanction against the most serious abuse of rights of access/contact across international frontiers – the order for the return of the child if the child is unlawfully retained following a period of agreed or court ordered access. At the same time the existence of this sanction supports the child's right of access/contact by creating a situation in which a custodial parent or a court may feel more secure in agreeing to or approving arrangements for overseas access/contact with the non-custodial parent. It should also be noted that the order for return in the case of unlawful retention is subject to the same carefully balanced defences as apply to unlawful removal.

*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*¹⁷

16 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* deals with all measures directed towards the protection of the person or property of the child (Article 1), and covers specifically "rights of access including the right to take a child for a limited period of time to a place other than the child's habitual residence" (Article 3 *b*). It covers any measures taken by "an authority" (judicial or administrative), which establishes rights of access/contact or which limits or attaches safeguards to their exercise. The term "access" encompasses contacts at a distance, which a parent is authorised to maintain with his or her child by correspondence, telephone or other means (see Lagarde Explanatory Report paragraph 20). It applies to children up to the age of 18 years (Article 2). There is no definition, and therefore no explicit limitation, of the persons in favour of whom a contact/access order may be made. The matter is being left to the applicable law, which will usually be the law of the forum (see Chapter III).

17 In respect of the above, the Convention determines which States or authorities have jurisdiction to take measures (Chapter II), which law should be applied by those authorities (Chapter III), and it provides for the automatic recognition of the measures taken (Article 23). There is a system of international co-operation, through Central and other authorities which has as its purpose *inter alia* the exchange of general information concerning child protection as well as the facilitation of communications and the exchange of relevant information in respect of a particular child needing protection (Chapter V).

a Jurisdiction

18 The primary rule is that the judicial or administrative authorities of the State of the child's habitual

of experts considered this to be a major problem because Central Authorities might be unwilling to act unless there is a firm legal requirement and judges might not attribute sufficient weight to these rights. Many others disagreed, pointing out that Central Authorities could assist in giving effect to access provisions, at least by providing administrative assistance to bring the case before a tribunal. They argued that the final decision concerning access should be made by a judge. Two experts pointed out that access is an important part of custody and that more might be possible if one recognises access as a legitimate interest in custody.

One expert explained that, in many cases, the problem was financial rather than legal.

Finally, it was suggested that each Central Authority should inform the others of the exact help it is able to offer to those seeking rights of access. (See the document submitted by the Central Authority for England and Wales, attached as an annex to the Permanent Bureau's Circular No 2(93) addressed to the Central Authorities.)"

¹⁷ The 1996 Convention, which entered into force on 1 January 2002, has been ratified by three States. See footnote 26 below.

residence have jurisdiction to determine issues relating to access/contact (Article 5). In the case of refugee children, or children whose habitual residence cannot be established, the authorities of the State where the child is present have jurisdiction (Article 6).

19 Where a child's habitual residence changes, the authorities of the new habitual residence usually have jurisdiction (Article 5, sub-paragraph 2).

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

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

20 However, if a new habitual residence is established following the unlawful removal of a child, jurisdiction will remain with the authorities of the former habitual residence until certain conditions are satisfied (Article 7). In the meantime, the authorities of the new habitual residence may only take urgent (Article 11) or provisional (Article 12) measures.

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

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

21 In exceptional circumstances, and where it is in the best interests of the child, jurisdiction in respect of access/contact may be transferred with the agreement of the authorities of the child's habitual residence, to the authorities of another State, for example that of the child's nationality, or any State with which the child has a substantial connection (Articles 8 and 9).

22 Authorities of a State exercising jurisdiction to decide upon the divorce (or legal separation or annulment) of the marriage of a child's parents may, with the consent of the parents, determine issues of custody and access, provided that one of the parents had his/her habitual residence in that State when proceedings were commenced and provided that one of the parents had parental responsibility in respect of the child concerned.

23 The authorities of the State where the child is present have jurisdiction to take measures in cases of urgency (Article 11) or to take provisional measures with territorially limited effect (Article 12). One example is given in paragraph 10 above.

b Recognition and enforcement

24 Orders relating to access/contact made by an authority exercising jurisdiction under the Convention are entitled to be recognised by operation of law in all other Contracting States (Article 23, paragraph 1). The grounds for refusing recognition are narrowly drawn (Article 23, paragraph 2), and the recognising State is bound by the findings of fact on which jurisdiction was based in the State of origin (Article 25). Provision is made for advance determination of whether access/contact orders made in one State may or may not be recognised in another (Article 24). Enforcement of access/contact orders in the State addressed takes place, in accordance with the procedure provided for in the law of that State (Article 26, paragraph 1), as if those measures had been taken by the authorities of that State and to the extent provided by its law (Article 28). The procedure by which the order is declared enforceable or registered for enforcement must be simple and rapid (Article 26, paragraph 2).

c Co-operation

25 The Central Authorities provided for by the Convention have a general obligation to co-operate with each other to achieve the objects of the Convention, and they are required to provide information on their respective laws and services relating to child protection, which of course includes laws and services pertaining to matters of access/contact (Article 30). They have a duty, either directly or through public authorities or other bodies, to facilitate by mediation, conciliation or other means, agreed solutions to disputes concerning access in situations to which the Convention applies. They also have a duty upon request to assist in discovering the whereabouts in their several jurisdictions of any child in need of protection (Article 31).

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

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

28 In order to assist a parent in one State who is seeking to obtain or maintain access to a child in another State, the authorities of the State in which that parent resides may make a preliminary finding on the suitability of that parent to exercise access and on the conditions of its exercise. The authorities having jurisdiction to make the decision on access must admit and consider such finding and may adjourn proceedings to await such a finding (Article 35).

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

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

29 In the case of a child who is exposed to serious danger, and in respect of whom protective measures have been taken or are under consideration, there is an obligation to inform the authorities of any Contracting State to which the child has moved, or has been moved, of that danger (Article 36).

Section 6 – The Council of Europe draft Convention on Contact Concerning Children

30 The Council of Europe draft Convention on Contact Concerning Children is likely to be adopted by the Council of Ministers of the Council of Europe in the first half of 2002¹⁸. The draft Convention first sets out general principles applicable to contact orders, to be implemented in the internal laws of the States Parties and to be applied by the judicial authorities. The intention is that the adoption of common standards should also facilitate co-operation and the mutual recognition of contact decisions at the international level.

¹⁸ The draft Convention was approved by the European Committee on Legal Co-operation (CDCJ) of the Council of Europe on 6 December 2001 and will be submitted to the Council of Ministers following its consideration by the Parliamentary Assembly. The text and the Explanatory Report are available on the Council of Europe website at <www.legal.coe.int>.

31 Article 4 affirms the right of the child and both his or her parents to maintain regular contact. Contact may be restricted or excluded only where necessary in the best interests of the child. The basis for this approach is Article 8 of the European Convention on Human Rights and the case law developed under it by the European Court of Human Rights, including the principle that the State has a positive obligation, inherent in an effective respect for family life, to maintain and develop family ties.¹⁹ The idea of “necessity” when applied to restrictions on contact implies the further principles that there should be no other less restrictive method available of protecting the interests of the child and that the restrictions should be proportionate.

32 The jurisprudence of the European Court of Human Rights also justifies the provisions of Article 4, which allow persons other than parents having “family ties”²⁰ (for example, close family relations or persons having a *de facto* family relationship with the child) with a child the right to apply for contact with a child. This is, of course, different from the presumption in favour of contact, which applies to a parent.

33 The second object of the draft Convention²¹ is to establish appropriate safeguards and guarantees for both national and international cases to ensure the proper exercise of contact and to ensure the return of the child at the end of a period of contact. A non-exhaustive list of safeguards and guarantees is set out in Article 10, paragraph 2, and States are obliged to provide under their laws for at least three categories of safeguards and guarantees. The safeguards to ensure that a contact order is carried into effect include supervised contact, the obligation of a person (either the parent seeking contact or the person with whom the child lives, or both) to provide for travelling and accommodation expenses for the child, the deposit of a security to ensure that contact is not frustrated, or the imposition of a fine.²² Safeguards to ensure that the child is not improperly removed or retained when contact occurs include the surrender of passports or identity documents, the provision of financial guarantees, and charges on property²³. Other safeguards or guarantees mentioned are undertakings (*i.e.* specific promises or assurances given to a court by a litigant), a requirement that the person having contact report regularly to a competent body, the issuing of a certificate in the country in which contact is to take place recognising in advance the custody or residence order in favour of the parent with whom the child usually lives, an advance declaration of enforceability of the contact order in that State, and restrictions as to the place where contact is to be exercised.

34 The third objective²⁴ is to promote co-operation, both nationally and internationally, between the different authorities involved in contact cases, in particular, Central Authorities and the courts. The structure for co-operation between Central Authorities is based on the model of the Hague Conventions of 1980²⁵ and 1996,²⁶ but with certain additions, such as encouragement for improved co-operation between judicial authorities in different States. The assistance to be given by Central Authorities in the institution of proceedings relating to contact does not extend to an obligation to provide legal aid or assistance.

¹⁹ See *Airey v. Ireland* (1979), Series A, No. 32, *Marckx v. Belgium* (1979), Series A, No. 31, and *Kroon and others v. Netherlands* (1994), Series A, No. 297c.

²⁰ See *Scozzari and Giunta v. Italy* (2000), Series A, para. 221 and *Boyle v. UK* (1994), Series A, No 282-B.

²¹ Article 1(b).

²² Article 10, paragraph 2(a).

²³ Article 10, paragraph 2(b).

²⁴ Article 1 (c).

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

²⁶ *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*.

35 The draft Convention does not set out common jurisdictional standards for transfrontier cases, nor does it provide in detail for recognition and enforcement of contact orders, but it does place the general obligation on States Parties to establish (for example, through the applicable international instruments, such as 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*), a system for the recognition and enforcement of contact orders. It also requires the State in which contact is to be exercised, when adapting or supplementing the conditions for the exercise of contact, generally to respect the essential elements of an existing contact order.

36 Finally, the draft Convention places an obligation on States Parties to ensure (for example, through applicable international instruments such as the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*) that, where unlawful retention of a child occurs following a period of contact abroad, the child is returned to the country where he or she usually lives.

Section 7 – Conclusions and recommendations

37 In order to give effect to the child's right to maintain personal relations and direct contacts with both parents, as well as with other persons with whom the child has close family ties, an international legal framework is required which:

- a* promotes agreement between parents concerning contact arrangements and supports agreements once made;
- b* discourages vexatious or repetitive litigation concerning contact;
- c* provides a secure legal background against which the custodial parent may feel safe in releasing a child for contact, *i.e.* with a degree of confidence that the conditions of contact will be adhered to and that the child will be returned after a period of visiting contact is complete;
- d* provides a framework within which the non-custodial parent may with confidence expect contact arrangements to be respected by the custodial parent;
- e* deters conduct by either parent designed to frustrate the enjoyment of contact or to break the conditions of contact;
- f* offers reasonable assistance to foreign parents seeking to effect contact in an unfamiliar legal system; and
- g* offers reasonable facilities for supervised access, or other appropriate protective measures, where unsupervised contact is not in the best interests of the child.

38 While the law cannot itself guarantee the successful development of long-term human relationships, it should be capable of providing a firm legal framework within which the above objectives may be pursued. An essential element of this stable legal framework is a set of agreed standards for exercising jurisdiction to make or modify contact orders in cross frontier situations, as well as provisions for the recognition and enforcement of contact orders made on the basis of those agreed standards. A coherent and universal set of jurisdictional standards is essential for three reasons:

- a* To avoid conflicts of jurisdiction when applications for contact are first considered. Where there exists the possibility of the authorities/courts of more than one country exercising jurisdiction, the danger exists of duplicated litigation, with attendant costs and the generation of inconsistent orders. Even if duplication is avoided by a first past the post rule (*lis pendens*), this will provide an incentive for a parent to seise rapidly the more convenient forum, an outcome which is in conflict with the principle that parents should be encouraged to settle their differences concerning their children by agreement and without litigation if possible.
- b* To ensure that jurisdiction exists to make contact orders when this is in the interests of the child. Existing gaps, for example, where jurisdiction to make interim orders is absent²⁷, need to be filled.
- c* To circumscribe jurisdiction to modify an existing contact order. If an existing contact order may too readily be modified by the authorities in a country in which the child has a temporary residence, especially where that residence occurs for the purpose of exercising contact in that country, a situation of uncertainty is created which encourages litigation, promotes conflicting orders, places in jeopardy existing and possibly agreed contact arrangements and acts as a strong disincentive to courts when considering whether to give permission for the exercise of contact abroad. At the same time, it is important to have realistic but closely circumscribed jurisdictional principles, which enable the terms and conditions of contact to be modified in situations of emergency, even by the authorities of a country in which a child is merely present.

39 The Hague Convention of 1996 offers the prospect of achieving a coherent international legal framework for decision-making concerning cross-frontier access. The Committee notes that the Convention entered into force on 1 January 2002,²⁸ that preparations for its ratification are being made in Canada, in Australia, and within the European Union, and that consideration of ratification of the Convention has been called for in a number of international *fora*, including international judicial gatherings.²⁹

40 Courts should have available a wide and flexible range of mechanisms geared towards encouraging compliance with, and discouraging departure from, the terms and conditions of contact. The Council of Europe draft Convention on Contact Concerning Children is particularly valuable for drawing attention to this need and for providing concrete examples of such guarantees and safeguards.

41 The framework for administrative co-operation established by existing Conventions (such as the Hague Conventions of 1980 and 1996), and proposed future instruments (such as the Council of Europe draft Convention on Contact Concerning Children), while providing a sound basis for co-operation, need to be augmented by more specific rules clarifying the precise obligations of assistance (including, where necessary, legal assistance) to be afforded by Central Authorities to foreigners who seek to establish or implement contact arrangements. Efforts are also needed to improve the facilities available to enable controlled or supervised contact to be exercised where this is appropriate, for example, by the provision of contact centres. Further work is needed on the development of mediation facilities in transfrontier contact cases.³⁰

42 At the national level, the problems surrounding transfrontier contact will be ameliorated if:

- a* legal procedures are accessible and swift, both at trial and appeal levels;

²⁷ See, for example, at paragraph 14.

²⁸ The Czech Republic, Slovakia and Monaco have ratified the Convention. It has been signed by Morocco, the Netherlands and Poland.

²⁹ For example, the Common Law Judicial Conference on International Parental Child Abduction, Washington, DC 17-21 September 2000; the 3rd UK-German Conference on Family Law, Edinburgh, September 2000; the Franco/British Judicial Conference, Dartington Hall, England, 4-7 June 2001; the 2001 World Congress on Family Law and the Rights of Children, Bath, 19-22 September 2001; the International Judicial Seminar on the 1980 Hague Convention, De Ruwenberg Conference Centre, Netherlands, 20-23 October 2001. See also Conclusions and Recommendations of the Fourth Meeting of the Special Commission to Review the Operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (22-28 March 2001), No 7.1.

³⁰ The Committee has not had time to explore this issue more fully.

- b* the mechanisms for enforcement of contact orders are speedy and effective;
- c* rules and procedures are applied which will restrain vexatious litigation;
- d* applications for relocation³¹ by a custodial parent are not dealt with in an excessively restrictive fashion.

³¹ See footnote 6 above.