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Private International Law  
- Permanent Bureau -

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Subject: Questionnaire for the preparation of the Fourth Special Commission to review the operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction - Preliminary Document No. 1

Reference: Your letter of 20 October 2000  
- L. c. ON No 64 (00) -

Dear Sir / Madam

Thank you for sending the above-mentioned document, which contained a list of questions for the purpose of preparation of the Fourth Special Commission to review the operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.

It is my pleasure to enclose the replies of the Federal Republic of Germany. I apologise for the delay, which was caused by the necessity to consult various authorities of the Federation and the Länder. The statements concerning legal policy are naturally of a provisional nature. I hope you will understand that I may make additions and changes to these during the meeting of the Special Commission.

We will inform you about the composition of the German delegation to the Fourth Special Commission to review the operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction under separate cover.

**(1) The role and functioning of Central Authorities**

⇒ **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 fundamental problems have so far arisen in co-operation with the Central Authorities of other Contracting States. There have been difficulties only in the following individual cases:

- In one case of proceedings for return, it was not possible to determine the Central Authority of the State.
- In another case of proceedings for return, no reply could be obtained to our request for return. In response to an enquiry to this effect from our Central Authority, the Ministry of Justice of the country in question stated that this matter could not be assigned there.

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

What continues to be problematic is the entire field concerning rights of access pursuant to Article 21 of the Hague Convention. Different opinions are obviously held by the Contracting States as to the extent to which mutual assistance is granted with respect to rights of access. In this context, the Central Authority of a Contracting State has sent a letter stating that it only carries out very restricted tasks in proceedings for rights of access in the case of incoming requests. It does not consider it to be at all necessary to take action within the context of proceedings already pending. There have also been difficulties in the past with this Central Authority in respect of the discovery of the whereabouts of a child under Article 7a of the Hague Convention.

⇒ **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?**

In every case of the receipt of an application for return, the Central Authority attempts to persuade the abducting or retaining parent to voluntarily return the child or to return with the child to the country of origin. This is done by means of a letter of request which is served on the abducting or retaining parent after his or her whereabouts have been determined. However, such letter is not sent where the parent making the application expressly states that it should not be sent, and in cases in which there are clear indications that such a letter alone could lead to the abducting parent disappearing or fleeing. There are no statistics kept on the success rate of such letters of request, but it is low.

Where the remaining requirements have been fulfilled (well-founded application, complete documents with translations, advance on costs or documents in respect of legal aid), the German Central Authority has, since October 2000, been sending out the letter of request at the same time as it institutes court proceedings. Apart from expediting proceedings, it is expected that this will give the request for voluntary return a greater impact.

**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 7g))? Do these measures result in delays in your own jurisdiction or, where cases originate in your country, in any of the requested jurisdictions?**

Proceedings for the granting of legal aid are preliminary proceedings – which precede the actual proceedings for return – in which the personal and financial situation as well as the prospect of success of the intended court proceedings are examined by the court that is competent to decide on the application for return, provided that the formal institution of the court proceedings is made dependent on the prior granting of legal aid. The proceedings provide for the submission of the application for legal aid and the assignment of counsel (section 117 subsec. 1 of the Code of Civil Procedure), along with submission of a draft of the proposed statement of claim or the application, as well as a form containing details of

the personal and financial circumstances of the applicant (section 117 subsec. 2 of the Code of Civil Procedure). The opposing party is in principle to be granted a hearing in accordance with the law in respect of the foregoing (section 118 subsec. 1 first sentence of the Code of Civil Procedure). Only once legal aid has been granted can the formal service of the statement of claim or application take place.

If the applicant submits the forms to the Central Authority, the relevant application for legal aid and the draft statement on the merits of the case are drawn up and filed with the court. Only once counsel has been assigned is he or she given responsibility for the further conduct of the proceedings. The Central Authority is sent copies of the pleadings and oversees the further proceedings.

In the past, the prior conduct of legal aid proceedings has led to a delay in the decision on the merits. In the course of developing measures to expedite proceedings, the Central Authority has modified the proceedings to the effect that institution of proceedings is no longer dependent on legal aid already having been granted. This means that the proceedings in the matter itself will in future take place immediately and parallel to legal aid proceedings. It is anticipated that this will serve to further expedite matters.

**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 German Central Authority does not have the staff capacity to provide court representation for applicants from Contracting States. Court hearings are, in principle, attended by counsel. The Central Authority can provide assistance in finding a lawyer.

**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? In particular, does your Central Authority:**

- a ensure that appropriate child protection bodies are alerted;**
- b provide information to either parent in respect of legal, financial, protection and other resources in your State;**

- c facilitate contact with bodies providing such resources;**
- d assist in providing any necessary care for the child pending custody proceedings;**
- e provide any other support, advice or information to a parent who accompanies the child on return;**
- f provide any assistance in ensuring that undertakings attached to a return order are respected.**

The Central Authority usually calls in a lawyer, who, together with the competent youth welfare office, has the primary concern of ensuring the protection of the child. In custody proceedings, which may follow return, it is the duty of the court, the youth welfare office and the lawyer to assert the child's best interests.

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

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

- a provide information or advice;**
- b facilitate the provision of legal aid or advice;**
- c initiate or assist in the institution of proceedings, where appropriate, on behalf of the applicant;**
- d assist in ensuring that the terms or conditions on which access has been ordered or agreed are respected;**
- e assist in cases where modification of existing access provisions is being sought.**

In the case of incoming applications for access, the Central Authority requests the parent making the application to state its idea of the form access would take. This idea is passed on to the other parent via the competent youth welfare office. An attempt is then made to reach a settlement to which both parents agree. If it is not possible to reach agreement between the parents, the Central Authority can arrange a lawyer for the parent filing the application or, in the event of recourse to legal aid, the Central Authority institutes the court proceedings itself and applies for the assignment of counsel to conduct the court proceedings and keep the Central Authority informed on the progress of such proceedings. Reference is made to the statements made above with respect to support granted in the application for legal aid.

In a situation of estrangement between the parent making the application and the child (due to a longer period of interruption of personal contact or due to rejection by the child as a result of extreme conflicts in the relationship between the parents) - this situation making it necessary for child and parent cautiously to be brought closer together or for there to be supervised access - the youth welfare office supports the parents, if necessary with the involvement of a psychological counselling service.

Any measures which may be necessary for judicial execution of access determined by a court must be arranged and supervised by the Family Court as the court of enforcement. To the extent that there is a German court decision the contents of which can be enforced and which are not complied with by the parent under obligation to do so, the Central Authority can, pursuant to section 33 of the Non-Contentious Matters Act, apply to the competent court for a warning, and for subsequent imposition, of a coercive fine or detention, as well as for the use of direct force, whereby the use of force against a child is not permissible pursuant to section 33 subsec. 2 second sentence of this Act.

**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 German Central Authority has been keeping statistics on proceedings under the Hague Convention since 1992. The statistical data constitute part of the annual reporting to the Federal Ministry of Justice. The statistics have previously not been forwarded to the Permanent Bureau of the Hague Conference. However, statistics have been sent for the preparation of the Special Commission of the Hague Conference, most recently in 1997. The statistics collected as part of the analysis and evaluation of proceedings are, for the main part, the same as the statistics which are requested in the Permanent Bureau's standard forms. If the Permanent Bureau of the Hague Conference considers it to be important to have the statistics of the Central Authority sent on to them, a copy of the statistics forwarded to the Federal Ministry of Justice can be made available to the Permanent Bureau of the Hague Conference.

**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?**

The recommendations contained in the conclusions are in principle to be endorsed. It has been made easier for the Central Authority to fulfil its duties as a result of an increase in the number of staff and the provision of modern technology in the year 2000, in accordance with the recommendation.

**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?**

Recommendations in this respect may arise as a result of the discussions at the meeting of the Special Commission.

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

**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.**

As a result of the Act to Implement the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and the European Convention of 20 May 1980 on the Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children (Custody Convention Implementation Act) of 5 April 1990 and of amendments made to his Act, jurisdiction has been concentrated in the courts of first instance. Accordingly, the Family Court in the district of which the higher regional court is based has jurisdiction for the whole higher regional court district, whereby the governments of the Länder are free to further concentrate this jurisdiction. The amended version of the Act entered into force on 1 July 1999. Until then, more than 600 local courts

(courts of first instance) had jurisdiction. There are currently 24 local courts and 24 higher regional courts (appellate courts) in the Federal Republic of Germany, which have competence for return proceedings. It is not possible to give an exact figure for the number of competent judges; however, it can be established that the number was considerably reduced as a result of the Custody Convention Implementing Act. They would number approximately 200.

**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?**

As already stated in the reply to question (2) no. 1 above, the Federal Republic of Germany has concentrated the jurisdiction of the courts.

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

re a) In principle, a decision on an application can be made on the basis of the documents alone provided that an opportunity to be heard in writing was given in accordance with the law. However, a hearing usually takes the form of a personal hearing before the court. Without a prior hearing a court would only make provisional arrangements in case of urgency.



- re b) There are no special measures or rules to control or limit evidence. However, orientation according to the wording of the Convention and the taking into consideration of the nature of proceedings naturally leads to restriction to the essentials. The court thus usually restricts itself to the evidence at hand.
- re c) In the Federal Republic of Germany, there is no such control by the executive branch (which is also true for all other court proceedings conducted in this country). However, the court must take into consideration the requirement to act expeditiously as contained in Article 11 of the Hague Convention, in respect of which the Central Authority keeps a watchful eye on the courts. Otherwise, there is only the possibility of a review of the decision of the court of first instance by the appellate court.
- re d) Under section 8 subsec. 2 of the Custody Convention Implementing Act, it is possible to appeal against a decision on the return or retention of a child with the remedy of "immediate complaint" before the higher regional court in accordance with section 22 of the Non-Contentious Matters Act. The complaint must be filed within the time-limit to be observed of two weeks from service. An appeal against a decision obliging return of the child can only be filed by the party opposing the application, by the child himself if he or she is at least 14 years old, or by the competent youth welfare office. There are no explicit limitations on the grounds for appeal. New facts and evidence are also possible. Return can be excluded under Article 13 of the Hague Convention. There is no further possibility to appeal. However, final court decisions involving human rights issues can be challenged before the Federal Constitutional Court.

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

A determination as to whether a child objects to being returned is generally made on the basis of a personal hearing of the child before the judge. In many cases, the competent youth welfare office is asked to provide a report, or the court appoints a curator according to section 50 of the Non-Contentious Matters Act. Only in exceptional cases is an expert opinion by a child psychologist asked for.

The hearing of the child can be ordered for evidential purposes to clarify matters in general, or the child can be heard to find out whether it objects to being returned. In the latter case, the will of the child can only be taken into account if the child's judgement is sufficiently sound and if the court has come to the conclusion that the child's will has been formed without undue influence. If, on taking these criteria into consideration, the child objects very strongly to being returned, a return can be ruled out according to section 13 b of the Hague Convention. The principle guiding the judicial decision is, however, the restitution of the former situation regarding rights of custody.

**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?**

In practice, procedural delays occur when the court has to deal with defences under Article 13 of the Hague Convention (e.g. by having to order a hearing of the child). It happens quite often that such defences under Article 13 of the Hague Convention are raised. They have to be raised by the defendant. There are no restrictions on the nature of the evidence to be taken (e.g. affidavits by witnesses, information by authorities, in particular the youth welfare office). If the hearing is well prepared, the court can decide after just one hearing date. There are no provisions regarding the shortening of time limits.

**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 form such proceedings? Are such enforcement procedures routinely invoked, and are they successful in achieving the enforcement of return orders?**

The enforcement of return orders follows specific proceedings governed by the provisions of the Non-Contentious Matters Act. The competent person is the bailiff. In principle, the enforcement will only take place when the decision is final (section 8 subsec. 1 of the Custody Convention Implementation Act). However, the Family Court can order the immediate enforcement of the decision. Where such an order is made, a complaint may be filed in respect thereof.

According to section 33 subsec. 1 of the Non-Contentious Matters Act, the court can impose the payment of a coercive fine in order to enforce its return order. The imposition of such a penalty has to be preceded by a warning. Irrespective of this, the court can order coercive detention against the person obliged to return the child. If such an order cannot be effected without the use of force, it is possible, on the basis of a special court order and subject to the provisions of section 33 of the Non-Contentious Matters Act, to resort also to physical force, irrespective of other coercive measures.

**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.**
- b underscoring the obligation of States Parties to process return applications expeditiously, and making it clear that this obligation extends also to appeal procedures.**
- c calling upon trial and appellate courts to set and adhere to timetables that ensure the speedy determination of return applications.**
- d calling for firm judicial management, both at trial and appellate levels, of the progress of return applications.**
- e calling upon States Parties to enforce return orders promptly and effectively.**
- f recommending that the “grave risk” defence under Article 13 should be narrowly construed.**
- g proposing any other measures (please specify) to improve the efficiency and speed with which applications are processed and orders enforced.**

The recommendations a) to c) as well as e) and f) can be supported, because their observance contributes to the realisation of the Convention’s objectives.

However, the Federal Government of Germany has reservations about recommendation d), since it is unclear and the courts are independent and subject only to law.

With regard to recommendation g) we would like to propose specific training measures for judges who are dealing with proceedings under the Hague Convention, as is done in Germany, in order to make it easier for them to deal efficiently with the Convention.

**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);**
- **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).**

Since the number of discussions and articles about the Hague Convention has increased considerably in the past years, the courts are now more aware of the significance and particularities of such proceedings. The fact that in the Federal Republic of Germany these proceedings are concentrated in 24 courts of first instance has also contributed to this effect. The decisions taken show a tendency towards a more restrictive interpretation of Article 13 b of the Hague Convention.

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

- 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?**

In the Federal Republic of Germany, “undertakings“ do not form a legal concept or institution.

However, within the framework of return agreements recorded and approved by the court, the parties can assume certain obligations. An example from the past is the case of a father who agreed to withdraw an application for criminal prosecution of the abducting parent in her home country and to make sure that she could return to this country together with the child, receiving maintenance payments from the applicant for a certain amount of time. In most cases, these commitments are prepared by the lawyers involved in the proceedings and are later discussed and recorded during the judicial hearing.

**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?**

The cross-border enforcement of commitments under civil law must be pursued by the applying parent. Foreign judicial decisions can be enforceable, under national law, provided that the requirements of section 328 of the Code of Civil Procedure or of section 16a of the Non-Contentious Matters Act are met or, where applicable, according to the relevant international instruments. Commitments stemming from private documents attested by a notary are only domestically enforceable. There is no differentiation made between agreements initiated by the parties and those made at the request of the court.

**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?**

Courts cannot seek or grant safe harbour orders or mirror orders as such. However, upon application by the parent due to return the child, the competent German court may grant provisional measures such as maintenance payments for a certain amount of time or make arrangements with regard to access or with respect to the right to determine the child's residence. Furthermore, a German court can lift the so-called "border barrier" imposed by it to secure the right of custody or access, giving the parent who cared for the child in the foreign country the assurance that he/she will not have to hand over the child to the authorities

of the country of origin as soon as he/she enters that country. Insofar as the police or the public prosecution office have taken certain measures, these cannot be revoked by the court itself. In such cases, the court can only suggest that they should be revoked.

- 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)?**

The Federal Republic of Germany has not yet acceded to the Hague Convention of 19 October 1996. Consequently, this Convention is not applicable in Germany. Currently, an examination is under way on the EU-level to see what form the accession of EU Member States could take.

- 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?**

The Federal Government has no knowledge of such cases.

- 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.**

Criminal charges in the country of origin make the return of the child a lot more difficult, since the abducting parent will not be willing to return together with the child. The revocation of an application for criminal prosecution – if followed by a dropping of the criminal charges – makes the return of the child a lot easier, since the abducting parent can often be persuaded to return the child himself/herself voluntarily. In cases where the abducting parent does not intend to stay permanently in the country of origin, it will also be

much harder for him/her to have access to the child, if criminal proceedings are pending. In such a case, access is only possible if the child visits the abducting parent (and not vice versa).

**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?**

In judicial practice, such contacts do not happen frequently. They were used, for example, to clarify the modalities of a return. Considering that today, however, only a small number of judges deal with such cases and that there have been multinational training seminars, it can be expected that there will be more direct contacts in the future. There are, however, no procedural safeguards in this respect.

**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?**

Within its competence, the Central Authority is entitled to act as a focus or channel for communication between judges at the international level in child abduction/access cases. The Central Authority also employs former judges. As the creation of another central institution appears not to be necessary, the Federal Government does not intend to 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. This does not exclude informal contacts between judges of different jurisdictions.

**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?**

The parent concerned can get help and advice from the local youth welfare office. However, the youth welfare office is not entitled to provide legal counselling. Depending on

his/her personal and financial circumstances, the accompanying parent may be entitled to get assistance under the Legal Advice Scheme.

**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?**

In principle – and after conclusion of the return procedure - the abducting parent, too, can obtain a favourable custody order by means of amendment of the existing order. Such an application will only be successful if the circumstances have changed since the return order was issued and if it is now in the child's best interests to remain with the "abducting" parent. This possibility is based on the principle that custody matters are not considered in Germany to be static so that the corresponding decisions may be modified in accordance with the requirements of the child's well-being.

**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.**
- 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.**
- 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.**
- 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.**



- 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.**
  
- 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.**

Except for those contained in paragraphs d) and e), the Federal Government would generally support the recommendations.

Regarding recommendation d), however, we consider that it does not make sense to link a return under civil law with criminal law measures.

As regards recommendation e), we refer to the answer stated in the reply to question (3) no. 8. The nomination of 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, would create a separate central institution in addition to the Central Authorities. The Federal Government is not convinced of the necessity of such additional central institution. This does not exclude to establish an informal network between judges of different jurisdictions.

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

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

In the Federal Republic of Germany, there are no special provisions for foreigners in this respect. The basic conditions are the same as for German nationals. Both German and foreign nationals can get support from the Central Authority (Article 21 of the Hague Convention) and from the competent youth welfare office.

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

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

In principle, German courts exercise jurisdiction if the child concerned is habitually resident in the Federal Republic of Germany (sections 64, 43 subsec. 1, 36 subsec. 1 of the Non-Contentious Matters Act; Articles 1 and 13 of the 1961 Hague Convention on Jurisdiction and Applicable Law in respect of Measures of Protection of Minors). In cases of divorce, the Brussels II Regulation may also apply. The substantive provisions regarding the right of access are contained in sections 1684 to 1686 of the Civil Code, the modification of a custody order or an order concerning access/contact is governed by section 1696 of the Civil Code. Decisions regarding the right of access/contact which are to be made in the context of pending return proceedings are based on Article 21 of the Hague Convention in conjunction with section 5 subsec. 1 first sentence, no. 1, and section 5 subsec. 2 of the Custody Convention Implementing Act.

**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?**

The recognition of foreign orders is governed by section 16a of the Non-Contentious Matters Act or, where applicable, by the relevant international instruments. Section 33 of the same Act regulates their enforcement. With regard to the second part of the question we refer to the answer to question (3) no. 4.

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

Cross-frontier access rights are regulated by the same provisions as access matters within the territory of the Federal Republic of Germany.

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

There are no special procedures in this respect. Both on the national and international level access/contact orders are granted on the basis of what is in the best interest of the child. Generally, it is assumed that contact with both parents is beneficial to the child's well-being. Should the case be brought before court, the judge will always try to reach an access agreement accepted by both parties (see section 52 subsec. 1 of the Non-Contentious Matters Act). Of course, mediation is also not excluded (see in this context section 52 subsec. 2 and section 52a of the Non-Contentious Matters Act).

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

Irrespective of the right of custody children regularly have a right to contact with both parents and the parents have corresponding rights and obligations regarding contact with their child. There are no other presumptions for the right of access, which is regulated in section 1684 subsec. 1 of the Civil Code. According to section 1684 subsec. 2 of the Civil Code the parents have to refrain from doing anything that would harm the relationship of the child with the other parent. Under subsection 4 of this provision, the Family Court can restrict or exclude the right of access as far as is necessary for the well-being of the child.

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

The non-custodial abducting parent has also got a right of access. However, the abduction may have resulted in circumstances which would make it advisable to exclude or restrict the right of access according to section 1684 subsec. 4 of the Civil Code. In such a case, the court can take all suitable measures to prevent another abduction. According to

section 1684 subsec. 4 third sentence of the Civil Code, the Family Court can order that access is only possible if a volunteering third person (for example a representative of the youth welfare office) is present.

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

An applicant is entitled to get help from the competent youth welfare office, if he legally resides in Germany (section 6 subsec. 2 and 4 of the Code of Social Law – SGB VIII, Child and Youth Welfare). In addition, the International Social Service – German branch – in Frankfurt/Main and the Central Authority can be of assistance.

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

With regard to the enforcement of foreign access orders, we have sometimes experienced problems resulting from differences with respect to the interpretation of substantive provisions regarding the right of access and its enforcement.

**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)?**

When deciding on the right of access, courts can make accompanying/additional orders with a view to guaranteeing enforcement. In order to prevent a (second) abduction, they may, for example, determine that the person exercising the right of access has to surrender his/her passport. However, German courts can neither give financial guarantees nor issue declarations affecting the legal status of foreigners.

**11. How in practice are access orders enforced?**

Those who are directly involved are themselves responsible for initiating enforcement procedures. If there are problems in this respect they may apply for access mediation proceedings before a court in accordance with section 52a of the Non-Contentious Matters Act. In this case the court is to try to get the parents to reach an agreement on the exercise of access rights. If the mediation proceedings are unsuccessful, the access order can be enforced according to section 33 of the Non-Contentious Matters Act. Court decisions differ on the question whether enforcement according to section 33 of the Non-Contentious Matters Act has always to be preceded by such mediation. As regards further details concerning enforcement, we refer to the answer stated in the reply to question (2) no. 6.

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

Recommendations in this respect may arise as a result of the discussions at the meeting of the Special Commission.

**(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.**

The question is understood to relate to experience with non-compliance with Convention obligations by other Contracting States. Reference is made to the remarks under (1) nos. 1 and 2; apart from this, no other problems have been encountered.

**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?**

Before Germany accepts a new accession, information is obtained from the German Foreign Office, the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth,

the Central Authority (Federal Public Prosecutor's Office) and the Länder concerning the frequency of child abduction in the acceding state, the existence of a functioning Central Authority and the applicable law relating to family matters and legal aid. Where the acceding state has not designated a Central Authority or provided its full address, or where that state's family law is incompatible with the basic principles of German family law, accession will not be accepted. The same applies if reservations made at the time of accession (e.g. in respect of costs, Article 26 of the Hague Convention) indicate that the State concerned may not be prepared to comply with its obligations under 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?**

Germany would favour the drawing up of a standard questionnaire because it would help to establish a uniform procedure generally accepted in all Contracting States concerning acceptance of accession. As to the questions that could usefully be included see the reply to question (5) no. 2, above.

**4. Are you in favour of an increase in the number of Special Commissions (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)?**

The frequency of Special Commission meetings should depend on the need for discussing particular problems.

**5. Are there any other measures or mechanisms which you would recommend:**

- a to improve the monitoring of the operation of the Convention;**
- b to assist States in meeting their Convention obligations;**

**c to evaluate whether serious violations of the Convention obligations have occurred?**

A smooth and largely uniform operation of the Convention seems to be possible only if national procedural provisions to implement the Convention are largely aligned on the one hand and court rulings are harmonised on the other. This depends not so much on measures and mechanisms of the Hague Conference on Private International Law but rather on the Contracting States and their domestic legislation and authorities. What is at best conceivable is a comparative consideration and evaluation of implementing legislation by the Special Commission, particularly with regard to the agreed expeditious procedures (Article 2 of the Hague Convention).

**(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?**

In principle, the Federal Government would welcome a further strengthening of the Permanent Bureau. Costs incurred thereby will, however, be subject to budgetary approval. In this regard it would be conducive to the effective functioning of the Convention, if .- without causing major additional costs - the forms for applications concerning the return of, and/or access to, the child were improved. It would be of particular importance to develop the respective forms with a view to increasing information on the various possibilities of exercising access in different countries. The form should also be designed to enable sufficient individual information to be given where this is relevant to access. Irrespective of whether or not the return of the child is granted, it appears to be of paramount importance that the other parent is given effective access.

**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?**

We would, in principle, welcome a further strengthening of the Permanent Bureau. Costs incurred thereby will, however, be subject to budgetary approval.

**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?**

We would favour the proposed recommendation. Difficulties may, however, arise from the fact that it is not currently possible for Germany to collect complete statistics on relevant cases. Up to now it is only return cases initiated and conducted through the Central Authority that are statistically recorded. There are no separate statistics on return cases brought directly before the courts. Nevertheless, collation of statistics by the Permanent Bureau of the Hague Conference would be useful. In this context, arrangements are being considered for the Justice Ministries of the Federal Länder to collect statistics on cases that are brought directly before their courts.

**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?**

Previous experience with multilateral judicial seminars has been very positive. Intensification of these activities of the Hague Conference is therefore endorsed.

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

Experience with the Convention to date has shown that its objectives are by and large being achieved. An extension of its application and measures to promote further ratifications and accessions would therefore be desirable. It must, however, be ensured that the states encouraged to ratify or accede to the Convention are willing and able to



comply with it. Whether and how this can be ensured by the Hague Conference seems uncertain. It might be preferable to encourage the states concerned to demonstrate their willingness to accede to the Convention by means of bilateral agreements with similar content. In this respect, the Hague Conference might wish to conduct and publish an evaluation of the experience that other Contracting States have had in respect of bilateral agreements and memoranda of understanding. In addition, reference is made to what has been said in reply to questions (5) nos. 2 and 3.

**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.**

Germany has no bilateral arrangements with non-Hague States.

**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”.**

This proposition is correct. A restrictive approach by courts in respect of a parent having custody or the right of access in relocation cases entails the risk of child abduction.

Yours faithfully

For the Federal Ministry of Justice

(Schrock)