Conférence de La Haye de droit international privé
Hague Conference on private international law

Actes et documents

de la Quatorzième session
6 au 25 octobre 1980

Tome III

Enlèvement d'enfants
Child abduction

Edités par le Bureau Permanent de la Conférence
Imprimerie Nationale/La Haye/1982

ISBN 90 12 03616 X

Avis au lecteur

Le présent tome contient les procès-verbaux des discussions de la Quatorzième session de la Conférence de La Haye de droit international privé concernant la Convention sur les aspects civils de l'enlèvement international d'enfants. Les autres travaux de cette Session figurent dans les autres tomes des *Actes et documents de la Quatorzième session*, à savoir: Tome I, Matières diverses; Tome II, Ventes aux consommateurs; Tome IV, Entraide judiciaire.
Dans ce tome, on trouve tout d'abord un certain nombre de documents préliminaires: un Questionnaire sur l'enlèvement international d'un enfant par un de ses parents et un Rapport sur le même sujet établis par M. Adair Dyer, les Réponses des Gouvernements, les Conclusions des discussions de la Commission spéciale de mars 1979, l'avant-projet de Convention élaboré par la Commission spéciale de novembre 1979 et le Rapport explicatif de Mlle Elisa Pérez-Vera, ainsi que, entre autres, les Observations des Gouvernements sur cet avant-projet.
Suivent les procès-verbaux et documents de travail de la Première commission chargée de la matière à la Quatorzième session. Enfin, le tome contient le procès-verbal de la séance plénière qui a approuvé le projet de Convention, le texte de la Convention adoptée et le Rapport explicatif de Mlle Elisa Pérez-Vera. Ce Rapport ne se borne pas à compléter le Rapport de la Commission spéciale, mais constitue un commentaire autonome de la Convention qui fut ouverte à la signature et immédiatement signée par plusieurs pays le 25 octobre 1980. On trouvera à la fin du tome des tables permettant de retrouver rapidement les discussions sur un point particulier.

Le Rapport initial et le Questionnaire ont été traduits en français par M. Raymond de Menasce du Centre français de droit comparé à Paris. Le Rapport explicatif sur l'avant-projet de Convention a été traduit en anglais par Mlle Annie Caron et le Rapport explicatif sur la Convention a été traduit en anglais par M. Harry L. Allan, avocat au barreau d'Edimbourg, secrétaire rédacteur de la Première commission.

La Quatorzième session a élaboré, pour tous les projets de conventions et les décisions, des textes français et anglais équivalents. Conformément à une pratique qui s'est développée au cours des trois dernières Sessions, les interventions ont été rendues en français ou en anglais, selon la langue employée par l'orateur.
Le présent volume peut être commandé, séparément ou avec les autres à l'Imprimerie Nationale des Pays-Bas, 1, Christoffel Plantijnstraat, Boîte postale 20014, 2500 EA La Haye, ou par l'intermédiaire des librairies.

Le Secrétaire général
de la Conférence,

G.A.L. DROZ.

Le Président
de la Quatorzième session,

J.C. SCHULTSZ.

Notice to the reader

This volume contains the minutes of the discussions of the Fourteenth Session of The Hague Conference on private international law concerning the Convention on the Civil Aspects of International Child Abduction. The other matters dealt with at this Session appear in the other volumes of the *Actes et documents de la Quatorzième session* which are: Book I, Miscellaneous matters; Book II, Consumer sales; Book IV, Judicial co-operation.
In this volume you will find, first of all, a number of preliminary documents: a Questionnaire on international child abduction by one parent and a Report on the same subject drawn up by Mr Adair Dyer, the Replies of the Governments, the Conclusions of the discussions held by the Special Commission of March 1979, the preliminary draft Convention prepared by the Special Commission of November 1979 and the Explanatory Report of Miss Elisa Pérez-Vera, as well as, among others, the Comments of the Governments on this Preliminary Draft.
Following are the minutes and working documents of the First Commission, which dealt with this subject at the Fourteenth Session. Finally, the volume contains the minutes of the final session which approved the draft Convention, the text of the Convention which was adopted and the Explanatory Report of Miss Elisa Pérez-Vera. This Report is not limited to supplementing the Special Commission's Report, but rather constitutes an autonomous commentary on the Convention, which was opened for signature and immediately signed by several countries on October 25th, 1980. At the end of this volume you will find tables which will enable you to find rapidly the discussions on a particular point.
The initial Report and Questionnaire were translated into French by Mr Raymond de Menasce, of the Centre for Comparative Law at Paris. The Explanatory Report on the preliminary draft Convention was translated into English by Miss Annie Caron, and the Explanatory Report on the Convention was translated into English by Mr Harry L. Allan, Advocate of the Bar at Edinburgh, who served as recording secretary of the First Commission during its meetings.
The Fourteenth Session drew up all of its draft conventions and decisions in equally authentic French and English texts. In accordance with a practice which has developed over the course of the last three Sessions, the remarks of the speakers have been set down in French or in English, depending on the language used by the speaker.
This volume can be ordered, separately or with the others, from the Government Printing and Publishing Office, 1, Christoffel Plantijnstraat, Post-box 20014, 2500 EA The Hague, Netherlands, or through a bookseller.

The Secretary General
of the Conference,

G.A.L. DROZ.

The President
of the Fourteenth Session,

J.C. SCHULTSZ.

Quatorzième session

Travaux préliminaires

Liste des documents préliminaires[1]

Questionnaire et Rapport sur l'enlèvement international d'un enfant par un de ses parents, établis par M. Adair Dyer. – *(Document préliminaire No 1 d'août 1978), infra* p. 9 et 12.

Réponses des Gouvernements au Questionnaire. – *(Document préliminaire No 2 de février 1979), infra* p. 61.

Summary of findings on a Questionnaire studied by International Social Service (version originale en anglais seulement). – *(Document préliminaire No 3 de février 1979), infra* p. 130.

Observations du Secrétariat du Conseil de l'Europe relatives au Questionnaire établi par le Bureau Permanent de la Conférence de La Haye de droit international privé, suivies d'une Annexe contenant le Projet de Convention européenne sur la reconnaissance et l'exécution des décisions en matière de garde des enfants et le rétablissement de la garde des enfants. – *(Document préliminaire No 4 de mars 1979), infra* p. 145.

Conclusions des discussions de la Commission spéciale de mars 1979 sur le kidnapping légal. – *(Document préliminaire No 5 de juin 1979), infra* p. 162.

Avant-projet de Convention sur les aspects civils de l'enlèvement international d'enfants, adopté par la Commission spéciale et Rapport établi par Mlle Elisa Pérez-Vera. – *(Document préliminaire No 6 de mai 1980), infra* p. 166 et 172.

Observations des Gouvernements sur le Document préliminaire No 6. – *(Document préliminaire No 7 de septembre 1980), infra* p. 215.

[1] La table des matières se trouve à la fin du présent tome.

List of Preliminary Documents[1]

Questionnaire and Report on international child abduction by one parent, drawn up by Adair Dyer. – *(Preliminary Document No 1 of August 1978), infra* pp. 9 and 12.

Replies of the Governments to the Questionnaire. – *(Preliminary Document No 2 of February 1979), infra* p. 61.

Summary of findings on a Questionnaire studied by International Social Service. – *(Preliminary Document No 3 of February 1979), infra* p. 130.

Observations by the Secretariat of the Council of Europe relating to the Questionnaire prepared by the Permanent Bureau of the Hague Conference on private international law, followed by an Annex containing the draft European Convention on recognition and enforcement of decisions concerning custody and on restoration of custody of children. – *(Preliminary Document No 4 of March 1979), infra* p. 145.

Conclusions drawn from the discussions of the Special Commission of March 1979 on legal kidnapping. – *(Preliminary Document No 5 of June 1979), infra* p. 162.

Preliminary draft Convention on the civil aspects of international child abduction, adopted by the Special Commission, and Report by Elisa Pérez-Vera. – *(Preliminary Document No 6 of May 1980), infra* pp. 166 and 172.

Comments of the Governments on Preliminary Document No 6. – *(Preliminary Document No 7 of September 1980), infra* p. 215.

[1] The Table of contents appears at the end of this volume.

Questionnaire on international child abduction by one parent

DRAWN UP BY ADAIR DYER

Preliminary Document No 1 of August 1978

Explanatory Note

Due to the difficulty of formulating a comprehensive formal definition of child abduction by a parent, none has been attempted.

THE FIVE TYPES OF SITUATIONS WHICH ARE CONSIDERED TO CONSTITUTE 'CHILD ABDUCTION' FOR THE PURPOSES OF THIS QUESTIONNAIRE ARE DESCRIBED BELOW

A The child was removed by a parent from the country of the child's habitual residence to another country without the consent of the other parent, at a time when no custody decision had yet been handed down but serious problems between the parents already existed.

B The child was abducted by a parent from the judicially determined custodian in one country and removed to another, where no conflicting custody decision had been handed down.

C The child was retained by the non-custodial parent or other relatives beyond a legal visitation period, in a country other than that in which the child habitually resided.

D The child was abducted by a parent from the legal custodian in one country and removed to another, where the abductor had been granted custody under a conflicting order in that other country or in a third country.

E The child was removed by a parent from one country to another in violation of a court order which expressly prohibited such removal.

Questions

Sociological information

1 Has your country experienced an increase in the frequency of occurrence of cases of child abduction by parents during the past five years?[1]

2 If so, can any reason by given for the increase in such cases?

3 Are statistics or other data available on the number of cases made known to the courts or administrative authorities of your country in each year involving one or more of the situations of child abduction described in the Explanatory

[1] See *Report*, pp. 18-19.

Questionnaire sur l'enlèvement international d'un enfant par un de ses parents

ETABLI PAR M. ADAIR DYER

Document préliminaire No 1 d'août 1978

Note explicative

En raison de la difficulté que l'on éprouve à donner une définition complète et formelle de l'enlèvement d'un enfant par un de ses parents, nous n'avons pas cherché à en donner une.

LES CINQ TYPES DE SITUATIONS CONSIDÉRÉES COMME DES «ENLÈVEMENTS D'ENFANTS» AU REGARD DU PRÉSENT QUESTIONNAIRE SONT DÉCRITS CI-DESSOUS

A L'enfant a été déplacé par un des ses parents du pays de la résidence habituelle de cet enfant dans un autre pays sans le consentement de l'autre parent, à un moment où aucune décision judiciaire en matière de garde n'avait encore été prononcée, mais où des problèmes sérieux opposaient déjà les parents.

B L'enfant a été enlevé par un de ses parents au gardien désigné par une décision judiciaire dans un pays et conduit dans un autre pays, où aucune décision en matière de garde contredisant la première n'a été prononcée.

C L'enfant a été retenu par le parent qui n'a pas la garde, ou par d'autres membres de la famille, au-delà de la durée légale de la visite, dans un pays autre que celui de la résidence habituelle de l'enfant.

D L'enfant a été enlevé par un de ses parents à son gardien légal dans un pays et conduit dans un autre, la garde ayant été attribuée au ravisseur par une décision judiciaire contraire rendue dans cet autre pays ou dans un troisième pays.

E L'enfant a été déplacé par un de ses parents dans un autre, en violation d'une décision judiciaire qui interdit expressément ce déplacement.

Questions

Informations de caractère sociologique

1 A-t-on constaté dans votre pays, au cours de ces cinq dernières années, un accroissement du nombre d'affaires d'enlèvements d'enfants par leurs parents?[1]

2 Dans l'affirmative, pouvez-vous dire à quelle raison est dû cet accroissement du nombre de ces affaires?

3 Existe-t-il des statistiques ou autres données sur le nombre d'affaires portées chaque année devant les autorités judiciaires ou administratives de votre pays, et concernant une ou plusieurs des situations d'enlèvements d'enfants in-

[1] Voir *Rapport*, p. 18-19.

Note? If so, please give data for the past five years, specifying where possible types of situations involved.

4 Have any research studies of the causes or effects of child abductions by parents been published in your country? If so, can a copy of the studies be furnished to the Permanent Bureau[2]?

Treaties

5 Is your country a party to any multilateral or bilateral treaties which deal with jurisdiction or with the applicable law in child custody cases, or with recognition and enforcement abroad of custody decisions? If so, please give the names, dates, parties and general features of such treaties[3].

6 Have any of such treaties proved useful in preventing or ameliorating problems of child abduction? If so, please identify the useful provisions and describe any helpful procedures developed under them. (See articles 4, 5, 6, 10 and 11 of the *Hague Convention of 5 October 1961 Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants.*)

7 Is your country a party to any human rights treaties containing provisions which may have a bearing on child abduction cases? If so, please specify the treaties and provisions in question[4].

8 Is your country a party to any treaty or administrative agreement containing provisions which are designed particularly to prevent or deal with child abduction? If so, please identify the treaty and describe the provisions.

Legislation and case law

9 What bases do your courts use for assuming jurisdiction in child custody cases[5]?

10 Are there any special provisions or practices which call for declining the exercise of jurisdiction in certain cases of child abduction? If so, please describe such provisions or practices.

11 What principles govern the assigning of legal custody in your internal law:

a during the marriage of the parents?
b after their divorce or legal separation?
c after death of one of the parents?
d in other cases[6]?

12 Does your country's law provide for the parent of one sex or the other to have control over the care and education of the child by operation of law, where the parents are or have been married and where no judicial decision has been handed down assigning custody? If so, please specify which parent[7].

13 In the case mentioned in Question 12, does a court or administrative tribunal have the power to award custody to the other parent?

14 Does the age of the child constitute a criterion under Questions 11, 12 or 13[8]?

[2] See *Report*, pp. 19-25.
[3] See *Report*, pp. 25-32.
[4] See *Report*, pp. 32-34.
[5] See *Report*, pp. 35-38.
[6] See *Report*, pp. 35-36.
[7] See *Report*, p. 39.
[8] See *Report*, p. 24.

diquées dans la Note explicative? Dans l'affirmative, prière de fournir des données pour les cinq dernières années, en spécifiant si possible de quel type de situation il s'agit.

4 Des travaux de recherche sur les causes ou les effets d'enlèvements d'enfants par leurs parents ont-ils été publiés dans votre pays? Dans l'affirmative, pourriez-vous en faire parvenir un exemplaire au Bureau Permanent[2]?

Conventions

5 Votre pays est-il partie à un ou plusieurs traités multilatéraux ou bilatéraux concernant la compétence des autorités ou la loi applicable en matière de garde d'enfants, ou concernant la reconnaissance et l'exécution à l'étranger des décisions en matière de garde des mineurs? Dans l'affirmative, prière d'indiquer le nom, la date, les parties contractantes et les grandes lignes de ces traités[3].

6 Parmi ces conventions, certaines se sont-elles révélées utiles pour prévenir les enlèvements d'enfants ou atténuer les problèmes qu'ils posent? Dans l'affirmative, prière d'indiquer les dispositions utiles et décrire toutes les mesures intéressantes prises en vertu de ces conventions. (Voir les articles 4, 5, 6, 10 et 11 de la *Convention de La Haye du 5 octobre 1961 concernant la compétence des autorités et la loi applicable en matière de protection des mineurs.*)

7 Votre pays est-il partie à des traités quelconques sur les droits de l'homme contenant des dispositions qui pourraient avoir une influence sur les affaires d'enlèvements d'enfants? Dans l'affirmative, prière d'indiquer ces traités et les dispositions en question[4].

8 Votre pays est-il partie à une convention ou une entente administrative quelconque contenant des dispositions spécialement destinées à prévenir ou traiter des enlèvements d'enfants? Dans l'affirmative, prière d'indiquer le traité et de décrire ces dispositions.

Législation et jurisprudence

9 Sur quelle base vos tribunaux s'appuient-ils pour se déclarer compétents dans les affaires de garde de mineurs[5]?

10 Existe-t-il des dispositions ou des pratiques particulières en vertu desquelles les tribunaux doivent se déclarer incompétents dans certaines affaires d'enlèvements d'enfants? Dans l'affirmative, prière d'indiquer ces dispositions ou ces pratiques.

11 A quels principes votre loi interne obéit-elle pour attribuer la garde légale:

a au cours du mariage des parents?
b après leur divorce ou leur séparation de corps?
c après le décès d'un des parents?
d dans d'autres cas[6]?

12 Le droit de votre pays prévoit-il que la surveillance et l'éducation de l'enfant reviennent de plein droit au parent de l'un ou de l'autre sexe, lorsque les parents sont ou ont été mariés et qu'aucune décision judiciaire attribuant la garde n'a été prononcée? Dans l'affirmative, prière d'indiquer de quel parent il s'agit[7].

13 Dans le cas envisagé par la Question 12, une autorité judiciaire ou administrative a-t-elle qualité pour attribuer la garde à l'autre parent?

14 L'âge de l'enfant constitue-t-il un critère dans les cas envisagés par les Questions 11, 12 ou 13[8]?

[2] Voir *Rapport*, p. 19-25.
[3] Voir *Rapport*, p. 25-32.
[4] Voir *Rapport*, p. 32-34.
[5] Voir *Rapport*, p. 35-38.
[6] Voir *Rapport*, p. 35-36.
[7] Voir *Rapport*, p. 39.
[8] Voir *Rapport*, p. 24.

15 What influence do the child's opinions have on the award of custody or rights of access or visitation[9]?

16 Do courts or administrative authorities in your country have the power to order the custodian to keep the child within your country? If so, please indicate whether the power has been frequently used and whether it is considered to be effective[10]. If not, are there any other measures available which might serve the same purpose?

17 What are your choice-of-law rules in child custody cases[11]?

18 Are there any norms of constitutional or other fundamental law in your country which would override the usual choice-of-law rules in custody cases? If so, please explain[12].

Visitation and access

19 Does your law provide for the parent who does not have custody to have access to the child[13]?

20 If the answer to Question 19 has been in the affirmative, can the child be removed for a certain period of time to a country other than that where he habitually resides for purposes of effectuating such access? If so, please describe any preliminary conditions which are set for the exercise of such access or visitation[14].

21 Does your law provide that the child has a right of regular access to a parent who does not have custody?

22 Do you find that the exercise of access or visitation contributes to child abductions? If so, please explain[15].

23 Do you find that the denial of access or visitation contributes to child abductions? If so, please explain[16].

Existing non-treaty remedies

24 Are there other practices prevailing in your country by which abductions of children are prevented? If so, please explain.

Possible treaty remedies

25 Would your country accept the inclusion of provisions in an international convention to be prepared which would be designed to prevent or deal with child abduction by the use of one or more of the possible methods mentioned in Part VII of the Report as follows:

a facilitating the enforcement of decisions?
b creation of an international tribunal?
c expediting the return of the child?
d defining more narrowly the jurisdiction of courts?
e giving the courts the power to decline jurisdiction for reasons of misconduct by a parent?
f granting to the courts the discretion to apply the doctrine of *forum non conveniens*?
g strengthening administrative co-operation?

If so, please identify the type of method which is favoured and indicate supporting reasons[17].

26 Are there possible methods not mentioned in Part VII of the Report which your country would favour using in the convention to be prepared? If so, please describe the possible methods and indicate supporting reasons.

[9] See *Report*, p. 21.
[10] See *Report*, pp. 40-41.
[11] See *Report*, pp. 39-40.
[12] See *Report*, pp. 38-39.
[13] See *Report*, pp. 41-43.
[14] See *Report*, p.42.
[15] See *Report*, pp. 42-43.
[16] See *Report*, pp. 41-43.
[17] See *Report*, pp. 46-51.

15 Quelle influence les opinions de l'enfant ont-elles sur l'attribution du droit de garde ou de visite[9]?

16 Les autorités judiciaires ou administratives ont-elles le droit dans votre pays de faire obligation au parent qui a la garde de maintenir l'enfant à l'intérieur de votre pays? Dans l'affirmative, prière d'indiquer si ce droit est souvent utilisé et si on le juge efficace[10]. Dans la négative, existe-t-il d'autres mesures qui permettent d'atteindre le même but?

17 Quelles sont vos règles de conflit de lois applicables aux affaires de garde d'enfants[11]?

18 Existe-t-il dans votre pays des normes dérivées de lois constitutionnelles ou d'autres lois fondamentales qui prendraient le pas sur les règles habituelles de conflit de lois dans les affaires de garde? Dans l'affirmative, prière de donner des précisions[12].

Droit de visite

19 Votre droit prévoit-il un droit de visite pour le parent qui n'a pas la garde[13]?

20 Si la réponse à la Question 19 est affirmative, l'enfant peut-il être conduit, pour une durée déterminée, dans un autre pays que celui de sa résidence habituelle, pour permettre l'exercice de ce droit de visite? Dans l'affirmative, prière d'indiquer à quelles conditions préalables une visite à l'étranger est soumise[14].

21 Votre loi prévoit-elle que l'enfant a le droit de rencontrer régulièrement le parent qui n'a pas la garde?

22 Estimez-vous que des enlèvements d'enfants sont favorisés par l'exercice du droit de visite? Dans l'affirmative, prière de donner des précisions[15].

23 Estimez-vous que des enlèvements d'enfants sont favorisés par le refus du droit de visite? Dans l'affirmative, prière de donner des précisions[16].

Solutions actuelles non conventionnelles

24 Existe-t-il dans votre pays des pratiques qui permettent de prévenir les enlèvements d'enfants? Dans l'affirmative, prière de donner des précisions.

Solutions conventionnelles possibles

25 Votre pays accepterait-il l'inclusion, dans une convention internationale à conclure, de dispositions destinées à prévenir ou traiter des enlèvements d'enfants, par l'emploi d'une ou de plusieurs des méthodes possibles exposées dans la septième partie du Rapport, à savoir:

a faciliter l'exécution des décisions?
b créer un tribunal international?
c accélérer la restitution de l'enfant?
d restreindre la compétence des tribunaux?
e donner aux tribunaux le droit de se déclarer incompétents en raison de la conduite répréhensible d'un parent?
f donner aux tribunaux le droit d'appliquer la doctrine du *forum non conveniens*?
g renforcer la coopération administrative?

Dans l'affirmative, prière d'indiquer quel type de méthode vous préconisez, et de donner les raisons de votre choix[17].

26 Existe-t-il éventuellement des méthodes qui n'ont pas été mentionnées dans la septième partie du Rapport que votre pays serait désireux de voir adoptées par la convention à conclure? Dans l'affirmative, prière d'indiquer ces méthodes en donnant les raisons de votre choix.

[9] Voir *Rapport*, p. 21.
[10] Voir *Rapport*, p. 40-41.
[11] Voir *Rapport*, p. 39-40.
[12] Voir *Rapport*, p. 38-39.
[13] Voir *Rapport*, p. 41-43.
[14] Voir *Rapport*, p. 42.
[15] Voir *Rapport*, p. 42-43.
[16] Voir *Rapport*, p. 41-43.
[17] Voir *Rapport*, p. 46-51.

Report on international child abduction by one parent ('legal kidnapping')

BY ADAIR DYER

Preliminary Document No 1 of August 1978

I — INTRODUCTION

A *History of the project*

The suggestion that the Hague Conference on Private International Law undertake the preparation of an international treaty dealing with the specific problem of abduction of children by one of their parents is of comparatively recent origin. The proposal was first made by the Expert of Canada, Mr T. Bradbrooke Smith, at a Special Commission meeting held at The Hague in January 1976 for the purpose of considering subjects to be included on the future work agenda of the Conference, following the Thirteenth Session, and certain other technical questions concerning the Hague Conventions in general.

The proposal was received with interest and at the direction of the Special Commission a short preliminary study of the subject, initially described as 'legal kidnapping', was prepared by Mr Georges A.L. Droz, Deputy Secretary-General of the Conference, as a basis for further consideration in the Fourth Commission of the Thirteenth Session. The discussions of that Commission, held during the period of October 4-23, 1976, showed that the proposal advanced by the Canadian Expert and analysed by Mr Droz had struck a responsive cord in legal and governmental circles among the Member States of the Conference. Indeed, the characteristic patterns consisting of abrupt removal of the child from one country to another by a parent during or after the breakdown of a marriage, frequently in violation of a custody order handed down in the country of the child's residence, or the unauthorised retention of the child after a legally permitted period of visitation under a custody order, have made their appearance in all Member States of the Conference and seem to occur with rapidly increasing incidence. Despite the fact that work involving certain aspects of this subject had been undertaken at the international level within certain other organisations, notably the Council of Europe, the Thirteenth Session of the Conference warmly supported the Recommendation that the Conference undertake this topic, which has become broadly intercontinental in its scope with a pattern of abduction routes cross-hatched across the globe, from Australia to Austria, from Canada to France (and back, by way of the secondary abduction), from Berlin to Israel, England to Holland, Holland to Morocco and so on in a seemingly endless flow.

What are the causes of this phenomenon which leaves in its wake an anguished parent, frequently with limited or no resources to pursue and with no knowledge of the child's whereabouts, a confused child who is often misled about the character and the feelings of the parent left behind and who finds that he must willy-nilly adapt to the new situation, and

Rapport sur l'enlèvement international d'un enfant par un de ses parents («kidnapping légal»)

ETABLI PAR M. ADAIR DYER

Document préliminaire No 1 d'août 1978

I — INTRODUCTION

A *Historique de la question*

La suggestion que la Conférence de La Haye de droit international privé entreprenne la préparation d'un traité international portant sur le problème spécifique de l'enlèvement d'un enfant par l'un de ses parents est relativement récente. La proposition fut faite, pour la première fois, par l'Expert du Canada, M. T. Bradbrooke Smith, au cours d'une réunion d'une Commission spéciale tenue à La Haye au mois de janvier 1976, en vue de décider quels sujets seraient portés à l'ordre du jour des futurs travaux de la Conférence, après la Treizième session, et pour étudier certaines autres questions techniques relatives aux Conventions de La Haye en général.

La proposition fut jugée intéressante et, à la demande d'une Commission spéciale, M. Georges A.L. Droz, secrétaire général adjoint de la Conférence, prépara une courte étude préliminaire sur la question que, tout d'abord, on appela le «kidnapping légal»: cette étude devait servir de base aux discussions de la Quatrième commission de la Treizième session. Les débats qui se déroulèrent devant cette Commission, entre le 4 et le 23 octobre 1976, montrèrent que la proposition faite par l'Expert canadien et analysée par M. Droz avait trouvé un écho favorable dans les milieux juridiques et gouvernementaux des Etats membres de la Conférence. En fait, on avait vu apparaître dans tous les Etats membres de la Conférence ces situations caractéristiques par lesquelles un parent s'empare soudainement d'un enfant et le fait passer dans un autre pays, à une époque où le mariage se désunit ou a déjà été rompu, et souvent en violation d'une décision accordant la garde de l'enfant, prononcée dans le pays de la résidence de celui-ci. Il peut aussi s'agir du refus illicite de restituer l'enfant après l'expiration de la durée légale de visite fixée par une décision judiciaire. De tels actes semblent se produire avec une fréquence accélérée. Bien que des travaux portant sur certains aspects de la question aient déjà été entrepris à l'échelon international par diverses autres organisations, et notamment par le Conseil de l'Europe, la Treizième session de la Conférence appuya chaudement la recommandation de confier à la Conférence l'étude d'un problème qui avait atteint une dimension intercontinentale, car les enlèvements empruntent des routes qui sillonnent toute notre planète, de l'Australie à l'Autriche, du Canada à la France (puis, en sens contraire, l'enfant ayant été récupéré par un nouvel enlèvement), de Berlin à Israël, d'Angleterre aux Pays-Bas, des Pays-Bas au Maroc, et ainsi de suite dans un flux qui semble incessant.

Quelles sont les causes de ce phénomène qui laisse dans son sillage des parents angoissés, le plus souvent démunis des ressources nécessaires pour engager des poursuites, et qui restent dans l'ignorance du lieu où l'enfant a été conduit, un enfant troublé, auquel on ment sur les sentiments et sur la personnalité du parent abandonné, et qui se rend compte

finally the parent-abductor who must go underground still looking over his shoulder with fear for the long arm of the law or the sudden stroke of the counterkidnapper? Amongst the causes lie the paths to solutions, and so it is that this Report must commence with identification of the phenomenon in its various manifestations and some assessment of the motivations and means which contribute to its incidence.

This topic, though it takes a new form reflecting changes in social and demographic conditions, as well as in the means of transportation, is not entirely new to the Hague Conference, and it will be seen that the Conference in its very earliest work undertook to prepare a Convention on the guardianship (*tutelle*) of infants (achieved at the Third Session) and that more than half a century later changes in social and demographic conditions led the Conference to return to this subject on a different approach and basis, resulting in the Convention on Protection of Minors of 5 October 1961. The fact that the Conference, less than 20 years later, is now returning to deal with a narrower and more specific aspect of this subject area indicates the accelerating pace of the change which drives us on.

B *Difficulties in defining the problem*

Difficulties in finding suitable terminology to reflect and to define the problem arose from the very genesis of the project, even though the practical situations which occurred most frequently were easy enough to identify. The confusion in terminology is evident in the Final Act of the Thirteenth Session which speaks in English of 'legal kidnapping' but in French of '*le déplacement illégal d'un enfant*'. Descriptive terminology in the legal literature ranges from 'international kidnapping of children'[1] to 'international abduction of children by a parent'[2] to '*Kindesentführungen ins Ausland*'[3]. The word 'abduction' seems to have some advantages in English as a reasonably neutral term which also provides the practical advantage for a Hague Conference Convention of having a near-equivalent in French ('*enlèvement*'); that word has therefore been adopted in this Report and in the accompanying Questionnaire in place of the original English term of the Thirteenth Session's Recommendation ('kidnapping'), for most purposes.

The use of the term 'legal' in conjunction with the term 'kidnapping' raised considerable confusion and difficulty, reflected in the fact that the French-language version of the Final Act on this point ultimately referred to '*le déplacement illégal d'un enfant à l'étranger* (legal kidnapping)'[4]. Since the great bulk of the cases involved abductions which were carried out either by a parent or on behalf of a parent, it seemed better to eliminate the term 'legal' and to specify that the abduction referred to is abduction of a child by one of his or her parents. The term 'parent' is here used in a sense which may be broad enough to include not only natural parents (including the fathers of illegitimate children) but

[1] Brigitte M. Bodenheimer, 'The International Kidnapping of Children: the United States Approach', *Family Law Quarterly*, Vol. XI, pp. 83-100 (Spring 1977).
[2] Title of a brief of the Canadian Ministry of Justice, a copy of which has been furnished to the Permanent Bureau.
[3] Title of an article by Dr Kurt Siehr, published in *Der Amtsvormund*, 1977, pp. 219-236.
[4] The word 'legalized', used in the title of the article by Lewis, 'Legalized Kidnapping of Children by their Parents', *Dickinson Law Review*, Vol. 80, p. 305 (1976), would seem likely to create even more confusion in the context of preparation of an international treaty. It should be borne in mind however that in most, if not in all cases, the abduction across the border is accompanied by the desire to find in another jurisdiction a 'legal' remedy which was withheld from the abductor in the country of origin.

qu'il doit, qu'il le veuille ou non, s'adapter à cette situation nouvelle, et enfin l'auteur de l'enlèvement qui doit constamment rester terré, qui jette sans cesse derrière lui des coups d'oeils furtifs, dans la crainte d'être surpris par un représentant de l'ordre, ou que l'autre partie ne parvienne à reprendre l'enfant au moyen d'un nouvel enlèvement? Ce sont de ces causes que dépendent les solutions à trouver, et c'est pourquoi le présent Rapport doit au préalable chercher à identifier le phénomène dans ses diverses manifestations et découvrir les mobiles et les procédés qui contribuent à son incidence.

Ce problème, bien qu'il ait pris des formes nouvelles qui reflètent l'évolution des conditions sociales et démographiques, ainsi que la transformation des moyens de transport, n'est pas entièrement nouveau pour la Conférence de La Haye, et nous verrons que celle-ci, au cours de ses tout premiers travaux, avait entrepris la préparation d'une Convention sur la tutelle des enfants (achevée à la Troisième session) et que plus d'un demi-siècle plus tard, la modification des conditions sociales et démographiques avait conduit la Conférence à revenir sur cette question, mais en l'abordant dans une optique différente et sur d'autres bases; et la Convention du 5 octobre 1961 sur la protection des mineurs avait été le résultat de ses travaux. Le fait que, moins de 20 ans plus tard, la Conférence se préoccupe actuellement dans ce domaine d'un aspect plus étroit et plus spécifique montre combien se sont accélérés les changements qui nous incitent à agir.

B *Les difficultés à définir le problème*

Dès le début des travaux, on s'aperçut combien il était difficile de trouver une terminologie appropriée pour poser et définir le problème, en dépit du fait que les situations les plus fréquentes n'étaient pas difficiles à reconnaître dans la pratique. La confusion dans les termes apparaît clairement dans l'Acte final de la Treizième session, dont la version anglaise parle de «*legal kidnapping*» et la version française du «déplacement illégal d'un enfant». Dans la littérature juridique, on a qualifié cet acte de «*international kidnapping of children*»[1], de «*international abduction of children by a parent*»[2] et de «*Kindesentführungen ins Ausland*»[3]. Le mot anglais «*abduction*», semble présenter certains avantages: c'est un terme assez neutre, dont l'avantage pratique, pour une convention de la Conférence de La Haye, est d'avoir en français un équivalent très proche, le mot «enlèvement»; nous avons donc employé le plus souvent ce terme dans le présent Rapport et dans le Questionnaire qui l'accompagne, de préférence au mot de «*kidnapping*», que la Treizième session avait tout d'abord recommandé.

L'emploi du terme «*legal*» appliqué au «*kidnapping*» a créé une grande confusion et soulevé de sérieuses difficultés, comme le montre le fait que dans la version française de l'Acte final, il est finalement fait mention du «déplacement illégal d'un enfant à l'étranger»[4]. Comme la grande majorité des affaires concerne des enlèvements exécutés soit par un des parents, soit pour le compte de celui-ci, on jugea préférable de supprimer le mot «*legal*» et de spécifier que l'enlèvement se référait à celui d'un enfant par l'un de ses parents. Le mot «parent» est employé ici dans une acception suffisamment large pour comprendre non seulement les parents par le sang (y compris les pères d'enfants illégitimes)

[1] Brigitte M. Bodenheimer, «*The International Kidnapping of Children: The United States Approach*», *Family Law Quarterly*, vol. XI, p. 83-100 (Printemps 1977).
[2] C'est le titre d'un mémoire du Ministère de la Justice canadien dont un exemplaire a été remis au Bureau Permanent.
[3] Titre d'un article du Dr Kurt Siehr, publié dans *Der Amtsvormund*, 1977, p. 219-236.
[4] Le mot «*legalized*», que l'on trouve dans le titre de l'article de Lewis «*Legalized Kidnapping of Children by their Parents*», *Dickinson Law Review*, vol. 80, p. 305 (1976), semble devoir ajouter à la confusion dans le contexte de la préparation d'un traité international. Il ne faut cependant pas oublier que, dans la plupart des cas, sinon dans tous, l'enlèvement au-delà des frontières s'accompagne du désir de trouver devant une autre juridiction une solution «légale» qui était refusée au ravisseur dans le pays d'origine.

also adoptive parents (whether the adoption is plenary or partial in its effects) as well as foster or step-parents (to the extent that they have a relationship with the child which is recognised under the law of some States as creating reciprocal rights and duties with the child).
The remarks directed to the problem of 'abduction' of a child by one of his parents will also, broadly speaking, cover the phenomenon of retention of the child by a parent following a legal period of visitation in a country other than the country of the child's habitual residence. However, because the term 'abduction' is difficult to stretch so as to make it cover this situation, and because the institution of visitation rights bears certain particular features of its own, a special section of this Report (Part V) will be devoted to the particular problem of the relationship between visitation rights and child abduction.
It should be acknowledged here with gratitude that the Permanent Bureau has gained considerable help in trying to unravel problems of terminology and in defining and classifying the types of situations involved from materials provided by the Government of Canada and from discussions held with members of the General Secretariat of International Social Service (ISS) in Geneva and with the heads of a number of national branches of ISS, as well as from written submissions by a number of those branches; the Ministry of Justice in Paris has also contributed very helpful materials and information on this subject, for which the Permanent Bureau is grateful.

C *Analogous activities*

1 *Work undertaken by other international organisations*

Since 1972 the Committee of Experts on the custody of children has been conducting meetings at the Council of Europe in Strasburg, in order to deal in the European context with problems of custody. This Committee, under the chairmanship of Mr R. Loewe (Austria), in the initial phase of its work prepared two draft Conventions, one on the enforcement of custody decrees and the other on the creation of an international tribunal to decide certain international controversies arising out of custody cases; these Drafts were put in form suitable for submission, together with accompanying reports, in February 1977. Meanwhile the Swiss Expert on that Committee had submitted a proposal for a draft Convention on 'restoration of custody'; this proposal, rather than being directed at the broad range of general custody disputes, was focused on the particular problem of arbitrary removal of a child from the jurisdiction where he resided in the custody of an adult.

The fact that this proposal was brought before the same Committee which had already prepared a draft on enforcement of custody decrees should make it clear that the acute problem of abduction of children by a parent creates difficulties which go beyond the normal custody dispute and which are not readily susceptible of being dealt with efficaciously through normal procedures for recognition and enforcement of custody decrees. In fact, the genesis of the Swiss proposal came during the period of time when the Permanent Bureau of the Hague Conference was first beginning to study the problem, at the request of countries which had observed its particular nature.

The Council of Europe Committee mentioned above held a further meeting at Strasburg in October 1977 for the purpose of considering specifically the proposal of the Swiss Expert. That meeting resulted in a preliminary draft Convention on restoration of custody of children, however still tentative in its form. This Committee will meet again during

mais aussi les parents adoptifs (que l'adoption ait des effets complets ou limités), ainsi que les parents nourriciers ou parents par alliance (dans la mesure où la loi de certains Etats créent dans ce cas des droits et des devoirs réciproques entre l'enfant et les «parents»).
Ces observations sur le problème de «l'enlèvement» d'un enfant par l'un de ses parents peuvent, plus ou moins, s'appliquer au fait pour un parent de retenir l'enfant, après l'expiration du délai du droit de visite, dans un pays autre que celui où l'enfant a sa résidence habituelle. Cependant, comme il est difficile de donner au mot «enlèvement» un sens qui puisse s'appliquer à cette situation et comme l'institution du droit de visite comporte certains éléments qui lui sont propres, nous consacrerons une section spéciale de ce Rapport (partie V) au problème particulier des rapports entre le droit de visite et l'enlèvement d'un enfant.
Il faut signaler ici avec gratitude que le Bureau Permanent, quant il s'est heurté à ces problèmes de terminologie et a cherché à définir et à classifier les diverses situations qui peuvent se présenter, a été considérablement aidé par la documentation fournie par le Gouvernement du Canada et par les entretiens qu'il a eus avec des membres du secrétariat général du Service Social International de Genève et avec les dirigeants des branches nationales de cette organisation, qui lui ont aussi remis des notes écrites établies par certaines de leurs branches. Le Ministère français de la Justice lui a également communiqué des documents sur la question et lui a fourni des renseignements très utiles, pour lesquels le Bureau Permanent lui est très reconnaissant.

C *Activités parallèles*

1 *Travaux entrepris par d'autres organisations internationales*

Depuis 1972, le Comité d'experts sur la représentation légale et la garde des mineurs a tenu, au Conseil de l'Europe, à Strasbourg, plusieurs réunions en vue d'étudier le problème de la garde des enfants dans un contexte européen. Ce Comité, présidé par M. R. Loewe (Autriche), a préparé dans la phase préliminaire de ses travaux les projets de deux Conventions, l'une sur l'exécution des décisions relatives à la garde et l'autre sur la création d'un tribunal international compétent à statuer sur les conflits internationaux qui peuvent se poser dans des affaires de garde d'enfant. Au mois de février 1977, ces projets prirent forme et purent être présentés avec les rapports qui les accompagnaient. Entretemps, l'Expert suisse siégeant à ce Comité proposa que soit établi un projet de Convention sur le «rétablissement de la garde». Cette proposition, plutôt que de porter sur un large éventail de conflits relatifs à la garde, ne concernait que le problème particulier d'un enfant arbitrairement enlevé du territoire où il résidait sous la garde d'un adulte et transporté dans un autre territoire.
Le fait que cette proposition ait été soumise à un comité qui avait déjà préparé un projet de Convention sur l'exécution des décisions en matière de garde montre, à l'évidence, que le sérieux problème de l'enlèvement d'un enfant par un de ses parents soulève des difficultés qui vont bien au-delà des conflits normaux en matière de garde et qui ne peuvent pas être rapidement et efficacement réglés au moyen des procédures normales de reconnaissance et d'exécution des décisions en matière de garde des mineurs. En fait, la proposition suisse vit le jour au cours de la période pendant laquelle le Bureau Permanent de la Conférence de La Haye avait commencé à étudier ce problème, à la demande de pays qui avaient pris conscience de son caractère particulier.
Le Comité d'experts du Conseil de l'Europe, mentionné plus haut, tint une nouvelle réunion à Strasbourg au mois d'octobre 1977 dans le but d'examiner tout particulièrement la proposition de l'Expert suisse. A la suite de cette réunion, un avant-projet de Convention sur le rétablissement de la garde fut rédigé, encore dans une version préliminaire. Le Comité

1978; the two draft Conventions prepared earlier may be delayed somewhat in their submission to the appropriate bodies of the Council of Europe so that the problems of integrating or aligning the three Conventions may be further considered.
The countries which have participated in the work of the Council of Europe, however, have not been opposed to the Hague Conference taking up work on the subject of 'legal kidnapping'. In fact, a number of these countries have expressly encouraged work in this field by the Hague Conference because of the worldwide scope of the problem, since abductions by air on an intercontinental basis are becoming more frequent. Work by the Conference therefore should not in any sense interfere with the work of the Council of Europe, but the Conference could gain some insight into a few avenues which possibly might be followed from the work of the Committee of Experts on the custody of children of the Council of Europe, which work has been followed closely by a member of the Permanent Bureau serving in the capacity of observer.
It should perhaps be noted here that the Council of Europe has also prepared the European Convention on the Repatriation of Minors of 28 May 1970, which may have some bearing on the Conference's work on child abduction. This Convention, however, seems not to have met with the approval of the Members of the Council.

Concerning the work of other international organisations, we should note here that there are certain incipient developments in two organisations, the future course of which is not known at this time.

First, an outline of the problem and certain suggestions as to possible action which might serve to curb the increasingly frequent international abduction of children by parents was presented by the Minister of Justice of Canada to a meeting of Commonwealth Law Ministers held in Winnipeg, Canada, in August 1977[5]. Whether this may result in a formal initiative through the Commonwealth Secretariat to deal with this subject is not yet known[6]. In this connection, it is of interest to point out that an accord has recently been reached between the Hague Conference and the Commonwealth Secretariat in London under which information would be exchanged on topics of mutual interest to the two organisations and observers would be invited to attend meetings on subjects of mutual interest, where appropriate; the Law Ministers' Meeting had also recommended, *inter alia*, that the Commonwealth Secretary-General explore with the Hague Conference the possibility of keeping those Commonwealth Governments who were not Members of the Conference fully informed of developments there[7].

The second initiative which should be briefly mentioned is a development within the framework of the discussions being held by the European Communities concerning possible revisions to the Brussels Convention of September 27, 1968. The Belgian Delegate to the Working Group has proposed the addition of a protocol to that Convention dealing with

[5] See *Report of the Scottish Law Commission*, 1976-1977 (Scot. Law Com. No 47), p. 14, footnote 6. The Canadian Ministry of Justice has furnished the Permanent Bureau with a copy of a brief based upon the paper presented at Winnipeg, which was entitled 'The International Abduction of Children by a Parent' (see footnote 2, above).

[6] *The Final Communiqué of the Winnipeg Meeting*, para. 36, dealt with the question as follows: *One particular problem of immense social importance and requiring concrete early action was that of parental abduction of children from the parent with lawful custody. It was agreed that early examination be given to greater co-operation in the enforcement of custody orders, particularly as criminal proceedings were generally unsuited for use in a family context. The* [Law Ministers] *emphasised that their concern was for the welfare of the children and that the existence of a Commonwealth scheme could reduce the number of such distressing incidents.*

[7] *Id.*, para. 34.

doit se réunir de nouveau en 1978; le dépôt des projets des deux Conventions qui avaient été établis devant le Conseil de l'Europe pourrait dès lors être retardé pour permettre une étude plus approfondie des problèmes d'intégration et d'alignement que posent ces trois Conventions.
Les pays qui ont participé aux travaux du Conseil de l'Europe ne se sont cependant pas opposés à ce que la Conférence de La Haye entreprenne des travaux au sujet du «kidnapping légal». Bien au contraire, plusieurs de ces pays ont expressément encouragé la Conférence de La Haye à s'engager dans cette voie, en raison de la portée mondiale du problème, car les enlèvement par voie aérienne, à l'échelle intercontinentale, sont de plus en plus fréquents. Les travaux de la Conférence ne devraient donc en aucune façon empiéter sur ceux du Conseil de l'Europe, mais au contraire les travaux du Comité d'experts sur la garde des enfants pourraient amener la Conférence à explorer de nouvelles voies: un membre du Bureau Permanent suit ces travaux de très près, en qualité d'observateur.

Il faudrait peut-être rappeler ici que le Conseil de l'Europe a aussi préparé la Convention européenne sur le rapatriement des mineurs du 28 mai 1970, laquelle pourrait exercer une certaine influence sur les travaux de la Conférence au sujet des enlèvements d'enfants. Il semble cependant que cette Convention n'ait pas été approuvée par les membres du Conseil de l'Europe.
Nous devons signaler ici certains nouveaux développements dans les travaux d'autres organisations internationales, plus particulièrement deux d'entre elles; cependant, à l'heure actuelle, nous ignorons quel avenir est réservé à ces travaux.
En premier lieu, le Ministre de la Justice du Canada, au cours d'une réunion des Ministres de la Justice du Commonwealth, tenue à Winnipeg au Canada au mois d'août 1977, a fait un exposé sur le problème et a présenté certaines suggestions pour une action destinée à réduire le nombre toujours croissant d'enlèvements internationaux d'enfants par leurs parents[5]. On ne sait pas encore si le Secrétariat du Commonwealth entend prendre une initiative officielle à cet égard[6]. Il est intéressant de signaler à ce sujet que, tout récemment, un accord de coopération a été passé entre la Conférence de La Haye et le Secrétariat du Commonwealth à Londres pour procéder, dans des cas appropriés, à un échange d'informations portant sur des sujets d'un intérêt commun. Au cours de la réunion, les Ministres de la Justice ont, *inter alia*, recommandé que le Secrétariat général du Commonwealth examine, avec la Conférence de La Haye de droit international privé, la possibilité d'informer très complètement les Gouvernements du Commonwealth, qui ne sont pas Membres de la Conférence, sur les développements qui se produisent au sein de la Conférence[7].
La seconde initiative dont il faut brièvement faire mention est le mouvement qui se dessine, à l'occasion des discussions qui prennent place au sein de la Communauté Européenne, en faveur d'une révision éventuelle de la Convention de Bruxelles du 27 septembre 1968. Le Délégué belge du groupe de travail a proposé qu'un protocole soit ajouté à

[5] Voir *Report of the Scottish Law Commission*, 1976-1977 (*Scot. Law Com.* No 47), p. 14, note 6. Le Ministère de la Justice canadienne a fait parvenir au Bureau Permanent un exemplaire d'un mémoire basé sur le Rapport présenté à Winnipeg, sous le titre «L'enlèvement international d'un enfant par l'un de ses parents» (voir la note 2 ci-dessus).

[6] On lit dans le *Communiqué final de la réunion de Winnipeg*, paragraphe 36, au sujet de cette question (traduction): *Un problème spécial, d'une immense importance sociale, qui exige que des mesures concrètes soient rapidement prises, est celui de l'enlèvement par un parent d'un enfant dont l'autre parent a juridiquement la garde. Il fut convenu d'entreprendre au plus tôt l'étude d'une coopération plus étroite pour l'exécution des décisions relatives à la garde, en particulier parce que des poursuites pénales ne sont généralement pas appropriées dans un contexte familial. Ils* [les Ministres] *soulignèrent qu'ils se préoccupaient de l'intérêt de l'enfant et que le nombre de ces incidents déplorables pourrait être réduit si le Commonwealth parvenait à s'entendre sur un système.*

[7] *Id.*, paragraphe 34.

the specific problem of 'legal kidnapping'. As of the present time, it is not known what the future of that initiative will be.

2 *Bilateral arrangements between States*

Certain States which have within their Ministries of Justice a centralised and active office for international legal cooperation, such as France, have commenced to make bilateral arrangements to improve the handling of situations involving abducted or displaced minors, or violation of visitation rights, where this takes place on the international level. Thus, an agreement made on September 9, 1977 between the Ministers of Justice of France and the Province of Quebec, respectively, provides for improved cooperation where there are questions of custody or protection of children or violation or denial of visitation rights[8]. The Office of International Judicial Co-operation within the French Ministry of Justice is now involved in discussions with several States with a view to establishing similar cooperative arrangements for matters of custody and protection of children and visitation rights[9].

Other bilateral arrangements among certain States have been worked out in connection with the operation of the *Convention of 5 October 1961 on the Protection of Infants.* This Convention, which will be discussed in more detail subsequently in this Report, provides rules for jurisdiction of authorities in respect of measures of protection for minors residing in Contracting States and provides for recognition of such measures, but enforcement of decisions is left to the procedures of the recognising States. This means that the efficacy of the Convention of 5 October 1961 for cases involving abrupt removal of children depends very much on the degree of cooperation which exists between the legal authorities of the Contracting States involved in a particular situation of this type[10]. Handling of cases of 'legal kidnapping' may therefore be greatly improved by appropriate consultation between the authorities of Contracting States in regard to the procedures to be used. It should be noted, however, that the Convention itself opens up the possibility for measures of protection to be taken consecutively in different States, since it permits the State of nationality of the minor, after consultation with the authorities of the State of his habitual residence, to take measures which will 'replace' those taken by the latter State.

Since this Convention has been ratified by only eight countries, all on the continent of Europe, the effect of intensifying bilateral cooperation under the Convention would still be limited in its scope. The Permanent Bureau has, however, within the past year – in the case of the Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters – undertaken the experiment of holding a Special Commission meeting for the purpose of bringing administrators together to discuss the operation of an existing treaty. It was seen that this type of meeting could have a very positive effect on cooperation among authorities in the carrying out of a Hague Convention, and the possibility should not be ignored that such a Special Commission meeting to deal with the Convention of 5 October 1961 might serve to improve the effectiveness of cooperation between the authorities of Contracting States in the hand-

cette Convention, qui viserait le problème particulier du «kidnapping légal». Pour le moment, nous ne savons pas encore si cette initiative sera couronnée de succès.

2 *Arrangements bilatéraux entre Etats*

Certains Etats, ceux dont le Ministère de la Justice possède un service centralisé et actif chargé de l'entraide judiciaire internationale (notamment la France), ont pu conclure récemment des arrangements bilatéraux destinés à améliorer le règlement d'affaires concernant, soit l'enlèvement ou le déplacement de mineurs, soit la violation du droit de visite, lorsque l'acte incriminé s'est produit sur un plan international. C'est ainsi que le 9 septembre 1977, un accord a été conclu entre le Ministre de la Justice français et celui de la Province de Québec. Il prévoit une coopération plus étroite lorsque se posent des questions de garde ou de protection d'enfants, ou de refus du droit de visite[8]. Le Bureau d'entraide judiciaire internationale du Ministère français de la Justice a aussi engagé des pourparlers avec plusieurs Etats, en vue de conclure des accords similaires d'entraide en matière de garde, de protection d'enfants et de droit de visite[9].

D'autres arrangements bilatéraux ont été organisés entre certains Etats dans le cadre de la *Convention du 5 octobre 1961 sur la protection des mineurs.* Cette Convention, sur laquelle nous reviendrons en détail dans ce Rapport, règle la compétence des autorités et la loi applicable en matière de protection de mineurs qui résident dans un des Etats contractants et la reconnaissance des mesures de protection prises, mais l'exécution des décisions est réglée par le droit interne de l'Etat où elles sont demandées. Cela signifie que l'efficacité de la Convention du 5 octobre 1961, quand il s'agit de l'enlèvement soudain d'un enfant, dépend dans une large mesure du degré de coopération qui existe dans les Etats contractants entre les autorités compétentes dans les affaires de cette nature[10]. Le règlement des affaires de «kidnapping légal» peut, par conséquent, être grandement facilité par des consultations appropriées entre les autorités des Etats contractants, au sujet des mesures à prendre. Il faut d'ailleurs signaler que la Convention prévoit elle-même la possibilité que des mesures de protection soient prises successivement dans différents Etats, puisqu'elle permet à l'Etat dont le mineur est ressortissant, après avis préalable des autorités de l'Etat de sa résidence habituelle, de prendre des mesures pour «remplacer» celles que ce dernier Etat avait prises.

Comme cette Convention n'a été ratifiée que par huit pays – tous des Etats de l'Europe continentale –, une coopération bilatérale intensifiée dans le cadre de cette Convention ne pourrait avoir qu'une portée limitée. Cependant, au cours de l'année dernière, le Bureau Permanent – au sujet de la Convention du 15 novembre 1965 relative à la signification et la notification à l'étranger des actes judiciaires ou extrajudiciaires en matière civile ou commerciale – a tenté l'expérience de réunir une Commission spéciale, dans le but de mettre en présence de hauts fonctionnaires pour discuter de l'application d'un traité en vigueur. On constata qu'une réunion de ce genre pouvait avoir un effet très positif sur la coopération entre les autorités pour l'application d'une Convention de La Haye: il ne faut donc pas refuser de croire qu'une réunion d'une Commission spéciale portant sur la Convention du 5 octobre 1961 permettrait d'améliorer l'efficacité de l'entraide entre

[8] Agreement published in Chatin, *'Entraide judiciaire internationale en matière civile, commerciale et administrative', Recueil pratique de conventions,* Paris, Ministry of Justice, 2nd ed., 1978, pp. 1-11 inserted between pp. 128 and 129.
[9] Telephone communication from Mr L. Chatin on January 30, 1978.
[10] It should be noted that this Convention does not primarily lay down hard and fast legal rules but stresses the importance of cooperation between the various national authorities.

[8] Accord publié dans Chatin, «Entraide judiciaire internationale en matière civile, commerciale et administrative», *Recueil pratique de conventions,* Paris, Ministère de la Justice, 2ème éd., 1978, p. 1-11 inséré entre les pages 128 et 129.
[9] Communication téléphonique avec M. L. Chatin, le 30 janvier 1978.
[10] Il faut signaler que le but principal de cette Convention n'est pas d'établir des règles de droit strictes et étroites mais de souligner l'importance d'une coopération entre les diverses autorités nationales.

ling of cases involving minors, including those where the minor has been abruptly removed from one of the States or where visitation rights have been violated or denied on the international level.

3 *Work carried out within federal or other juridically non-unified States*

Several States which have a federal structure, or which are otherwise composed of territorial units having different systems of law in the area of child custody and visitation, have undertaken work to improve cooperation among their component territorial units.

Thus in the United States the National Conference of Commissioners on Uniform State Laws produced in 1968 the text of a uniform act, the Uniform Child Custody Jurisdiction Act[11]. The techniques used in that Act will be discussed in some more detail subsequently in this Report, but it should be said at this point that the effort undertaken was to center as nearly as possible the jurisdiction over custody of a minor in a single jurisdiction, requiring the courts of other States to decline the exercise of jurisdiction over questions of custody for such a child. The history of that Uniform Act demonstrates that one of the major problems leading to its preparation was abduction of children by one of their parents among the jurisdictions in order to obtain a new decision on custody in a jurisdiction which was expected to be more favourable to the abductor[12].
The Uniform Child Custody Jurisdiction Act has been to date one of the most rapidly successful Uniform Acts prepared by the National Conference of Commissioners; it has been adopted in less than ten years by 20 of the 50 States of the United States, which fact testifies to the pressing nature of the need which this uniform legislation was designed to meet.
A similar development within Canada resulted in the recommendation in 1974 by the Uniform Law Conference of Canada for enactment as a Uniform Act of the Extra-Provincial Custody Orders Enforcement Act[13], which has now been adopted in 8 of the 12 Provinces of Canada[14].
Finally, within the United Kingdom the Law Commission and the Scottish Law Commission have taken the problem of custody conflicts among their jurisdictions under study and have produced a report on the subject[15]; this study may now be extended to problems of international custody conflicts, but the timing of such study does not appear to have been clearly defined at this time[16].

4 *Possible action by the Conference*

The range of the analogous activities which have been undertaken or contemplated elsewhere shows both the need for solutions and the difficulties which may be encountered. This subject of 'legal kidnapping' is not one of the traditional rubrics of private international law, and its

[11] *Handbook of the National Conference of Commissioners on Uniform State Laws*, 1968, pp. 194-218 (includes prefatory note and article-by-article comments).

[12] See Brigitte M. Bodenheimer, 'Progress Under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody and Excessive Modification', *California Law Review*, Vol. 65, No 5 (Sept. 1977). Since Professor Bodenheimer's article was written, two more States have adopted this Act: Florida and Idaho (see 65 *Cal. L. Rev.* at 980, footnote 14, for the original 18 States and statutory references).

[13] Proceedings of the Fifty-Sixth Annual Meeting of the Uniform Law Conference of Canada held at Minaki, Ontario, August 19-23, 1974, pp. 29 and 108-115. See also Castel, *Canadian Conflict of Laws*, Vol. 2, 1977, pp. 232-234.

[14] Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland, Nova Scotia, Prince Edward Island, Saskatchewan.

[15] 'Custody of Children – Jurisdiction and Enforcement in the United Kingdom' (The Law Commission, *Working Paper No 68*; The Scottish Law Commission, *Memorandum No 23)*.

[16] See *Twelfth Annual Report of the Scottish Law Commission*, 1976-1977 (*Scot. Law Com. No 47*), Nos 59 and 60, p. 14.

les autorités des Etats contractants dans des affaires de mineurs, y compris celles dans lesquelles le mineur a été soudainement enlevé dans l'un des Etats membres, ou d'affaires dans lesquelles le droit de visite a été violé ou méconnu, sur un plan international.

3 *Travaux entrepris dans des Etats fédéraux ou composés d'unités non juridiquement unifiées*

Plusieurs Etats, qui ont une structure fédérale, ou qui sont composés d'unités territoriales régies par des systèmes juridiques différents en matière de garde des mineurs et de droit de visite, ont entrepris des travaux en vue de renforcer la coopération entre les unités territoriales qui les composent.
C'est ainsi qu'aux Etats-Unis, la *National Conference of Commissioners on Uniform State Laws* a établi en 1968 le texte d'une loi uniforme, le *Uniform Child Custody Jurisdiction Act*[11]. Nous examinerons plus loin de façon plus détaillée la technique que cette loi utilise, mais il faut d'ores et déjà dire que le but recherché est, dans la mesure du possible, de donner compétence à un seul Etat pour assurer la garde d'un mineur, en obligeant les tribunaux des autres Etats à décliner leur compétence à cet égard. Les travaux préparatoires de cette loi montrent qu'un des principaux problèmes qui se posait était celui de l'enlèvement d'un enfant par un de ses parents, perpétré dans le but d'obtenir dans un autre Etat une nouvelle décision en matière de garde, présumée plus favorable au ravisseur[12].

A l'heure actuelle, l'*Uniform Child Custody Jurisdiction Act* est une des lois établies par la *National Conference of Commissioners*, dont le succès a été le plus rapide: en moins de dix années, vingt des cinquante Etats des Etats-Unis l'ont adoptée: ce fait montre combien était pressant le besoin d'une législation uniforme que cette loi cherche à satisfaire.

Un mouvement similaire s'est produit au Canada, où l'*Uniform Law Conference* a recommandé en 1974 la promulgation d'une loi uniforme, l'*Extra-Provincial Custody Orders Enforcement Act*[13] que huit des douze Provinces du Canada ont déjà adopté[14].
Enfin, au Royaume-Uni, la *Law Commission* et la *Scottish Law Commission* ont étudié le problème des conflits en matière de garde qui naissent entre les deux unités territoriales, et ils ont rédigé un rapport sur la question[15]. Cette étude pourrait être étendue à des conflits internationaux, mais le calendrier des travaux ne semble pas encore avoir été établi avec précision[16].

4 *Action possible de la Conférence*

L'importance des travaux analogues qui ont été soit entrepris, soit envisagés ailleurs, montre à la fois combien le besoin de solutions se fait sentir et quelles difficultés peuvent être rencontrées. Le «kidnapping légal» n'est pas un sujet qui entre dans le domaine traditionnel du droit

[11] *Handbook of the National Conference of Commissioners on Uniform State Laws*, 1968, p. 194-218 (qui comprend des notes préliminaires et des commentaires article par article).

[12] Voir Brigitte M. Bodenheimer, «*Progress Under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody and Excessive Modification*» («Les progrès accomplis grâce à l'*Uniform Act*, et les problèmes qui restent à résoudre: les décisions pénales, la garde conjointe et les modifications excessives»), *California Law Review*, Vol. 65, No 5 (Sept. 1977). Après la parution de cet article, deux autres Etats ont adopté cet *Act*, la Floride et l'Idaho (voir dans *Cal. L. Rev.*, p. 980, note 14, la liste des 18 premiers Etats qui l'ont adopté et les références à leurs lois).

[13] Procès-verbaux de la Cinquante-sixième Assemblée annuelle de l'*Uniform Law Conference of Canada*, tenue à Minaki, Ontario, du 19 au 23 août 1974, p. 29 et 108-115. Voir aussi Castel, *Canadian Conflict of Laws*, Vol. 2, 1977, p. 232-234.

[14] Alberta, Colombie britannique, Manitoba, Nouveau-Brunswick, Nouvelle-Ecosse, Terre-Neuve, Ile du Prince-Edouard, Saskatchewan.

[15] «*Custody of Children – Jurisdiction and Enforcement in the United Kingdom*» (*The Law Commission Working Paper No 68; The Scottish Law Commission, Memorandum No 23)*.

[16] Voir le Douzième Rapport annuel de la *Scottish Law Commission*, 1976-1977 (*Scot. Law Com. No 47*), Nos 59 et 60, p. 14.

treatment in this Report will not therefore be carried out by means of a strictly classical analysis of rules for jurisdiction and choice of law. The author felt that it was necessary first to attack the sociological dimension and then to examine existing treaties on the subject, before undertaking what will be largely a bibliographical survey of conflicts rules. The emphasis, finally, will be on possible civil and administrative remedies for this very practical – but difficult to define – problem.

Special attention will be given to the relationship between custody and visitation rights. It is the author's opinion that very serious consideration should be given to this problem and that it may well be necessary to include special provisions on visitation rights in any convention which is to be prepared.
Penal remedies are discussed, but these are generally considered to be ineffective in the family context on the international level, and they would fall in any case outside the scope of private international law. They are not expected to take on an important role in the Conference's discussions.

The accompanying Questionnaire has been designed to elicit as much relevant information as possible, and the responses of the Governments of Member States will have a very important influence on the directions to be taken in further studies aimed at alleviating the problem of childnapping. Whatever unification of legal rules concerning jurisdiction and choice of law – or recognition of custody decisions – may be achieved, such rules may not be an effective rein upon the factual activity of kidnapping. It is felt that an essential element will lie in the creation of conditions favourable to cooperation between governmental authorities in this very delicate area of parental rights and children's welfare because the competent courts may be able to avoid decisions which may bring the non-custodial parent into a psychological state where he will revert to the *ultima ratio* of kidnapping.

international privé, et dans le présent Rapport nous ne l'étudierons donc pas au moyen d'une analyse stricte et classique des règles de compétence et du choix de la loi applicable. Le soussigné a jugé préférable de s'attaquer tout d'abord à la dimension sociologique de la question, puis d'étudier les traités qui sont en vigueur en ce domaine, avant d'entreprendre, sur les règles de conflit, un examen qui sera essentiellement bibliographique. Pour terminer, l'accent sera mis sur les solutions offertes par le droit civil et administratif pour résoudre ce problème de caractère très concret – mais difficile à définir.
Une attention toute particulière sera accordée aux rapports entre le droit de garde et le droit de visite. Le soussigné estime que ce problème mérite une étude approfondie et qu'il sera sans doute nécessaire d'introduire dans toute convention qui viendrait à être établie des dispositions spéciales au sujet du droit de visite.
Les mesures pénales seront aussi examinées, mais on estime en général qu'elles demeurent inefficaces au niveau international dans le contexte de la famille, et en tout état de cause qu'elles sortent du domaine du droit international privé. Il est peu probable qu'elles tiennent une place importante dans les travaux de la Conférence.
Le Questionnaire qui accompagne ce Rapport cherche à recueillir le plus grand nombre possible de renseignements utiles et les réponses des Etats membres auront une très grande influence sur la direction que prendront les futurs travaux destinés à atténuer le grave problème des enlèvements d'enfants. Même si on parvenait à unifier les règles de droit sur la compétence et le choix de la loi applicable – ou sur la reconnaissance des décisions en matière de garde –, ces règles pourraient ne pas constituer concrètement un obstacle assez sérieux pour mettre un frein aux agissements des ravisseurs. Il semble essentiel de créer les conditions favorables pour que s'établisse une coopération entre les autorités gouvernementales dans ce délicat domaine des droits des parents et de l'intérêt des enfants, car les tribunaux compétents pourraient alors éviter de prononcer des décisions qui mettent les parents qui n'ont pas la garde dans un état psychologique tel qu'en dernier ressort, ils ont recours à l'enlèvement.

II — SOCIOLOGICAL BACKGROUND OF THE PROBLEM

A *The increase in incidence of child abductions carried out by parents*

Although statistics are not readily available on the number and frequency of abductions of children by their parents, there seems to be general agreement by the commentators that a rapid increase in such occurrences has come about within recent years. Some of the underlying factors contributing to such an increase can be identified without an extended search. For example, the great improvements in international transportation and communications, designed precisely in order to facilitate more rapid and efficacious interchange of people on the international level, clearly will serve also to facilitate the operations of the child abductor; in practice, he or she may put thousands of miles of distance between the child and the parent left behind, in the matter of a few hours.
A second factor which on its face would appear to contribute to greater opportunity for international abduction of children has been the trend towards freer crossing of borders, fewer visa requirements and decreasing rigour of passport control. The trend within some regional areas, such as the European Common Market, where high value has been placed on the free circulation of people within the Market area, and where there has been a large influx of migrant labour from outside the Market area, has been to

II — LE CADRE SOCIOLOGIQUE DU PROBLÈME

A *L'accroissement du nombre d'enlèvements d'enfants par leurs parents*

Bien que des statistiques portant sur le nombre et la fréquence des enlèvements d'enfants par leurs parents soient difficiles à trouver, les commentateurs semblent d'accord pour affirmer que ces actes se sont rapidement multipliés depuis quelques années. Il n'est pas difficile de découvrir quelques-uns des facteurs qui contribuent à cet accroissement. Par exemple, l'amélioration très sensible des moyens internationaux de transport et de communication destinés précisément à faciliter à l'échelle internationale les échanges rapides et efficaces entre les personnes, facilite aussi de toute évidence les agissements des ravisseurs d'enfants. Dans la pratique, ceux-ci peuvent en quelques heures mettre des milliers de kilomètres entre l'enfant et le parent auquel il a été soustrait.
Un autre facteur qui à première vue ouvre de bonnes perspectives à l'enlèvement international des enfants est la tendance à simplifier le franchissement des frontières, à réduire les formalités de visa et à contrôler moins sévèrement les passeports. A l'intérieur de certaines zones régionales, notamment celle du Marché Commun européen, – où l'on attache une grande valeur à la libre circulation des personnes à l'intérieur de la zone dans laquelle l'afflux de travailleurs étrangers a été très fort – une tendance a eu

reduce drastically the rigour of control of international border crossings. Moreover, many are the bilateral agreements between far-away countries in which the visa requirements have been abolished. This trend has suffered a setback in the last few years at the hands of international terrorists whose abuse of the facility has forced a return to tighter controls of persons and passports, as well as from a reversal of the flow of migrant labour due to changes in economic conditions; but the long-term conditions would still appear to be dominated by the technological capability for rapid mass international transit and by the needs of industrial economies for international mobility of labour.

These two trends, towards improved transportation facilities and unimpeded crossing of borders, obviously provide greater opportunity for the parent abductor of a child. The Questionnaire which has been circulated by International Social Service to its branches, at the request of the Conference, includes questions directed towards the types of passports or travel documents utilised and the means of carrying out these abductions in the specific cases, and it is hoped that the responses to this Questionnaire will bring additional light on the extent to which the physical opportunity presented by modern transport developments contributes to the occurrence of an abduction.

The usual underlying condition for the carrying out of a child abduction by a parent on the international level is, of course, an 'international' family. Here once again the statistics available are not satisfying, but it seems apparent that for the same reasons as stated above the number of marriages between persons coming from different countries (and even from different continents) has increased in absolute and in relative terms.

Needless to say, an increase in the number of marriages having an international element will in time produce an increase in the number of broken families on the international level. Add to this the general trend in most countries towards more liberal granting and recognition[17] of divorces, which affects the purely domestic marriages as well, and one can see a probable proximate cause for the apparent increase in 'childnapping'.

Finally, as an important factor in the incidence of international abduction of children by parents, one must mention frustration: frustration on the part of the non-custodial parent when unjustifiably deprived of the right of visitation with the child, frustration with the slowness, expense and inefficacy of legal proceedings concerning custody of the child (which often contributes to the re-kidnapping of the kidnapped child self-help engendering self-help).

pour résultats de rendre beaucoup moins sévère le contrôle aux frontières des Etats. Au surplus, un grand nombre d'accords bilatéraux ont été conclus entre deux pays éloignés l'un de l'autre, qui abolissent la nécessité d'un visa d'entrée. Cette tendance a été battue en brèche ces dernières années par les activités des terroristes internationaux qui, en abusant de ces avantages, ont rendu nécessaire un contrôle plus rigoureux des personnes et des passeports, ainsi que par le reflux des travailleurs étrangers en raison de modifications dans la situation économique. Mais, à plus long terme, la situation semble toujours devoir rester dominée par la possibilité technique de voyages internationaux rapides et nombreux et par la nécessité pour les économies industrielles de disposer d'une main-d'oeuvre internationale mobile.

Ces deux tendances, l'une vers l'amélioration des moyens de transports et l'autre vers la suppression des formalités aux frontières, facilitent évidemment les desseins des parents qui envisagent d'enlever leur enfant. Dans le Questionnaire que le Service Social International a soumis à ses branches, à la demande de la Conférence, on trouve des questions sur le type de passeports et de documents de voyage qui sont utilisés et sur les moyens qui permettent d'exécuter des enlèvements dans certains cas déterminés. On espère que les réponses au Questionnaire montreront plus clairement dans quelle mesure les facilités matérielles offertes par l'amélioration récente des moyens de transport contribuent à accroître la fréquence des enlèvements.

Une des conditions essentielles pour qu'un parent procède à l'enlèvement international de son enfant est, bien entendu, l'existence d'une famille «internationale». Sur ce point encore les statistiques que l'on possède sont loin d'être satisfaisantes, mais il semble hors de doute que, pour les raisons que nous avons exposées plus haut, le nombre des mariages conclus entre des ressortissants de pays différents (et même venus de continents différents) s'est accru, en termes tant absolus que relatifs.

Il va sans dire que l'accroissement du nombre de mariages où intervient un élément international apportera à l'avenir, au plan international, un accroissement du nombre des familles désunies. Si on ajoute à cela une tendance générale, dans la plupart des pays, à accorder et à reconnaître plus facilement le divorce[17] – une tendance qui affecte aussi les mariages purement nationaux –, on peut voir là une cause immédiate probable de l'accroissement apparent du nombre des «rapts d'enfants».

Enfin, il faut considérer la frustration comme l'un des plus importants facteurs du grand nombre d'enlèvements d'enfants par leurs parents sur le plan international: la frustration qu'éprouve un parent qui n'a pas la garde, si le droit de visite lui est refusé sans motif valable, la frustration qui naît de la lenteur, du coût et de l'inefficacité des procédures judiciaires en matière de garde d'enfants (qui amène souvent un enlèvement en sens contraire de l'enfant: se faire justice à soi-même déclenche une mesure identique).

B *Typical elements of the situation which results in an abduction*

Let us attempt to construct here a model of the typical situation which produces the abduction of a child by one of his parents.

B *Les éléments typiques d'une situation qui conduit à un enlèvement*

Cherchons ici à construire le modèle d'une situation typique qui conduit à l'enlèvement d'un enfant par l'un de ses parents.

[17] *E.g.* the Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations. It should be mentioned that this Convention does not apply to orders relating to the custody of children (article 1, second paragraph).

[17] Par exemple, la Convention du premier juin 1970 sur la reconnaissance des divorces et des séparations de corps. Il faut signaler que cette Convention ne vise pas les décisions relatives à la garde des enfants (article premier, second paragraphe).

The first typical condition is an international family composed of two living adults and one or more children, where the marriage or other relationship between the adults either has already broken down or at least has deteriorated into a state of instability.
A second typical element is the existence of significant cultural differences between the adults who have constituted the family, this being frequently linked to different nationalities of the parties, at least before the inception of the marriage or other relationship.
Third, one parent is haunted by frustration or fear. In the case of a broken marriage or relationship, where custody has been settled on one of the former partners, exclusion of the non-custodial parent from access to the child may build frustration, and ultimately despair. The inability to continue to exercise some influence over the upbringing and development of the child, and to monitor the treatment and handling of the child by the other parent, may bring on such frustration in a conscientious parent – frustration which is but aggravated when the financial obligation to support the child is effective and is being honoured.

The fear which can lead a parent to become an abductor may arise from any one of a number of sources. This emotion triggers the abduction perhaps more often in cases where the situation has not been stabilised by a custody order, but where the abducting parent fears the loss of the child, by reason of possible prejudice of the local courts of the other partner's country, superior financial resources of the other partner which can be mustered in that country, or even fear of a sequestration and concealment of the child by the other parent.

The fourth element of the typical situation is opportunity: the occasion which makes an abduction possible. The scattered indications which are available to us at this time tend to show that periods of legally permitted visitation rank high on the list of occasions offering the opportunity for abduction. Attendance at school also offers the opportunity for a more or less feasible act of kidnapping. Cases of forcible abduction are known, though probably not frequent, and in some cases even hired thugs have been employed. It is hoped that the responses to be given by the ISS branches to the Questionnaire which has been submitted to them will cast some further light on the situations of daily life which offer tempting opportunity to the would-be abductor.

Fifth, the typical abductor must think that he has something to gain by his act of self-help. In practice this is the compliant law or legal authority. The law which gives an advantage, or even an irrefutable right, to one parent because of his or her sex, is an open invitation to the abductor, whether it be to gain the benefit of the favourable law by displacement of the child, or to avoid the prejudice of an unfavourable law. The practices of some courts in favouring their nationals or their residents in custody proceedings likewise lend the offer of tempting gain to the would-be abductor. Conflicting court decisions in different countries provide the abductor with even more firm support, since he has the cover of a judicial decision and compliance with law, once he has successfully cleared the border.

Sixth among the elements of a typical 'childnapping', as we shall set them out here, is an element which is at best half-typical. This arises from the observed fact that from time to time the attitude or response of the 'deprived parent' towards the abduction is ambiguous.

This is a grey area which defies clearcut legal standards. Was the parent who had custody of the child aware of a

La première condition typique est l'existence d'une famille internationale, composée de deux adultes en vie et d'un enfant (ou de plusieurs). Dans cette famille, le mariage (ou toute autre forme d'union) est déjà rompu, ou s'est si fortement détérioré qu'il est très instable.
Un deuxième élément typique est l'existence de différences profondes de culture entre les adultes qui composent la famille: elles sont fréquemment liées au fait que les partenaires étaient de nationalité différente, tout au moins avant le mariage ou l'union.
Troisièmement, un des parents ressent une frustration ou éprouve une crainte. Quand le mariage (ou l'union) a été rompu et la garde confiée à l'un des parents, si l'autre parent ne parvient pas à voir l'enfant, un sentiment de frustration peut s'emparer de lui pour finalement devenir un véritable désespoir. S'il ne peut plus exercer son influence pour décider comment l'enfant doit être élevé, s'il ne peut plus contrôler la manière dont l'enfant est traité par l'autre parent, un parent consciencieux éprouvera une frustration de cette nature – une frustration qui devient plus forte encore s'il remplit scrupuleusement son obligation alimentaire envers l'enfant.
La crainte qui peut conduire un parent à devenir un ravisseur peut plonger ses racines dans des sources très diverses. C'est la frustration qui pousse le plus souvent à commettre un enlèvement quand la situation n'a pas été stabilisée par une décision concernant la garde, et que le ravisseur craint de perdre l'enfant parce qu'il est persuadé que les tribunaux du pays dont l'autre parent est ressortissant se prononceront avec partialité contre lui; il peut aussi craindre que l'autre époux ne puisse disposer de ressources plus grandes dans son propre pays, ou il peut même avoir peur de voir cet autre époux séquestrer ou dissimuler l'enfant.
L'opportunité est le quatrième élément d'une situation typique: c'est l'occasion qui rend l'enlèvement possible. Les renseignements que nous avons pu recueillir, ici et là, tendent à montrer que c'est au cours de visites légalement autorisées que les occasions de procéder à un enlèvement se présentent le plus souvent. L'assistance de l'enfant à l'école offre aussi fréquemment de bonnes possibilités d'enlèvement. On signale quelques affaires d'enlèvements où on a eu recours à la force, et parfois même aux services d'hommes de main. Il faut espérer que les réponses qui seront données au Questionnaire que le Service Social International a soumis à ses branches jetteront quelque lumière sur des situations qui, dans la vie quotidienne, offrent des occasions tentantes au parent qui rumine un enlèvement.
Cinquièmement, le ravisseur typique doit s'imaginer que son acte lui sera profitable. Pratiquement, il pense que la loi ou les autorités judiciaires lui donneront raison. Une loi qui accorde la préférence (ou même un droit irréfragable) à l'un des parents en raison de son sexe, constitue pour le ravisseur une invitation ouverte, soit qu'il espère bénéficier de la loi favorable en déplaçant l'enfant, soit qu'il cherche à se soustraire aux dispositions défavorables d'une loi. Certains tribunaux ont tendance à favoriser leurs propres ressortissants, ou ceux qui résident dans le pays, dans les affaires de garde d'enfants, ce qui peut constituer un avantage alléchant pour un ravisseur en puissance. Si des décisions contradictoires ont été prononcées par les tribunaux de deux pays, le ravisseur, dès qu'il a réussi à franchir sans encombres la frontière, se trouve sur un terrain plus ferme encore – puisqu'il est couvert par une décision judiciaire et qu'il s'est conformé à la loi.
Au sixième rang des éléments typiques entrant dans un «enlèvement d'enfant» tels que nous les exposons ici, nous placerons un élément qui, au mieux, n'est qu'à moitié typique. Il s'agit de l'attitude ou de la réaction ambiguë au sujet de l'enlèvement que l'on constate parfois chez le parent «dépossédé».
Nous nous trouvons ici dans une zone de pénombre qui fait fi des normes juridiques habituelles. Le parent qui a la garde

deteriorating situation (either of that parent or of the child) in which the child's interests, temporarily at least, would be served by the summary intervention of the other parent? Did a subsequent improvement in the custodial parent's ability to cope, or social or family pressures, then drive the 'deprived' parent to protest the 'childnapping'?

Was the child entrusted for visitation to a father who had a previous record for absconding across borders with the child during visitation, without any effort at safeguards? Did the mother then use the 'kidnapping' as an excuse for pursuing with the intent to bring the child (and the father) back home?

This grey area offers a *pot-pourri* of ambiguous and mixed motives, such as those suggested by the questions above, which arise from the actual cases handled by international social workers. It should be pointed out that this ambivalence makes the definition of 'legal kidnapping', and therefore the collection of valid statistics thereon, extremely difficult, where the factor of intent on the part of the abductor or consent on the part of the deprived parent is taken into account. This is one of the reasons why the Permanent Bureau in the accompanying Questionnaire has eschewed reference to 'intent' or 'consent' of the parent, and instead has held to five types of factual situations expressed in as neutral terminology as seemed possible. Given, the word 'abducted' has emotive force, yet this term has been used only in the two out of five situations where the outrage to the deprived parent and the contempt of the courts is clearest, that is, where the child has been taken from the deprived parent in a country where that parent held custody under judicial order.

Before passing on to consideration of the effects of the abduction on the child, we should perhaps mention another element which may from time to time contribute to the decision of a non-custodial parent to abduct the child: encouragement or even pressure from the child. A child who has reached the age of discernment may have developed strong personal opinions about whether the custodial parent remains able to cope with the problems of family life, or whether the relationship with a new spouse of that parent is tolerable. This may result in a strongly expressed preference on the part of the child for an immediate change of custody, which then confronts the non-custodial parent with the prospect of a long, expensive and emotionally exhausting suit for change of custody. The non-custodial parent should of course resist such pressures, but some opinions from social workers in the field would indicate that pressures from the child may trigger the decision to abduct.

C *Effects of the abduction or removal on the child*

1 *General presumptions*

In the increasing volume of literature on this subject, which has primarily appeared in the law reviews, the presumption generally stated is that the true victim of the 'childnapping' is the child himself, who suffers from the sudden upsetting of his stability, the traumatic loss of contact with the parent who has been in charge of his upbringing, the uncertainty and frustration which come with the necessity to adapt to a strange language, unfamiliar cultural conditions and unknown teachers and relatives. An important modern trend in sociological thought support this presumption, since many sociologists and social workers lay increasing stress on the child's need for stability – some even suggesting that all custody orders should in principle be final and uncon-

de l'enfant s'est-il rendu compte que la situation se détériorait (sa propre situation ou celle de l'enfant) et que l'intérêt de l'enfant serait mieux servi – provisoirement tout au moins – par une intervention abrupte de l'autre parent? Plus tard une amélioration des possiblités pour le parent gardien de mieux accomplir ses obligations envers l'enfant (ou des pressions sociales ou familiales) a-t-elle amené le parent «dépossédé» à protester contre «l'enlèvement»?

L'enfant a-t-il été confié, pour une visite, à un père qui s'était déjà rendu coupable d'une soustraction de l'enfant à l'occasion d'une visite, sans prévoir des garanties? La mère a-t-elle pris prétexte du «rapt» pour engager des poursuites, afin d'obtenir que l'enfant (ainsi que le père) rentre à la maison?

Cette marge de pénombre offre un vaste éventail de motivations ambiguës et enchevêtrées, comme celles que suggèrent les questions posées ci-dessus, qui ont été tirées d'affaires réelles dont des travailleurs sociaux internationaux ont eu à s'occuper. Il faut souligner que, du fait même de cette ambiguïté, il est extrêmement difficile de donner une définition du «kidnapping légal» et, par conséquent, d'établir des statistiques valables à ce sujet, en tenant compte du facteur d'intention chez le ravisseur et de celui de consentement chez le parent dépossédé. C'est notamment pour cette raison que dans le Questionnaire qui accompagne ce Rapport, le Bureau Permanent a évité de parler de «l'intention» ou du «consentement» du parent, et qu'il a préféré s'en tenir à cinq types de situations de fait, énoncées dans un langage aussi neutre que possible. Bien entendu, le mot «enlèvement» dégage sa propre force émotive, mais ce terme n'a été employé que dans deux des cinq situations prévues, celles où l'affront fait au parent dépossédé et l'outrage à l'autorité du tribunal sont les plus évidents, c'est-à-dire les cas où l'enfant a été enlevé dans le pays où sa garde avait été confiée au parent dépossédé par une décision judiciaire.

Avant d'étudier les effets de l'enlèvement sur l'enfant lui-même, peut-être faudrait-il faire mention d'un autre élément qui, de temps à autre, peut pousser un parent à enlever l'enfant dont il n'a pas la garde: c'est l'encouragement qu'il a reçu de l'enfant lui-même ou la pression que celui-ci a exercée sur lui. Un enfant qui a atteint l'âge du discernement a pu s'être forgé des opinions personnelles très précises et se demander si le parent auquel il a été confié est encore capable de résoudre les problèmes de leur vie familiale, ou s'il estime tolérable la cohabitation avec le nouveau conjoint de ce parent. En pareil cas, l'enfant peut exprimer violemment son désir d'un changement immédiat de la garde, ce qui oblige le parent qui n'a pas la garde à envisager, pour l'obtenir, un procès long, coûteux et épuisant du point de vue affectif. Bien entendu, le parent qui n'a pas la garde devrait résister à des pressions de cette nature, mais, en ce domaine, l'opinion de travailleurs sociaux donne à croire que la pression exercée par l'enfant peut être le ressort qui déclenche la décision de l'enlever.

C *Effets d'un enlèvement ou d'une soustraction sur l'enfant*

1 *Présomptions générales*

Le poids de la littérature consacrée à cette question va sans cesse croissant, alors qu'autrefois, elle était surtout réservée aux revues juridiques. L'opinion qu'on y trouve le plus souvent exprimée est que la véritable victime d'un «enlèvement d'enfant» est l'enfant lui-même. C'est lui qui pâtit de perdre brusquement son équilibre, c'est lui qui subit le traumatisme d'être séparé du parent qu'il avait toujours vu à ses côtés, c'est lui qui ressent les incertitudes et les frustrations qui découlent de la nécessité de s'adapter à une langue étrangère, à des conditions culturelles qui ne lui sont pas familières, à de nouveaux professeurs et à une famille inconnue. Un grand nombre de sociologues – ainsi que de travailleurs sociaux – partagent ce point de vue, car ils

ditional and that the parent given custody should have discretion over whether or not to grant visitation to the non-custodial parent.[18]

It is not the prerogative of the author of this Report to determine the validity of these presumptions, nor to decide the rigourousness and the manner of application of legal norms which are needed for the purpose of protecting the stability of the child. It should only be noted here that some feedback from professionals in the field of international social work suggests the possibility that not all 'kidnapping' is bad for the child, that in some cases of deteriorating situations or ambivalent feelings on the part of the parent having custody or possession of the child the abduction may have a positive effect on the child, precisely by removing him from an unstable or uncertain environment. Whether these kidnappings may be viewed as being analogous with a husband's desertion of his wife, 'the poor man's divorce', or whether it simply relieves the custodial parent from having to admit publicly his inability to cope and the fact that the child will be better off, at least temporarily, with the other parent, the ultimate effects on the child's stability in some cases may be positive.

It appears that the majority of social reports prepared in such cases tend to show that the child is 'adjusting well' to his new environment. There is of course a natural suspicion of bias on the part of the social workers if they are citizens of the abductor's home country, speak his language and share his cultural and religious background; however, the incidence of such social reports should be observed and noted, as well as the fact that the tendency to report good adjustment apparently increases with the length of the time which the child has spent in the new environment.

2 *Relevant legal standards*

It may seem anomalous that a reference to legal standards has been brought into the section of this Report which deals with the sociological background of the problem. The anomaly may seem less pronounced when it is pointed out that the legal standard used in most of the countries of the Hague Conference for determination of the custody and care of a child is keyed to 'the best interests of the child'. On a worldwide scale, however, a large number of countries retain the more traditional legal standards for assignment of custody, which range from establishment of a presumption or an irrefutable right in favour of the parent of one sex or the other to systems where the legal dispute over custody centers around the 'fitness' or 'unfitness' of one of the parents, usually the mother, based on allegations of sexual conduct which may have little or nothing to do with the actual suitability of the parent to exercise the custody over and care of the child.

The legal standard 'the best interests of the child' is at first view of such vagueness that it seems to resemble more closely a sociological paradigm than a concrete juridical standard.[19] How can one put flesh on its bare bones without delving into the assumptions concerning the *ultimate* interests of a child which are derived from the moral framework of a particular culture? The word 'ultimate' gives rise to

[18] See, for example, Goldstein *et al., Beyond the Best Interests of the Child* (New York 1973), at p. 101 (para. 30.5).
[19] *Cf.* Council of Europe, *Legal Representation and Custody of Minors* (Proceedings of the Fourth Colloquy on European Law, University of Vienna, 5-7 March 1974), General Report by Professor Jacques Foyer, at pp. 81-82 (see *infra* Annex I, p. 52).

insistent de plus en plus souvent sur la nécessité pour l'enfant de trouver son équilibre – certains vont jusqu'à suggérer que toutes les décisions en matière de garde soient en principe sans recours et inconditionnelles, et que le parent auquel la garde a été confiée soit entièrement libre d'accorder ou de refuser un droit de visite à l'autre parent.[18]
Il n'appartient pas à l'auteur du présent Rapport de juger si ces affirmations sont fondées, ni de déterminer la sévérité des règles juridiques qui sont indispensables pour que l'équilibre de l'enfant soit assuré, ni de dire comment ces règles doivent être appliquées. Il suffit de signaler ici que l'expérience des professionnels du travail social au niveau international les a amenés à penser que les «rapts» ne sont pas tous contre l'intérêt de l'enfant et que, dans certains cas, quand la situation s'est détériorée, ou quand le parent qui a la garde ou la possession de l'enfant éprouve des sentiments ambigus, l'enlèvement peut avoir un effet positif sur l'enfant, justement parce qu'il le soustrait à un environnement instable ou incertain. Que ces rapts puissent être considérés comme analogues à l'abandon de sa femme par un mari (le «divorce des pauvres») ou tout simplement que cela évite au parent qui a la garde d'avoir à admettre publiquement qu'il est incapable d'élever l'enfant et que celui-ci aurait avantage – temporairement tout au moins – à être confié à l'autre parent, les effets sur l'équilibre mental de l'enfant pourraient finalement être positifs dans certains cas.
La majorité des rapports sociaux établis dans des affaires de ce genre semble indiquer que l'enfant «s'adapte bien» à son nouveau milieu. On peut bien entendu soupçonner de partialité les travailleurs sociaux qui sont du même pays que le ravisseur, qui parlent sa langue et qui ont la même culture et la même religion que lui; il faut néanmoins tenir compte du nombre de ces rapports sociaux, ainsi que du fait que plus le séjour de l'enfant se prolonge dans son nouvel environnement, plus les rapports ont tendance à faire état d'une bonne adaptation.

2 *Les normes juridiques*

Il peut sembler étrange que l'on fasse référence à des normes juridiques dans cette partie de notre Rapport qui porte sur l'aspect sociologique du problème. Cette anomalie paraîtra peut-être moins forte quand on aura signalé que, dans la plupart des pays de la Conférence de La Haye, le principe de droit qui régit la garde et la protection de l'enfant est de respecter «l'intérêt supérieur de l'enfant». Mais, à l'échelle mondiale, un grand nombre de pays ont conservé leurs règles juridiques traditonnelles pour décider à qui la garde doit être confiée. Ces règles vont d'une présomption (ou d'un droit irréfragable) en faveur du parent d'un sexe déterminé, jusqu'à des systèmes où le conflit juridique au sujet de la garde est tranché selon «l'aptitude» ou «l'inaptitude» de l'un des parents – généralement la mère; or cette qualité repose souvent sur des allégations au sujet de sa conduite sexuelle, qui n'ont rien, ou très peu, à voir avec son aptitude réelle à exercer le droit de garde et à protéger l'enfant.
La norme juridique reposant sur «l'intérêt supérieur de l'enfant» est, à première vue, d'une telle imprécision qu'elle ressemble davantage à un paradigme social qu'à une norme juridique concrète.[19] Comment étoffer cette notion pour décider quel est l'intérêt *final* de l'enfant sans faire des suppositions qui ne prennent leur source que dans le contexte moral d'une culture déterminée? En introduisant le

[18] Voir, par exemple, Goldstein *et al., Beyond the Best Interests of the Child* (New York 1973), p. 101 (paragraphe 30.5).
[19] *Cf.* Conseil de l'Europe, *Représentation légale et garde des mineurs* (Actes du Quatrième colloque du droit européen, Université de Vienne, 5 au 7 mars 1974), Rapport de synthèse du professeur Jacques Foyer, p. 70 à 73 (voir *infra* Annexe I, p. 52).

immediate problems when it is inserted into the equation since the general statement of the standard does not make it clear whether the 'interests' of the child to be served are those of the immediate aftermath of the decision, of the adolescence of the child, of young adulthood, maturity, senescence or old age.[20] The 'indeterminate' nature of the standard is apparent.

One might draw an analogy here with that elusive modern concept which has gained some headway in recent years as an approach to the solution of conflict-of-laws questions: the reference to the law having the 'most significant relationship'[21] or 'the closest connection' with the occurrence, instrument or issue. Unless a legislative effort is made to set out the specific elements for establishing this standard in particular cases, one ultimately falls back on more nebulous methods of fleshing out the bones, such as 'choice-influencing considerations'[22] or 'principles of preference'.[23] Not too much has been done in the way of serious research into the 'choice-influencing considerations' that should go into the determination of 'the best interests of the child'. One illustrative effort was carried out within the Family Law Section of the American Bar Association and the results, 'Report of the Custody Committee 1975/76', were published in the ABA's *Family Law Newsletter*.[24] This short Report, which will serve to demonstrate the broad confusion of the concept of the 'best interests and welfare of the child', even within a single State, is attached hereto as an annex, since it may not be otherwise generally available to the readers hereof.

How therefore does the abduction of a child by one of its parents fit in into the overall picture of the 'best interests of the child'? Is the kidnapping of the child by the parent such a presumptive infringement of the best interests of the child that the child should be returned immediately to the country from which he was kidnapped without even a preliminary enquiry into his best interests? Should a court faced with a custody application by the kidnapper have the power to decline to hear the case, on the grounds of the kidnapper's grievous fault? These questions will arise again in Part VII of this Report, where we shall discuss possible correctives for the increasing incidence of international child abduction.

3 *The influence of lapse of time*

Whatever else may be said about the effect on a child of abduction by one of its parents, it seems clear that the length of time which elapses between the abduction and the ultimate resolution of the custody dispute has a strong influence on the nature and the persistence of the effects on the child. Time is an important factor in the adjustment of the child to his new situation, and information from social welfare agencies tends to indicate that the delay of the courts in reaching decisions on custody after a kidnapping

[20] See Mnookin and Coons, 'Towards a Theory of Children's Rights', *Harvard Law Bulletin*, Vol. 28, No 3 (Spring 1977), at p. 18; see also, Mnookin, 'Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy', *Law and Contemporary Problems*, Vol. 39, p. 226 (Summer 1975) and '*Was stimmt nicht mit dem formellen 'Kindeswohl'*', *FamRZ* 1975, p. 1, cited in Glendon, *State, Law and Family* (1977), Ch. 6, footnote 134.

[21] *E.g. Restatement, Second, Conflict of Laws* (1971), Sections 6 and 145; the provision on jurisdiction over the custody of a person (Section 79) is more concrete.

[22] Leflar, *American Conflicts Law* (1968), Ch. 11: 'Choice-Influencing Considerations', pp. 233-265.

[23] Cavers, 'Contemporary Conflicts Law in American Perspective', *Rec. des Cours*, 1970, Vol. III, pp. 143-146 and 151-162.

[24] Vol. 17, No 2, pp. 30-31 (Winter 1977) (see *infra* Annex II, p. 56).

mot «final» dans l'équation, on fait aussitôt naître de sérieux problèmes, puisque l'énoncé général de la norme ne permet pas de savoir clairement si «l'intérêt» de l'enfant qu'il faut protéger est celui qui suit immédiatement la décision, ou celui de son adolescence, de son existence de jeune adulte, de son âge mûr, ou de sa vieillesse.[20] Le caractère «indéterminé» de la norme est apparent.

On pourrait trouver ici une analogie avec un concept moderne assez vague qui a gagné du terrain ces dernières années, celui qui se réfère, pour tenter de résoudre des questions de conflits de lois, à la loi qui a «le rapport le plus significatif» (*the most significant relationship*)[21] ou «le lien le plus étroit» (*the closest connection*) avec l'événement, l'instrument ou la question en litige. Si les législateurs ne font pas d'efforts pour énoncer les éléments spécifiques qui permettent d'appliquer cette norme dans des cas particuliers, nous devrons en définitive en revenir à des méthodes plus nébuleuses pour étoffer la notion, telles que «des considérations qui pèsent sur le choix» (*choice-influencing considerations*)[22] ou «les principes de préférence» (*principles of preference*).[23] On n'a pas fait grand-chose, dans le domaine de la recherche, pour étudier sérieusement les «considérations qui pèsent sur le choix» et qui permettent de dire quel est «l'intérêt supérieur de l'enfant». La Section du droit de la famille de l'*American Bar Association* a cependant fait une étude instructive, dont les conclusions, sous le titre de «Rapport du Comité sur le droit de garde 1975/76» ont été publiées dans la *Family Law Newsletter* de l'ABA.[24] Ce bref document permet de se rendre compte combien est confuse la notion de «l'intérêt supérieur de l'enfant» à l'intérieur même d'un seul Etat: nous l'annexons à ce Rapport, car nos lecteurs pourraient avoir du mal à se le procurer.

Dans ces conditions, quelle place faut-il assigner à l'enlèvement d'un enfant par l'un de ses parents dans la notion générale de «l'intérêt supérieur de l'enfant»? Faut-il présumer que le rapt d'un enfant par son parent constitue une violation si fondamentale de l'intérêt de l'enfant que celui-ci doit immédiatement être ramené dans le pays où il a été enlevé, sans même procéder à une enquête préalable pour déterminer où se trouve son intérêt supérieur? Un tribunal, saisi par le ravisseur d'une demande de garde, doit-il pouvoir déclarer l'action irrecevable pour le motif que le ravisseur s'est rendu coupable d'une faute grave? Nous retrouverons ces questions dans la Septième partie de ce Rapport, qui étudie les moyens susceptibles de combattre l'accroissement du nombre des enlèvements internationaux d'enfants.

3 *L'influence du temps qui s'écoule*

Quoi que l'on puisse dire d'autre de l'effet sur un enfant de son enlèvement, il semble évident que la longueur du temps qui s'écoule entre l'enlèvement et la conclusion définitive du conflit sur la garde a une profonde influence sur la nature et la persistance de cet effet. Pour que l'enfant s'adapte à sa nouvelle situation, le temps constitue un facteur important et les renseignments fournis par les institutions sociales de protection des mineurs montrent que le délai qui s'écoule avant que le tribunal se soit prononcé sur la garde, après un

[20] Voir Mnookin and Coons, «*Towards a Theory of Children's Rights*», *Harvard Law Bulletin*, Vol. 28, No 3 (Printemps 1977), p. 18; voir aussi Mnookin, «*Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*», *Law and Contemporary Problems*, Vol. 39, p. 226 (Eté 1975) et «*Was stimmt nicht mit dem formellen Kindeswohl*», *FamRZ* 1975, p. 1, cité dans Glendon, *State, Law and Family* (1977), Ch. 6, note 134.

[21] Par exemple, *Restatement, Second, Conflict of Laws* (1971), Sections 6 et 145: la disposition relative au for en matière de garde (Section 79) est plus concrète.

[22] Leflar, *American Conflicts Law* (1968), Ch. 11: «*Choice-Influencing Considerations*», p. 233-265.

[23] Cavers, «*Contemporary Conflicts Law in American Perspective*», *Rec. des Cours*, 1970, Vol. III, p. 143-146 et 151-162.

[24] Vol. 17, No 2, p. 30-31 (Hiver 1977) (voir *infra* Annexe II, p. 56).

becomes in itself a significant influence on the results of the litigation, since the court may find it more difficult to send back a child who has been forced to adjust to his new situation for a period of six months or more than to order the return of a child who has freshly arrived in its territory.

4 *The importance of the age of the child*

Clearly the child's age is of great importance in determining the effects which an abduction may bring on. Legislation in a number of countries sets a minimum age, typically 14 years, after which the custody determination as between parents may be taken only after the child has been, to the extent possible, heard by the judge. See for example the Netherlands Civil Code, article 167. Some jurisdictions go even further and give the child of 14 years or older the right to choose which parent shall be his conservator, subject to the approval of the court. See for example the Texas Family Code, Section 14.07. The general trend is towards greater emphasis on the child's consent.[25]

The ages which have been fixed by the legislators to permit or require an input from the child into his custody determination would seem on their face to have only limited correlation with the stages of the child's development affecting his susceptibility to abduction by a parent and the effect of that abduction and its aftermath upon him. The actual cases which have come to the attention of the Permanent Bureau have not involved a child above the age of 13 years, so the fact that the most common age for providing an input by the child is 14 years would not seem to have an impact.

Child psychologists and psychiatrists have endeavoured to identify stages of a typical child's development, particularly by reference to the evolution of relationships between the child and each of his respective parents and by reference to the nature and quality of the child's cognitive learning faculties, psychomotor development and psychological evolution.[26] It is beyond the scope of this document to attempt the identification or description of such stages, much less to endeavour to correlate them with susceptibility of the child to abduction by a parent. This would be a difficult and hazardous task even within the confines of one culture and, in the framework of multinational families, the intricacies become insurmountable.

Perhaps all that one can venture to say is that the older the child, the more he will be able to resist the abduction, but the less rapid will be his adaptation to the new language, culture and relationships if the abduction is successful.

The age at which the child commences compulsory or customary education must also have a significant impact, since from that time will date the formal process of formation of the child into a working unit of the broader culture which holds sway in the country of his residence.[27]

5 *Impact on the child of the foreign culture to which he is removed*

What can be said of this very important aspect of the child's adaptation following abduction? The simple possession of the nationality of his new place of residence is not sufficient.

[25] General Report, *op.cit.*, (footnote 19) at p. 79.
[26] See, in general, Pierre Boige *et al.*, *L'Enfant* (Encyclopoche Larousse 1976); Skard, 'Development in parent-child relationships', in *Assignment Children: Parent-Child Relationships in Different Cultures* (UNICEF, June 1969).
[27] For a broad, recent study, see Larson, 'Compulsory Education: National School Systems and the Pre-School Years: A Comparative Analysis', in *International Child Welfare Review* (No 33 – June 1977), at pp. 33-77.

enlèvement, pèse lourdement sur le résultat du litige, car les tribunaux trouveront plus difficile de rendre un enfant qui a eu six mois pour s'adapter de gré ou de force à sa nouvelle situation, que d'ordonner la restitution d'un enfant qui vient seulement d'être conduit dans le ressort du tribunal.

4 *L'importance de l'âge de l'enfant*

Il est évident que l'âge de l'enfant joue un rôle important pour déterminer quels effets l'enlèvement peut avoir. Dans un certain nombre de pays, la loi fixe un âge minimum, en général 14 ans, après lequel le juge ne peut prononcer sa décision sur la garde qu'après avoir dans la mesure du possible entendu l'enfant. C'est notamment le cas de l'article 167 du Code civil néerlandais. Certaines lois vont plus loin et donnent à l'enfant âgé de 14 ans, ou davantage, le droit de choisir lui-même le parent auquel il sera confié, sous réserve de l'accord du tribunal. On trouvera un exemple de cette règle dans le Code de la famille de l'Etat du Texas, article 14.07. La tendance générale est de mettre l'accent sur le consentement de l'enfant.[25]

Les âges fixés par les législateurs pour que l'enfant puisse ou soit tenu de contribuer à décider de la garde ne semblent avoir, à première vue, qu'un rapport lointain avec les étapes du développement de l'enfant qui affectent la possibilité d'un enlèvement et de ses suites sur lui. Aucune des affaires que le Bureau Permanent a eu l'occasion d'étudier ne concernait un enfant âgé de plus de 13 ans, de sorte que l'âge auquel l'enfant doit généralement être consulté, c'est-à-dire 14 ans, ne semble pas avoir une grande importance.

Les spécialistes de la psychologie et de la psychiatrie de l'enfance se sont efforcés de découvrir les étapes typiques du développement d'un enfant, eu égard en particulier à l'évolution de ses relations avec chacun de ses parents, et eu égard à la nature et à la qualité des facultés de l'enfant dans le domaine des connaissances, du développement psychomoteur et de l'évolution psychologique.[26] Il n'est pas possible, dans ce bref Rapport, de chercher à identifier et à décrire ces étapes, encore moins de tenter d'étudier quel rapport elles ont avec la possibilité pour un parent d'enlever son enfant. Ce serait déjà une tâche difficile et aléatoire dans le cadre d'une seule culture; aussi, quand il s'agit de familles multinationales, les complications deviennent-elles insurmontables.

Tout ce que l'on peut se risquer à dire, c'est que plus l'enfant est âgé, plus il sera en mesure de résister à l'enlèvement, mais aussi moins rapide sera son adaptation à la nouvelle langue, à la nouvelle culture et à son nouvel entourage, si l'enlèvement a été couronné de succès.

L'âge scolaire obligatoire ou habituel, doit aussi jouer un rôle important, car c'est de lui que date le processus de formation qui fait de l'enfant un élément effectif de la culture qui imprègne son pays de résidence.[27]

5 *L'impact sur l'enfant de la culture étrangère à laquelle il est soumis*

Que peut-on dire de cet aspect très important de l'adaptation de l'enfant après son enlèvement? Le seul fait qu'il soit ressortissant du pays de sa nouvelle résidence n'est pas

[25] Rapport de synthèse, *op.cit.*, (note 19), p. 79.
[26] Voir, en général, Pierre Boige *et al.*, *L'Enfant* (Encyclopoche Larousse 1976); Skard, «*Development in parent-child relationships*» dans *Assignment Children: Parent-Child Relationships in Different Cultures* (UNICEF, juin 1969).
[27] Pour une étude récente et sérieuse, voir Larson, «*Compulsory Education: National School Systems and the Pre-School Years: A Comparative Analysis*», dans *International Child Welfare Review* (No 33, juin 1977), p. 33-77.

If he does not speak the language – fluently – he may feel lost, or even rejected. If he has not had the religious training of the dominant group in the culture, he may feel shut out from its inner mysteries. The effect of an extended period of isolation, as we have seen from a number of recent 'terrorist' kidnappings, may be very severe.

To the contrary, if a boy is removed from a Western industrial society to a more traditional culture, he may feel like the 'man-child in the Promised Land'. But what if this is a female child, removed from an industrial society with important strivings for full equality between the sexes to a culture where the value of a female human being remains severely discounted? And what will be the warmth of acceptance of the child, as is often the case, bears the mixed physical traits of two very divergent groups?

If the new society is at first unreceptive or even hostile to the abducted child, where will his 'best interests' lie? Should he be required to absorb the strain of adaptation under such circumstance, in the hope that full acceptance and adaptation will ultimately be attained, the child thereby having two cultures and languages instead of one, or should priority be given to protecting the child from the struggles and possible scars which will result from the effort to adapt?

Obviously, the extent of the child's previous familiarity with the culture and the language of the place to which he is removed must affect the conclusions to be reached concerning the possibility of adapting successfully and any deleterious effects of the change. This is not to say that the possible traumatic effect of the kidnapping itself should be ignored, nor that subsequent protracted legal battles and the uncertainty attendant upon them, including even the fear of a possible re-kidnapping, may not take their special toll. It is simply to say that the extent of such special damage incurred by the child may well depend on the degree of prior familiarity which he has with the language and culture dominant in the place of his destination.

III — THE EXISTING LEGAL CONTEXT — INTERNATIONAL TREATIES

A *Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of infants*

This Convention was prepared at the Ninth Session of the Conference for the purpose of replacing the Convention of 12 June 1902 governing the guardianship (*Tutelle*) of infants. The 1961 Convention entered into force on 4 February 1969 and now has seven Contracting States, all Members of the Conference (Austria, France, Germany, Luxemburg, Netherlands, Portugal, Switzerland). The 1902 Convention will be discussed under Part III (B) below.

As noted in the Introduction to this Report, the 1961 Convention was the first leg in the programme which the Conference decided upon at its Eighth Session (1956) to revise the old family law Conventions, a programme which has continued on through the Thirteenth Session with preparation there of the Conventions of 14 March 1978 on Celebration and Recognition of the Validity of Marriages and on the Law Applicable to Matrimonial Property Regimes.

The reasons for the priority given to the revision of the Convention on guardianship of infants was clear. Not only has the principle of nationality employed for the connecting factor in the old Convention shown itself to have serious disadvantages in the turbulent demographic conditions of the twentieth century (as has been the case with all of the old

suffisant. S'il n'en parle pas – couramment – la langue, il pourrait s'y sentir perdu, ou même rejeté. Si l'instruction religieuse qu'il a reçue n'est pas celle du groupe culturel dominant, il pourrait se croire exclu de mystérieux secrets. Les effets d'une longue période d'isolement peuvent être très sévères, comme l'ont montré plusieurs rapts «terroristes» récents.

Par contre, si un garçon a été enlevé d'une société occidentale industrielle pour être conduit dans un pays de culture plus traditionnelle, il peut avoir le sentiment d'être «le mâle de la Terre Promise». Mais que se passera-t-il s'il s'agit d'une fillette, soustraite d'une société industrielle où la pleine égalité entre les sexes est ardemment recherchée, pour être plongée dans une culture où la valeur de la femme est fortement contestée? Et quelle sera la chaleur de l'accueil réservé à l'enfant, si, comme c'est souvent le cas, les traits de son visage montrent que deux groupes ethniques très différents se mêlent en lui?

Si au début la nouvelle société ne se montre pas accueillante envers l'enfant, si elle lui est même hostile, quel sera en pareil cas «l'intérêt supérieur» de l'enfant? Doit-on lui demander de supporter les contraintes de l'adaptation, dans l'espoir que celle-ci pourra finalement être réalisée et l'enfant accepté – pour appartenir désormais à deux cultures et parler deux langues – ou faut-il, par priorité, s'efforcer d'éviter à l'enfant les luttes – et peut-être les cicatrices – qui seront le résultat des efforts d'adaptation?

Il est évident que si l'enfant connaissait déjà la culture et la langue du pays où on l'a conduit, les conclusions auxquelles on aboutit sur ses possibilités de bien s'adapter au changement sans trop ressentir d'effets nocifs doivent tenir compte de ce fait. Ce qui ne signifie pas qu'il faille fermer les yeux sur la possibilité d'un traumatisme dû à l'enlèvement lui-même, ni que les interminables batailles judiciaires et les incertitudes qui s'y rattachent (sans compter la crainte d'un rapt éventuel pour reprendre l'enfant) ne pèsent pas d'un poids très lourd. Nous voulons simplement dire que l'étendue du dommage particulier qui menace l'enfant peut fort bien dépendre du degré de sa familiarité antérieure avec la langue et la culture dominantes de son lieu de destination.

III — LE CONTEXTE JURIDIQUE ACTUEL — LES TRAITÉS INTERNATIONAUX

A *La Convention concernant la compétence des autorités et la loi applicable en matière de protection des mineurs, conclue le 5 octobre 1961*

Cette Convention de 1961, préparée au cours de la Neuvième session de la Conférence, était destinée à remplacer la Convention du 12 juin 1902 pour régler la tutelle des mineurs. La Convention de 1961 est entrée en vigueur le 4 février 1969, et elle compte aujourd'hui sept Etats contractants, qui sont tous des Membres de la Conférence (Allemagne, Autriche, France, Luxembourg, Pays-Bas, Portugal, Suisse). La Convention de 1902 sera étudiée plus loin dans la partie III (B).

Nous l'avons signalé dans l'Introduction du présent Rapport, la Convention de 1961 n'était que la première étape du programme que la Conférence avait adopté à sa Huitième session (1956) pour réviser les Conventions sur le droit de la famille plus anciennes. Ce programme fut suivi jusqu'à la Treizième session, lors de laquelle furent préparées deux Conventions, celle du 14 mars 1978 sur la célébration et la reconnaissance de la validité des mariages et celle sur la loi applicable aux régimes matrimoniaux.

Les raisons qui avaient fait donner la priorité à la révision de la Convention sur la tutelle des mineurs sont claires. D'une part, le principe de la nationalité que l'ancienne Convention retenait comme facteur de rattachement a montré qu'il présentait de sérieux inconvénients dans les conditions démographiques troublées du vingtième siècle (ce qui est

Hague Conventions in the field of family law); the concept of *tutelle* itself, which had from the beginning been recognised to encompass a number of very diverse institutions for administration of both the property and the person of minors,[28] had also been shown in particular to leave very serious gaps of coverage where modern institutions for care and control of the person of the minor were involved. The decision handed down in 1958 by the International Court of Justice in the case concerning the application of the Convention of 1902 governing the guardianship of infants (*Netherlands* v. *Sweden*)[29] had indicated that a certain category of legal provisions for protection of children, where the normal guardianship might be suspended or set aside in order to assure the education or the personal welfare of the minor through intervention of governmental authorities, were not included within that Convention.
Also parental authority over the care and control of the child which was granted by law, without the necessity for a court order within the jurisdiction where the legal provisions were in force, fell without the Convention.[30]
Extensive preparatory work was done in order to produce the Convention of 1961 by the Permanent Bureau of the Conference, by governmental experts and by staff members of International Social Service, a non-governmental organisation concerned with protection of children on the international level. The result was a compromise, of the general type which now may be viewed as 'classic', between the principle of nationality and the competing modern concept of the habitual residence of the child.

This Treaty, which was the last of the Hague Conventions to be prepared solely in the French language,[31] set up within its structure however the possibility of two successive proceedings on the merits concerning the custody of a minor. Articles 1 and 2 give the authorities of the State of habitual residence of a minor jurisdiction to take measures of protection for him, applying their own law. Article 4 however provides that the authorities of the State of nationality of the minor may, if they consider that the interests of the minor so require, after having informed the authorities of the State of the habitual residence, take under their own internal laws measures for the protection of his person or property, and that these measures replace measures which may possibly have been taken by the authorities of the State of his habitual residence. Article 7 of the Convention, though it requires recognition of the measures taken by the authorities of a State in accordance with article 4, does not go so far as to govern their enforcement in the other States. Moreover article 8, which permits the authorities of the State of the infant's habitual residence to take measures of protection 'in so far as the infant is threatened by a serious danger to his person . . .', does not expressly require such measures to be provisional in nature.[32] Since the State of the infant's nationality is not bound to recognize these measures, successive decisions by the authorities of the two States may then co-exist.

The particular problem of abduction of a child for the purpose of removing him to a territory where the abductor

d'ailleurs le cas de toutes les Conventions de La Haye dans le domaine du droit de la famille). D'autre part, la notion de tutelle elle-même, qui, on l'avait constaté dès le début, portait sur des institutions très différentes en matière d'administration des biens du mineur et de protection de sa personne,[28] avait aussi montré qu'elle présentait de très sérieuses lacunes, notamment en ce qui concerne les institutions modernes chargées de la protection des mineurs. La décision prononcée en 1958 par la Cour internationale de Justice, dans une affaire portant sur l'application de la Convention sur la tutelle (*Pays-Bas* v. *Suède*),[29] a montré que la Convention ne contenait pas de dispositions relatives à certaines règles de droit sur la protection des mineurs lorsque la tutelle normale a été suspendue ou retirée, afin d'assurer l'éducation ou le bien-être du mineur par l'intervention des autorités officielles.

De plus, quand la loi accordait la tutelle sans qu'il fût nécessaire d'obtenir une décision judiciaire dans le pays où ses dispositions étaient en vigueur, la tutelle n'était pas visée par la Convention.[30]
Le Bureau Permanent de la Conférence accomplit un travail considérable pour établir la Convention de 1961. Il en fut de même des experts gouvernementaux et des membres du personnel du Service Social International – une organisation non gouvernementale qui s'occupe de la protection des mineurs à l'échelle internationale. Ces efforts ont abouti à un compromis, du genre que l'on peut désormais considérer comme «classique», entre deux principes opposés, celui de la nationalité et celui, plus moderne, de la résidence habituelle du mineur,
La Convention, qui est la dernière des Conventions de La Haye uniquement rédigée en langue française,[31] admet néanmoins, dans sa structure, la possibilité de prendre des mesures successives pour assurer la protection d'un mineur. Les articles 1 et 2 donnent compétence aux autorités, tant judiciaires qu'administratives, de l'Etat de la résidence habituelle d'un mineur pour prendre les mesures tendant à la protection de sa personne ou de ses biens prévues par leur loi interne. Cependant, l'article 4 prévoit que si les autorités de l'Etat dont le mineur est ressortissant considèrent que l'intérêt du mineur l'exige, elles peuvent, après avoir avisé les autorités de l'Etat de sa résidence habituelle, prendre selon leur propre loi interne des mesures tendant à la protection de sa personne ou de ses biens. Ces mesures remplacent les mesures éventuellement prises par les autorités de l'Etat où le mineur a sa résidence habituelle. L'article 7 de la Convention, tout en déclarant que les mesures prises par les autorités d'un Etat en vertu de l'article 4 sont reconnues dans tous les Etats contractants, ne va pas jusqu'à régir leur exécution dans les autres Etats. Au surplus, l'article 8, en vertu duquel les autorités de l'Etat de la résidence habituelle peuvent prendre des mesures de protection «pour autant que le mineur est menacé d'un danger sérieux dans sa personne . . .», n'exige pas expressément que ces mesures aient un caractère provisoire.[32]
Comme l'Etat dont le mineur est ressortissant n'est pas tenu de reconnaître ces mesures, des mesures successives prises par les autorités de deux Etats peuvent donc être simultanément en vigueur.
Le problème particulier de l'enlèvement d'un enfant dans le but de le conduire sur un territoire où le ravisseur peut

[28] See, for example, Simon, *La tutelle des mineurs selon la Convention de La Haye du 12 juin 1902* (Lausanne, 1919), p. 9 *et seq.*
[29] *ICJ Reports*, 1958, p. 55.
[30] Simon, *op.cit.*, p. 22, citing Meili and Mamelok, *Das Internationale Privat- und Zivilprozessrecht auf Grund der Haager Konventionen* (1911), p. 274 *et seq.*
[31] An agreed English translation of the Convention has been published in *The American Journal of Comparative Law*, 1960, at pp. 708-711 and in *The International and Comparative Law Quarterly*, 1961, at pp. 53-63.
[32] See Karaquillo, *Etude de quelques manifestations des lois d'application immédiate dans la jurisprudence française de d.i.p.* (Limoges 1977), p. 90, No 225.

[28] Voir, par exemple, Simon, *La tutelle des mineurs selon la Convention de La Haye du 12 juin 1902* (Lausanne, 1919), p. 9 et s.
[29] *Recueil des décisions de la C.I.J.* 1958, p. 55.
[30] Simon, *op.cit.*, p. 22, qui cite Meili et Mamelok. *Das Internationale Privat- und Zivilprozessrecht auf Grund der Haager Konventionen* (1911), p. 274 et s.
[31] Une traduction agréée en langue anglaise a été publiée dans *The American Journal of Comparative Law*, 1960, p. 708-711 et dans *The International and Comparative Law Quarterly*, 1961, p. 53-63.
[32] Voir Karaquillo, *Étude de quelques manifestations des lois d'application immédiate dans la jurisprudence française de d.i.p.* (Limoges 1977), p. 90, No 225.

might obtain a favourable custody decision was contemplated by the drafters of the 1961 Convention, but was not expressly dealt with by them. Article 5 of the Convention provides for the mobile conflict resulting from the transfer of the child's habitual residence from one territory to another, maintaining the measures taken in the former State of habitual residence in force until new measures are taken by the authorities of the State of the new residence 'after previous notice' to the authorities of the State of the former habitual residence. Where the infant was under protection of the authorities of the State of his nationality at the time of the change of residence, measures taken by the national authorities according to their domestic laws remain in force in the State of the new habitual residence.

The Preliminary Draft of the Special Commission had contained a specific article (article 6) providing that a transfer of the habitual residence of the minor, which was brought about for the purpose of evading the authorities having jurisdiction, would not bring about any change in the jurisdiction as provided for in the Convention. The provision dealing with this particular type of evasion was not retained in the final draft of the Convention and the problem was left to the general law of the Contracting States because no subjective or objective criterion for describing the nature of the fraudulent intent required could be found. (See the Explanatory Report of Mr W. de Steiger in *Actes et documents de la Neuvième session, Tome IV, Protection des mineurs* at pp. 231-232).[33]

This Convention is also complicated by the inclusion of article 3 providing that a relationship subjecting the infant to authority, which arises directly from the domestic law of the State of the infant's nationality, shall be recognised in all the Contracting States. Litigated cases involving questions of parental authority arising by operation of law under this provision have been numerous despite the relatively short period of time during which the Convention has been in force.[34] It can be expected that such cases will increase in number, frequently involving a clash between the provisions of article 3 and article 16 of the Convention (the public policy exception), since a substantial number of States still have provisions of law granting parental authority to one parent or the other by operation of law and these provisions are coming more and more in conflict with constitutional or statutory provisions in various countries guaranteeing equality between the sexes.

It should be mentioned however that the Convention of 1961 has a number of very useful features which could be employed to reduce or alleviate cases of abduction of children by one of their parents. For example, article 4 requires the authorities of the State of the infant's nationality to 'inform' the authorities of the State of his habitual residence before taking measures under their own law for the protection of his person. The second paragraph of article 5 requires previous notice to the authorities of the State of the former habitual residence of the child before the authorities of the State of the new residence may take measures terminating or replacing the measures taken in the former State. Article 6 provides for the possibility that one of the concerned States may entrust to another concerned State the putting into force of measures which it has taken, by agreement between the authorities of both States. Articles 10 and 11, which are set out in full below, provide more generally for consultation and exchanges of views

[33] A recent German court decision indicates that an abduction does not change the minor's 'habitual residence' within the meaning of the Convention: see *FamRZ* 1976, No 12 at pp.708-711 (note of E. Jayme).

[34] See Sumampouw, *Les nouvelles Conventions de La Haye, leur application par les juges nationaux*, T.M.C. Asser Institute, 1976, at pp. 265-274 and the supplement to the 1976 edition dated October 1976, at pp. 22-23.

espérer obtenir une décision de garde en sa faveur a été étudié par les rédacteurs de la Convention de 1961, mais ils ne l'ont pas expressément résolu. L'article 5 de la Convention envisage le cas du conflit mobile et prévoit que dans le cas du déplacement de la résidence habituelle d'un mineur d'un Etat à un autre, les mesures prises par les autorités de l'Etat de l'ancienne résidence restent en vigueur tant que les autorités de la nouvelle résidence ne les ont pas levées ou remplacées, «après avis préalable auxdites autorités». Si le mineur dont la résidence a été déplacée était sous la protection des autorités de l'Etat dont il est ressortissant, les mesures prises par celles-ci suivant leur loi interne restent en vigueur dans l'Etat de la nouvelle résidence habituelle.

L'avant-projet de la Commission spéciale contenait un article particulier (article 6) qui prévoyait que le déplacement de la résidence habituelle du mineur, intervenu dans l'intention d'échapper aux autorités compétentes, ne modifierait pas la compétence des autorités désignées par la Convention. Cette disposition, qui visait tout particulièrement ce type de fraude, n'a pas été maintenue dans le texte définitif de la Convention, et la solution du problème a été laissée au droit commun des Etats contractants, parce qu'il n'a pas été possible de trouver un critère subjectif ou objectif de la fraude, qui donnât entière satisfaction (voir le Rapport explicatif de M. W. de Steiger dans les *Actes et documents de la Neuvième session, tome IV, Protection des mineurs*, p. 231-232).[33]

Une autre complication découle de l'article 3 de la Convention de 1961, qui prévoit qu'un rapport d'autorité résultant de plein droit de la loi interne de l'Etat dont le mineur est ressortissant est reconnu dans tous les Etats contractants. Cette disposition a soulevé un grand nombre de litiges sur des questions de puissance parentale, bien que la Convention ne soit entrée en vigueur qu'assez récemment.[34] On peut s'attendre à voir ces procès se multiplier, trouvant souvent leur source dans l'opposition entre l'article 3 de la Convention et son article 16 (l'exception d'ordre public), puisque la loi interne d'un nombre assez élevé d'Etats contient encore des dispositions qui accordent, de plein droit, la puissance parentale à l'un ou l'autre des parents, et que ces dispositions se heurtent de plus en plus souvent aux dispositions de la Constitution ou de la loi des nombreux pays qui garantissent l'égalité entre les sexes.

Il faut toutefois dire que la Convention de 1961 contient quelques mesures très utiles dont l'emploi pourrait réduire le nombre des enlèvements d'enfants par l'un de leurs parents, ou en atténuer les effets. L'article 4, par exemple, fait obligation à l'Etat dont le mineur est ressortissant «d'aviser» les autorités de l'Etat de sa résidence habituelle, avant de prendre, selon sa loi interne, des mesures tendant à la protection de sa personne. Le deuxième alinéa de l'article 5 exige qu'un avis préalable soit donné aux autorités de l'Etat de l'ancienne résidence habituelle du mineur, avant que les autorités de la nouvelle résidence habituelle lèvent ou remplacent les mesures prises par le premier Etat. L'article 6 prévoit que les autorités de l'Etat dont le mineur est ressortissant peuvent, en accord avec celles de l'Etat où il a sa résidence habituelle ou possède des biens, confier à celles-ci la mise en oeuvre des mesures prises. Les articles 10 et 11, dont le texte intégral est donné ci-dessous, prévoient, d'une façon plus générale, un échange de vues entre les

[33] Un jugement allemand récent montre que l'enlèvement ne modifie pas «la résidence habituelle du mineur», au sens de la Convention: voir *FamRZ* 1976, No 12, p. 708-711 (note de E. Jayme).

[34] Voir Sumampouw, *Les nouvelles Conventions de La Haye, leur application par les juges nationaux*, T.M.C. Asser Institute, 1976, p. 265-274 et le supplément de l'édition 1976, daté d'octobre 1976, p. 22-23.

between the authorities of concerned States, the furnishing of information with regard to measures taken, and the designation by Contracting States of authorities for the purpose of giving and receiving the information furnished –

Article 10

In order to ensure the continuity of the measures applied to the infant, the authorities of a Contracting State shall, as far as possible, not take measures with respect to him save after an exchange of views with the authorities of the other Contracting States whose decisions are still in force.

Article 11

All authorities who have taken measures by virtue of the provisions of the present Convention shall without delay inform the authorities of the State of the infant's nationality of them and, where appropriate, those of the State of his habitual residence.
Each Contracting State shall designate the authorities which can directly give and receive the information envisaged in the previous paragraph. It shall give notice of such designation to the Ministry of Foreign Affairs of the Netherlands.

Although article 11 stops short of creating a Central Authority in each Contracting State for the purpose of handling exchanges of information, the procedure which it initiated for designation of authorities to furnish and receive information 'directly' foreshadows the Treaty device of the Central Authority, which found its origin among the Hague Conventions in the Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, article 2.[35] The same type of device was subsequently used in the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters.

If certain Contracting States have elected to designate a number of different authorities within their countries which are authorised to furnish and receive information under the second paragraph of article 11 (*e.g.* France, Germany), the publicity given to such designations through official publications of their Ministries of Justice can only serve to help create the basis for cooperation between the concerned authorities of the Contracting States.[36] Several other Contracting States designated only a single authority to furnish and receive information under article 11 of the Convention, in most cases the Ministry of Justice, and this is already in embryo the creation of a 'Central Authority', although not yet given that name. Provision for practical cooperation between authorities of the different Contracting States would seem to be an essential element in any treaty which the Hague Conference may produce for the purpose of reducing or ameliorating cases of international abduction of children by their parents. While the necessary mechanism has not been perfected in the Convention of 1961 to deal with this problem, which was only one of the many problems faced by the Commission producing that Convention, this embryonic Central Authority is at least a starting point in the search for an appropriate and effective mechanism.

autorités des Etats concernés, une information sur les mesures prises et la désignation des autorités qui peuvent donner et recevoir les informations visées par ce texte:

Article 10

Autant que possible, afin d'assurer la continuité du régime appliqué au mineur, les autorités d'un Etat contractant ne prennent de mesures à son égard qu'après avoir procédé à un échange de vues avec les autorités des autres Etats contractants dont les décisions sont encore en vigueur.

Article 11

Toutes les autorités qui ont pris des mesures en vertu des dispositions de la présente Convention en informent sans délai les autorités de l'Etat dont le mineur est ressortissant et, le cas échéant, celles de l'Etat de sa résidence habituelle.

Chaque Etat contractant désignera les autorités qui peuvent donner et recevoir directement les informations visées à l'alinéa précédent. Il notifiera cette désignation au Ministère des Affaires Etrangères des Pays-Bas.

Bien que l'article 11 n'aille pas jusqu'à créer dans chaque Etat contractant une Autorité centrale qui assume la charge de mettre en oeuvre cet échange d'informations, la procédure qu'il prévoit pour la désignation des autorités chargées de donner et de recevoir «directement» des informations, préfigure la création d'une Autorité centrale, un procédé que, dans les Conventions de La Haye, on trouve pour la première fois dans l'article 2 de la Convention du 15 novembre 1965 relative à la signification et la notification à l'étranger des actes judiciaires et extrajudiciaires en matière civile ou commerciale.[35] Un procédé similaire fut utilisé plus tard dans la Convention du 18 mars 1970 sur l'obtention des preuves à l'étranger en matière civile ou commerciale.
Si certains Etats contractants ont choisi de désigner dans leur pays des autorités différentes autorisées à fournir et à recevoir les informations visées au second alinéa de l'article 11 (la France et l'Allemagne, par exemple), la publicité donnée à ces désignations, au moyen des publications officielles diffusées par leurs Ministères de la Justice, ne peut qu'assurer une base solide de coopération entre les autorités concernées des Etats contractants.[36]
Plusieurs autres Etats contractants n'ont désigné qu'une autorité unique pour fournir et recevoir les informations visées par l'article 11 de la Convention: il s'agit en général du Ministère de la Justice, ce qui constitue déjà l'embryon d'une «Autorité centrale» – même si elle n'a pas encore reçu ce nom. Des dispositions prévoyant une collaboration d'ordre pratique entre les autorités de différents Etats contractants semblent constituer un élément essentiel de tout traité établi par la Conférence de La Haye dans le but de réduire le nombre, ou d'atténuer les conséquences, d'affaires d'enlèvements internationaux d'enfants par leurs parents. Bien que, dans la Convention de 1961 on n'ait pas trouvé le mécanisme parfait capable de résoudre ce problème, celui-ci n'était qu'un des nombreux problèmes auxquels la Commission s'était heurtée en préparant la Convention, et cette Autorité centrale embryonnaire représente tout au moins un point de départ dans la recherche d'un mécanisme approprié et efficace.

[35] It should be mentioned that International Social Service, in its observations on the Preliminary Draft of the 1961 Convention, had pled for creation of a centralising authority in each State to handle international questions concerning the protection of infants. See *Actes et documents de la Neuvième session, Tome IV, Protection des mineurs*, p. 45. It should be pointed out that a system of centralised authorities had already been provided for in the New York Convention of 20 June 1956 on the Recovery Abroad of Maintenance.
[36] See, for example, Chatin, *'Entraide judiciaire internationale en matière civile, commerciale et administrative', Recueil pratique de conventions*, (Paris, Ministry of Justice, 2nd ed., 1978) at pp. 722-726; *Bundesanzeiger*, Bonn, Ministry of Justice, 15 March 1977, p. 1.

[35] Il importe de signaler que le Service Social International, dans ses observations sur l'avant-projet de la Convention de 1961, avait plaidé pour la création d'une autorité centralisée dans chaque Etat, chargée des questions internationales en matière de protection des mineurs. Voir *Actes et documents de la Neuvième session, tome IV, Protection des mineurs*, p. 45. Il convient de signaler que la *Convention de New York du 20 juin 1956 sur le recouvrement des aliments à l'étranger* avait déjà institué un système d'autorités centrales.
[36] Voir par exemple Chatin, «Entraide judiciaire internationale en matière civile, commerciale et administrative», *Recueil pratique de conventions* (Paris, Ministère de la Justice, 2ème éd., 1978), p. 722 à 726; *Bundesanzeiger*, Bonn, Ministère de la Justice, 15 mars 1977, p. 1.

B *Convention of 12 June 1902 governing the guardianship of infants*

Mention of this Treaty, which is one of the early series of Hague Conventions, has been made above in connection with the Convention of 1961. Belgium, Germany, Italy, Luxemburg, Netherlands, Poland, Portugal, Romania, Spain and Switzerland became Parties to this Treaty, which was also ratified but later denounced by France, Hungary and Sweden.[37]

Each of the World Wars of this century may have had the effect of breaking relations under the Treaty between certain of the States Parties thereto. However, in most cases relations were reaffirmed or resumed under the terms of a peace treaty (*e.g.* Treaty of Versailles, article 282) or pursuant to a bilateral treaty or exchange of communications (see Makarov, *Quellen des Internationalen Privatrechts/ Recueil de textes concernant le droit international privé*, 2nd ed., Vol. II, 1960, at pp. 625-627). In relations between Contracting States which have ratified the Convention of 1961 (Germany, Luxemburg, Netherlands, Portugal and Switzerland) the latter Convention has replaced the Convention of 1902.

Austria never ratified the Convention of 1902, but it came into force on 16 July 1920 in relations between Austria on the one hand and Belgium, Italy, Portugal and Romania on the other hand pursuant to the Treaty of Saint-Germain (see Makarov, *op. cit.*, p. 625). The Treaty also came into force by declaration between Austria and Germany but was abrogated and replaced in relations between these States by their bilateral Convention on guardianship of 5 February 1927, article 9 (see Makarov, *op. cit.*, pp. 625-628 and 635-638).

This Convention, like all of the early Hague Conventions on family law questions, gives the primary role to the law of nationality – in this case the nationality of the minor. However, unlike the Marriage Convention of 1902 (which gave certain possibilities for application of the law of the place of celebration) and the Divorce Convention of 1902 (which gave a role to the law of the State where the suit was brought and gave jurisdiction under certain conditions to the place of the spouses' domicile), the Convention on guardianship made its alternative references to the country where the minor had his 'habitual residence'. This was the first use in the text of a Hague Convention on family law of this expression which, since the renewal of the Conference's work in 1951, has not only become an essential element of the classic compromises in the field of personal status but has also played a prominent role in treaties on commercial subjects such as sale of goods and – most recently – agency.[38]

The Guardianship Convention of 1902 provides in article 2 that if the law of nationality of the minor does not organise guardianships in that State when the minor has his habitual residence abroad, a diplomatic or consular official authorised by that State can organise the guardianship in conformity with the law of that State if the State of the habitual residence of the minor does not object. Then, in article 3, it provides that if a guardianship is not instituted in conformity with the provisions of article 1 and article 2, the

[37] The Netherlands and Switzerland have denounced the Convention effective from June 1, 1979.

[38] The expression had appeared in the Final Protocol of the Second Session of the Conference, among the provisions concerning civil procedure, in the context of legal aid (*Actes*, 1894, *Protocole final*, p. 6, article 2); this provision later appeared in article 15 of the Convention of 14 November 1896 on civil procedure and article 21 of the Convention of 17 July 1905 on civil procedure. The reasons for the abandonment of the reference to the domicile of the minor in the Guardianship Convention of 1902 and ultimate adoption of the term 'habitual residence', are set out in *Actes*, 1894, at p. 94 and *Actes*, 1900, at p. 103.

B *La Convention du 12 juin 1902 pour régler la tutelle des mineurs*

Nous avons mentionné ce Traité (qui est l'un des tout premiers établis par la Conférence de La Haye) au sujet de la Convention de 1961. L'Allemagne, la Belgique, l'Espagne, l'Italie, le Luxembourg, les Pays-Bas, la Pologne, le Portugal, la Roumanie et la Suisse sont devenus Parties à ce Traité, qui a aussi été ratifié (mais dénoncé par la suite) par la France, la Hongrie et la Suède.[37]

Chacune des deux guerres mondiales a eu pour conséquence de rompre les relations créées par le Traité entre certains des Etats qui y étaient Parties. Cependant, dans la plupart des cas, les relations furent confirmées ou reprises en vertu d'un traité de paix (par exemple, le Traité de Versailles, article 282), ou à la suite d'un traité bilatéral ou d'un échange de communication (voir Makarov, *Quellen des Internationalen Privatrechts/Recueil de textes concernant le droit international privé*, 2ème éd., Vol. II, 1960, p. 625 à 627). Dans les relations des Etats contractants qui ont ratifié la Convention de 1961 (Allemagne, Luxembourg, Pays-Bas, Portugal et Suisse), cette dernière Convention remplace celle de 1902.

L'Autriche n'a jamais ratifié la Convention de 1902, mais celle-ci était entrée en vigueur le 16 juillet 1920 dans les relations entre l'Autriche d'un côté, la Belgique, l'Italie, le Portugal et la Roumanie de l'autre, aux termes du Traité de Saint-Germain (voir Makarov, *op. cit.*, p. 625). Le Traité est aussi entré en vigueur en vertu d'une déclaration commune entre l'Autriche et l'Allemagne, mais il a été abrogé et remplacé dans les rapports entre ces deux Etats par leur Convention bilatérale sur la tutelle du 5 février 1927, article 9 (voir Makarov, *op. cit.*, p. 625-628 et 635-638).

Cette Convention, comme toutes les premières Conventions de La Haye sur le droit de la famille, accorde le rôle prépondérant à la loi nationale – en l'espèce, à la loi du pays dont le mineur est ressortissant. Cependant, à la différence de la Convention sur le mariage de 1902 (qui, dans certains cas, permet d'appliquer la loi du lieu de la célébration), et de la Convention sur le divorce de 1902 (dans laquelle la loi de l'Etat où l'action a été introduite joue un certain rôle et qui attribue compétence, dans certaines conditions, aux autorités du lieu du domicile des époux), la Convention sur la tutelle ne faisait mention (quand une alternative était prévue) que du pays où le mineur avait sa «résidence habituelle». C'était la première fois que cette expression figurait dans une Convention de La Haye sur le droit de la famille, une expression qui, depuis que la Conférence a repris ses travaux en 1951, n'est pas seulement devenue un élément essentiel des compromis classiques en matière de statut personnel, mais joue aussi un rôle éminent dans des traités en matière commerciale, sur la vente de marchandises par exemple, et – plus récemment – sur la représentation.[38]

L'article 2 de la Convention de 1902 pour régler la tutelle des mineurs prévoit que si la loi nationale du mineur n'organise pas la tutelle dans cet Etat quand le mineur a sa résidence habituelle à l'étranger, un agent diplomatique ou consulaire autorisé par l'Etat dont le mineur est ressortissant pourra y pourvoir, si l'Etat de la résidence habituelle du mineur ne s'y oppose pas. L'article 3 prévoit toutefois que si la tutelle du mineur n'est pas, ou ne peut pas être, établie conformément aux dispositions des articles 1 et 2, la tutelle

[37] Les Pays-Bas et la Suisse ont dénoncé la Convention, l'effet de cette dénonciation partant du premier juin 1979.

[38] On trouve cette expression dans le Protocole final de la Deuxième session de la Conférence, parmi les dispositions relatives à la procédure civile, dans le contexte de l'assistance judiciaire (*Actes*, 1894, *Protocole final*, p. 6, article 2); l'expression reparaît dans l'article 15 de la Convention du 14 novembre 1896 sur la procédure civile et l'article 21 de la Convention du 17 juillet 1905 sur la procédure civile. Les raisons qui expliquent l'abandon de la référence au domicile du mineur dans la Convention sur la tutelle de 1902 et l'adoption définitive de l'expression «résidence habituelle» sont exposées dans les *Actes*, 1894, p. 94 et *Actes*, 1900, p. 103.

guardianship of a minor having his habitual residence abroad shall be established and exercised in conformity with the law of that place.
Incidentally, it should be noted that the Convention of 1902 contained two very far-sighted provisions which have their reflexion in the Convention of 1961, these being article 7, providing for measures to be taken for the protection of the person and the interests of a foreign minor by local authorities in case of urgency, while awaiting the institution of the guardianship, and article 8, providing for the transmission of information concerning the situation of a minor who needs a guardianship from the authorities of the State on the territory of which the minor is found to the authorities of the State of his nationality.

It can be seen from the comparatively small number of denunciations of this Convention, in contrast with the other old Hague Conventions on family law, and by the repeated reactivation of the Convention between Contracting States following the two World Wars of this century, that the Convention of 1902 on guardianship – while placing more emphasis on the nationality principle than modern conditions call for – has not been so far out of step with the times as were its contemporary conventions. In fact, the two most recent denunciations (the Netherlands and Switzerland) came only in 1977, after the 1961 Convention had come into force for the countries in question.

C *Other multilateral conventions dealing with custody*

Several other multilateral treaties are in force which contain provisions concerning custody of children –
First, the Montevideo Treaty of 12 February 1889 on International Civil Law (Title VII: articles 19-23) deals with guardianship and curatorship. See Makarov, *op. cit.*, Vol. II, pp. 87-90; *Textos de los Tratados de Montevideo sobre Derecho internacional privado*, OEA/Ser.Q/11.8, CJI-14 (Organization of American States, March 1973, pp. 43-44) – and, for States Parties, p. 173. For signatures, ratifications and deposits with explanatory notes, see *Inter-American Treaties and Conventions* (OAS Treaty Series No 9, 1976) at p. 139.
The Montevideo Treaty of 19 March 1940 on International Civil Law likewise contains provisions on guardianship and curatorship in its Title VIII, articles 25-29. See Makarov, *op. cit.*, Vol. II, pp. 105-106; *Textos de los Tratados de Montevideo sobre Derecho internacional privado, op. cit.*, p. 132. For signatures and ratifications see *id.*, p. 173 or *Inter-American Treaties and Conventions, op. cit.*, p. 139.
The Bustamante Code (1928) contains provisions on paternal authority in its Chapter VII, articles 69-72 (Makarov, *op. cit.*, Vol. II, pp. 21-22; *Documentos de la Organizacion de los Estados americanos sobre Derecho internacional privado*, OEW/Ser.W/11.9, CJI-15, OAS 1973, p. 740 – and on guardianship (Makarov, *op. cit.*, Vol. II, pp. 23-28; *Documentos de la Organizacion de los Estados americanos sobre Derecho internacional privado, op. cit.*, pp. 741-742). For Parties to the Bustamante Code see *Documentos, op. cit.*, p. 773.
Also on the regional level is the Scandinavian Convention of February 1931 containing certain provisions of private international law on marriage, adoption and guardianship, entered into at Stockholm, as edited under the agreement of 26 March 1953 at Stockholm, articles 14 and following. See Makarov, *op. cit.*, Vol. II, pp. 557-558.
All the multilateral treaties mentioned above give primary competence for guardianship to the law of the 'domicile' of the minor (under the Bustamante Code, article 7, the 'personal law' of the minor which is applicable may be the law of

d'un mineur dont la résidence habituelle est à l'étranger sera établie et exercée conformément à la loi de cette résidence habituelle.
Il faut incidemment signaler que la Convention de 1902 contenait deux dispositions à longue vue qui ont trouvé un écho dans la Convention de 1961; il s'agit de l'article 7, qui prévoit qu'en attendant l'organisation de la tutelle, ainsi que dans tous les cas d'urgence, les mesures nécessaires pour la protection de la personne et des intérêts d'un mineur étranger pourront être prises par les autorités locales. La seconde disposition est celle de l'article 8, selon laquelle les autorités d'un Etat sur le territoire duquel se trouve un mineur étranger dont il importera d'établir la tutelle, informeront de cette situation, dès qu'elle leur sera connue, les autorités de l'Etat dont le mineur est ressortissant.
On peut se rendre compte, d'après le nombre relativement réduit des dénonciations de cette Convention, par comparaison avec les autres anciennes Conventions de La Haye sur le droit de la famille, et d'après la fréquence des remises en vigueur de la Convention entre les Etats contractants après les deux guerres mondiales, que la Convention de 1902 sur la tutelle des mineurs – tout en mettant l'accent sur le principe de la nationalité plus fortement que le voudraient les conditions actuelles d'existence – n'est pas devenue aussi désuète que les autres conventions qui sont ses contemporaines. A vrai dire, les deux dénonciations les plus récentes (par les Pays-Bas et la Suisse) ont été effectuées en 1977 seulement, c'est-à-dire après l'entrée en vigueur de la Convention de 1961 dans ces deux pays.

C *Les autres conventions multilatérales relatives à la garde des enfants*

Plusieurs autres traités multilatéraux qui sont en vigueur contiennent des dispositions relatives à la garde des enfants.
Tout d'abord, le Traité de Montevideo du 12 février 1889 concernant le droit civil international (Titre VII, articles 19-23) porte sur la tutelle et la curatelle. Voir Makarov, *op. cit.*, Vol. II, p. 87-90); *Textos de los Tratados de Montevideo sobre Derecho internacional privado*, OEA/Ser.Q/11.8, CJI-14 (Organisation des Etats Américains, mars 1973, p. 43-44 et p. 173 pour les Etats Parties). Pour les signatures, les ratifications et le dépôt de notes explicatives, voir *Inter-American Treaties and Conventions* (OAS Treaty Series No 9, 1976) p. 139.
Le Traité de Montevideo du 19 mars 1940 sur le droit civil international contient aussi des dispositions en matière de tutelle et de curatelle (Titre VIII, articles 25-29). Voir Makarov, *op. cit.*, Vol. II, p. 105-106; *Textos de los Tratados de Montevideo sobre Derecho internacional privado, op. cit.*, p. 132. Pour les signatures et les ratifications, voir *id.* p. 173, ou *Inter-American Treaties and Conventions, op. cit.*, p. 139.
Le Code Bustamante contient des dispositions sur la puissance paternelle dans son Chapitre VII, articles 69-72 (Makarov, *op. cit.*, vol. II, p. 21-22); *Documentos de la Organizacion de los Estados americanos sobre Derecho internacional privado*, OEW/Ser.W/11.9, CJI-15, OAS 1973, p. 740 – et sur la tutelle (Makarov, *op. cit.*, Vol. II, p. 23-28; *Documentos de la Organizacion de los Estados americanos sobre Derecho internacional privado, op. cit.*, p. 741-742). Pour les Parties au Code de Bustamante, voir *Documentos, op. cit.*, p. 773.
La Convention scandinave de février 1931 contient aussi, au niveau régional, des dispositions de droit international privé sur le mariage, l'adoption et la tutelle (conclues à Stockholm en vertu de l'accord du 26 mars 1953, articles 14 et suivants. Voir Makarov, *op. cit.*, Vol. II, p. 557-558).

Tous les traités multilatéraux mentionnés ci-dessus donnent, en matière de tutelle, la préférence à la loi du «domicile» du mineur (en vertu de l'article 7 du Code Bustamante, la «loi personnelle» du mineur qui est applicable peut être soit la

his domicile or of his nationality, or the internal law of the forum State).
In passing, reference should be made to the relevant provision of the Vienna Convention on Consular Relations of 24 April 1963, which is limited to providing for a duty on the part of the receiving State to give information on guardianship matters.[39]
It should perhaps be noted that the Brussels Convention of 27 September 1968 excludes from its scope of application, in article 1, second paragraph, among others, 'the status and capacity of physical persons'. Even so, an English order to return a kidnapped child has apparently been recognized in Italy under this Treaty.[40] As mentioned above in the Introduction, it has come to the attention of the Permanent Bureau that a Belgian initiative seeks to add a protocol to this Convention dealing specifically with cases of 'legal kidnapping'.

D *Bilateral treaties*

Numerous bilateral treaties presently in force contain provisions dealing with guardianship of the nationals or residents of those countries. The earliest of these is probably the Franco-Swiss Convention of 15 June 1869 on Jurisdiction and Enforcement of Judgments in Civil Matters, article 10. See Makarov, *op. cit.*, Vol. II, p. 623; Chatin, *op. cit.*, p. 502. Another example is the Austro-German Treaty of 5 February 1927 concerning guardianship, which was mentioned above. See Makarov, *op. cit.*, Vol. II, pp. 635-638.
A substantial number of bilateral consular conventions contain provisions concerning the organisation of guardianships, usually for the purpose of permitting the organisation of guardianships by consuls on behalf of their nationals residing in the receiving State. Some of these are limited to guardianships organised following the death of one of the ascendants of the minor. These consular conventions are collected in Makarov, *op. cit.*, Vol. II, at pp. 639-658.
Bilateral treaties or agreements on recognition and enforcement of foreign judgments in civil matters and on mutual judicial cooperation may also contain provisions which reflect on the handling and enforcement of child custody decisions as between interested States. For a particularly broad range of these as they have been negotiated and brought into force for one particular country (France) see Chatin, *op. cit.*, Part I.
Some bilateral treaties in this field, however, exclude custody decisions from their scope. See, for example, the United Kingdom – United States Convention on the Reciprocal Recognition and Enforcement of Judgments in Civil Matters (*ad referendum* text, initialed at London, October 26, 1976, printed in *International Legal Materials*, June 1977, Vol. 16, pp. 71-87), article 2 (3) which states –

(3) *This Convention shall not apply to judgments which determine:*

(a) the status or legal capacity of natural persons;

loi de son domicile, soit celle de sa nationalité, soit le droit interne de l'Etat du forum).
Il faut aussi faire référence, en passant, à la disposition de la Convention de Vienne sur les Relations consulaires du 24 avril 1963, qui se borne à donner à l'Etat de résidence du Consul l'obligation de fournir des informations au sujet de la tutelle.[39]
Peut-être faudrait-il également signaler le second alinéa de l'article premier de la Convention de Bruxelles du 27 septembre 1968, qui exclut notamment de son domaine d'application «l'état et la capacité des personnes physiques». Néanmoins, une décision judiciaire anglaise, ordonnant la restitution d'un enfant objet d'un enlèvement, semble avoir été reconnue en Italie en vertu de ce Traité.[40] Nous l'avons dit dans notre Introduction, le Bureau Permanent a eu connaissance d'une initiative belge qui cherche à ajouter à cette Convention un protocole concernant spécifiquement les affaires de «*legal kidnapping*».

D *Traités bilatéraux*

De nombreux traités bilatéraux actuellement en vigueur contiennent des dispositions relatives à la tutelle des ressortissants de ces pays ou de ceux qui y résident. Le plus ancien est sans doute la Convention franco-suisse du 15 juin 1869 sur la compétence judiciaire et l'exécution des décisions en matière civile (article 10). Voir Makarov, *op. cit.*, p. 623 et Chatin, *op. cit.*, p. 502. Rappelons aussi le Traité austro-allemand du 5 février 1927 sur la tutelle, que nous avons déjà cité. Voir Makarov, *op. cit.*, Vol. II, p. 635-638.
Un grand nombre de conventions consulaires bilatérales contiennent des dispositions sur l'organisation de la tutelle par les consuls au profit des ressortissants de leur pays qui résident dans l'Etat de résidence du consul. Certaines de ces conventions ne visent que la tutelle organisée en raison du décès de l'un des ascendants du mineur. Makarov a publié l'ensemble de ces conventions consulaires (*op. cit.*, Vol. II, p. 639-658).

Les traités ou les accords bilatéraux sur la reconnaissance et l'exécution des jugements étrangers en matière civile et sur l'entraide judiciaire peuvent aussi contenir des dispositions portant sur la suite à donner et sur l'exécution des décisions concernant la garde des mineurs. Pour la nomenclature de la variété des traités dans un pays déterminé (à savoir la France), voir Chatin, *op. cit.*, Première partie.

Cependant, certains traités bilatéraux conclus en cette matière excluent de leur domaine d'application les décisions en matière de garde. Voir par exemple la Convention entre le Royaume-Uni et les Etats-Unis sur la reconnaissance réciproque et l'exécution des jugements en matière civile (texte *ad referendum*, paraphé à Londres le 26 octobre 1976, publié dans *International Legal Materials*, juin 1977, Vol. 16, p. 71-87) dont l'article 2(3) prévoit (traduction):

3) *La présente Convention ne s'applique pas aux jugements qui se prononcent:*

a) sur l'état ou la capacité juridique des personnes physiques;

[39] *Article 37*
Information in cases of deaths, guardianship or trusteeship, wrecks and air accidents.

If the relevant information is available to the competent authorities of the receiving State, such authorities shall have the duty:

...

(b) to inform the competent consular post without delay of any case where the appointment of a guardian or trustee appears to be in the interests of a minor or other person lacking full capacity who is a national of the sending State. The giving of this information shall, however, be without prejudice to the operation of the laws and regulations of the receiving State concerning such appointments;

...

[40] See Shapira and Siehr, 'The Jundeff Affair – Comparative Remarks on International Child Kidnapping and Judicial Co-operation', *Netherlands International Law Review*, 1978, Vol. 25, pp. 3-23, footnote 81, citing the decision of the *Pretura di Roma*, September 25, 1974, *Il diritto di famiglia e delle persone*, 1975, p. 566. The Convention has not yet been ratified by the United Kingdom.

[39] *Article 37*
Renseignements en cas de décès, de tutelle ou de curatelle, de naufrage et d'accident aérien.
Si les autorités compétentes de l'Etat de résidence possèdent les renseignements correspondants, elles sont tenues:

...

(b) de notifier sans retard au poste consulaire compétent tous les cas où il y aurait lieu de pourvoir à la nomination d'un tuteur ou d'un curateur pour un ressortissant mineur ou incapable de l'Etat d'envoi. L'application des lois et règlements de l'Etat de résidence demeure toutefois réservée en ce qui concerne la nomination de ce tuteur ou de ce curateur;

...

[40] Voir Shapira et Siehr, «*The Jundeff Affair – Comparative Remarks on International Child Kidnapping and Judicial Co-operation*», *Netherlands International Law Review*, 1978, Vol. 25, p. 3-23, note 81, qui cite la *Pretura di Roma* du 25 septembre 1974, *Il diritto di famiglia e delle persone*, 1975, p. 566. La Convention n'a pas encore été ratifiée par le Royaume-Uni.

(b) matters of family law, including marital rights in property;

. . .

(g) matters concerning the judicial supervision of the property or affairs of a person who is incompetent or incapable of managing and administering his property and affairs.

E *Human Rights Conventions, Declarations and Recommendations*

The Universal Declaration of Human Rights, adopted and proclaimed by the General Assembly of the United Nations on 10 December 1948, contains several clauses relating to the rights of spouses and of children. Particularly relevant are the following stated rights –

Article 16

1 *Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.*

2 *Marriage shall be entered into only with the free and full consent of the intending spouses.*

3 *The family is the natural and fundamental group unit of society and the State.*

Article 25

1 *Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.*

2 *Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.*

Article 26

1 *Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.*

2 *Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.*

3 *Parents have a prior right to choose the kind of education that shall be given to their children.*

The several regional and worldwide treaties which have been prepared since the Second World War to promote the protection of human rights have had comparatively little to say about the rights of the child, particularly as regards his family.
The first of these treaties to be prepared, the European Convention on the Protection of Human Rights and Fundamental Freedoms, in article 5, sets out first the principle that everyone has the right to liberty and security of person, but then qualifies this principle with particular reference to minors in the following way –

b) sur des questions concernant le droit de la famille, y compris les droits matrimoniaux relatifs aux biens;

. . .

g) sur des questions relatives au contrôle judiciaire sur les biens ou sur les intérêts d'une personne incapable, ou qui est dans l'impossibilité de prendre soin et d'administrer elle-même ses biens et ses intérêts.

E *Conventions, Déclarations ou Recommandations au sujet des droits de l'homme*

La Déclaration Universelle des Droits de l'Homme, adoptée et proclamée par l'Assemblée générale des Nations Unies le 10 décembre 1948, contient plusieurs clauses relatives aux droits des époux et des enfants. Les plus intéressantes sont les suivantes:

Article 16

1 *A partir de l'âge nubile, l'homme et la femme, sans aucune restriction quant à la race, la nationalité ou la religion, ont le droit de se marier et de fonder une famille. Ils ont des droits égaux au regard du mariage, durant le mariage et lors de sa dissolution.*

2 *Le mariage ne peut être conclu qu'avec le libre et plein consentement des futurs époux.*

3 *La famille est l'élément naturel et fondamental de la société et a droit à la protection de la société et de l'Etat.*

Article 25

1 *Toute personne a droit à un niveau de vie suffisant pour assurer sa santé, son bien-être et ceux de sa famille, notamment pour l'alimentation, l'habillement, le logement, les soins médicaux ainsi que pour les services sociaux nécessaires; elle a droit à la sécurité en cas de chômage, de maladie, d'invalidité, de veuvage, de vieillesse ou dans les autres cas de perte de ses moyens de subsistance par suite de circonstances indépendantes de sa volonté.*

2 *La maternité et l'enfance ont droit à une aide et à une assistance spéciales. Tous les enfants, qu'ils soient nés dans le mariage ou hors mariage, jouissent de la même protection sociale.*

Article 26

1 *Toute personne a droit à l'éducation. L'éducation doit être gratuite, au moins en ce qui concerne l'enseignement élémentaire et fondamental. L'enseignement élémentaire est obligatoire. L'enseignement technique et professionnel doit être généralisé; l'accès aux études supérieures doit être ouvert en pleine égalité à tous en fonction de leur mérite.*

2 *L'éducation doit viser au plein épanouissement de la personnalité humaine et au renforcement du respect des droits de l'homme et des libertés fondamentales. Elle doit favoriser la compréhension, la tolérance et l'amitié entre toutes les nations et tous les groupes raciaux ou religieux, ainsi que le développement des activités des Nations Unies pour le maintien de la paix.*

3 *Les parents ont, par priorité, le droit de choisir le genre d'éducation à donner à leurs enfants.*

Divers traités, soit régionaux, soit de portée mondiale, ont été conclus depuis la Seconde Guerre mondiale pour mieux assurer la défense des droits de l'homme, mais ils sont relativement muets au sujet des droits du mineur, surtout au regard de sa famille.
Le premier de ces traités, la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales, énonce, dans son article 5, le principe que toute personne a droit à la liberté et à la sécurité, mais il fait la réserve suivante au sujet des mineurs:

No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

. . .

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority.

In opposition to this specific exception, the general provision of article 8 granting to everyone the right to respect for his private and family life, his home and his correspondence does not appear to be a very strong guarantee of a minor's rights within the family.
The International Covenant on Civil and Political Rights is more specific in dealing with protection of the family, and particularly with equality of spouses upon dissolution of a marriage, in its article 23, as well as adding in article 24 a statement of rights of every child. The text of these articles is as follows:

Article 23

1 *The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.*

2 *The right of men and women of marriageable age to marry and to found a family shall be recognized.*

3 *No marriage shall be entered into without the free and full consent of the intending spouses.*

4 *States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.*

Article 24

1 *Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.*

2 *Every child shall be registered immediately after birth and shall have a name.*

3 *Every child has the right to acquire a nationality*[41].

The nature of the measures of protection to which a child has a right under article 24, paragraph 1, of the Covenant, however, is not very clear.
The American Convention on Human Rights, in its articles 17, 18 and 19, sets out analogous rights of the family and the child, specifically providing for recognition of equal rights for children born out of wedlock and those born in wedlock, a principle which had found earlier expression in article 25 of the Universal Declaration of Human Rights, quoted above.
The drafting of the United Nations Covenant and of the American Convention may well have been influenced by the ten principles for the well-being of all children which were set forth in the Declaration of the Rights of the Child, adopted by the United Nations General Assembly in 1959[42], particularly the second and seventh principles, the texts of which are set out below.

[41] U.N. Document No ST/HR/1, 1973, p. 11. The Covenant was adopted by the United Nations General Assembly on 16 December 1966 and entered into force on 23 March 1976, 44 countries have ratified it, as of 1 January 1978.
[42] The U.N. General Assembly has designated 1979 as the 'International Year of the Child', to mark the 20th anniversary of its approval of this Declaration.

Nul ne peut être privé de sa liberté, sauf dans les cas suivants et selon les voies légales:

. . .

d) s'il s'agit de la détention d'un mineur, décidée pour son éducation surveillée ou de sa détention régulière, afin de le traduire devant l'autorité compétente.

Contre cette exception particulière, la disposition générale de l'article 8 qui reconnaît à chacun le droit au respect de sa vie privée et familiale, de son domicile et de sa correspondance, ne semble pas constituer une garantie très sérieuse des droits du mineur dans sa famille.
Le Pacte international relatif aux droits civils et politiques porte avec plus de précision sur la protection de la famille et, en particulier, sur l'égalité des époux après la dissolution du mariage (article 23). L'article 24 ajoute une déclaration au sujet des droits de tout enfant. Voici le texte de ces articles:

Article 23

1 *La famille est l'élément naturel et fondamental de la société et a droit à la protection de la société et de l'Etat.*

2 *Le droit de se marier et de fonder une famille est reconnu à l'homme et à la femme à partir de l'âge nubile.*

3 *Nul mariage ne peut être conclu sans le libre et plein consentement des futurs époux.*

4 *Les Etats Parties au présent Pacte prendront les mesures appropriées pour assurer l'égalité de droits et de responsabilités des époux au regard du mariage, durant le mariage et lors de sa dissolution. En cas de dissolution, des dispositions seront prises afin d'assurer aux enfants la protection nécessaire.*

Article 24

1 *Tout enfant, sans discrimination aucune fondée sur la race, la couleur, le sexe, la langue, la religion, l'origine nationale ou sociale, la fortune ou la naissance, a droit, de la part de sa famille, de la société et de l'Etat, aux mesures de protection qu'exige sa condition de mineur.*

2 *Tout enfant doit être enregistré immédiatement après sa naissance et avoir un nom.*

3 *Tout enfant a le droit d'acquérir une nationalité*[41].

Il faut cependant bien dire que la nature des mesures de protection auquel le mineur a droit en vertu du premier alinéa de l'article 24 du Pacte manque un peu de clarté.
La Convention américaine sur les droits de l'homme accorde, dans ses articles 17, 18 et 19, des droits analogues à la famille et au mineur, et prévoit spécifiquement l'égalité des droits pour les enfants nés hors du mariage et ceux nés du mariage, un principe qui s'était déjà exprimé dans l'article 25 de la Déclaration Universelle des Droits de l'Homme que nous avons citée ci-dessus.
Les textes du Pacte des Nations Unies et de la Convention américaine peuvent fort bien avoir été influencés par les dix principes relatifs à l'intérêt de tous les enfants qui sont énoncés dans la Déclaration des droits de l'enfant adoptée par l'Assemblée générale des Nations Unies en 1959[42], en particulier les deuxième et septième principes dont voici le texte:

[41] Doc. N.U. No ST/HR/1, 1973, p. 12. Le Pacte a été adopté par l'Assemblée générale des Nations Unies le 16 décembre 1966 et est entré en vigueur le 23 mars 1976; au premier janvier 1978, 44 Etats l'avaient ratifié
[42] L'Assemblée générale des Nations Unies a déclaré que l'année 1979 serait «L'année internationale de l'Enfant» pour célébrer le vingtième anniversaire de la Déclaration.

Principle 2

The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be paramount consideration.

Principle 7

The child is entitled to receive education, which shall be free and compulsory, at least in the elementary stages. He shall be given an education which will promote his general culture, and enable him, on a basis of equal opportunity, to develop his abilities, his individual judgement, and his sense of moral and social responsibility, and to become a useful member of society.
The best interests of the child shall be the guiding principle of those responsible for his education and guidance; that responsibility lies in the first place with his parents.
The child shall have full opportunity for play and recreation, which should be directed to the same purposes as education; society and the public authorities shall endeavour to promote the enjoyment of this right[43].

The Economic and Social Council of the United Nations, and particularly the Commission on the Status of Women, has dealt in its work with the question of parental rights and duties, including guardianship. In a Resolution adopted by the Economic and Social Council in May 1967 on the basis of a proposal of the Commission on the Status of Women, the Council recommended that Member States take all possible measures to ensure equality between men and women in the exercise of parental rights and duties, including guardianship. For ensuring such equality, the Council recommended four principles as follows –

a women shall have equal rights and duties with men in respect to guardianship of their minor children and the exercise of parental authority over them, including care, custody, education and maintenance;

b both spouses shall have equal rights and duties with regard to the administration of the property of their minor children, with the legal limitations necessary to ensure as far as possible that it is administered in the interest of the children;

c the interest of the children shall be the paramount consideration in proceedings regarding custody of children in the event of divorce, annulment of marriage or judicial separation;

d no discrimination shall be made between men and women with regard to decisions concerning custody of children and guardianship or other parental rights in the event of divorce, annulment of marriage or judicial separation[44].

As will be seen in the subsequent section of this Report dealing with national legislation on the subject of custody, the same principles of equality between the parents and promotion of the best interests of the child have very broadly appeared in national legislation and case law on the subject of custody, but they still fall far short of attaining worldwide scope and application.

[43] U.N. Document No ST/HR/1.1973, pp. 94-95.
[44] See 'The United Nations and Human Rights' (New York 1968, *United Nations Publication*, Sales No E 67-I-29), p. 59.

Principe 2

L'enfant doit bénéficier d'une protection spéciale et se voir accorder des possibilités et des facilités par l'effet de la loi et par d'autres moyens, afin d'être en mesure de se développer d'une façon saine et normale sur le plan physique, intellectuel, moral, spirituel et social, dans des conditions de liberté et de dignité. Dans l'adoption de lois à cette fin, l'intérêt supérieur de l'enfant doit être la considération déterminante.

Principe 7

L'enfant a droit à une éducation qui doit être gratuite et obligatoire au moins aux niveaux élémentaires. Il doit bénéficier d'une éducation qui contribue à sa culture générale et lui permette, dans des conditions d'égalité de chances, de développer ses facultés, son jugement personnel et son sens des responsabilités morales et sociales, et de devenir un membre utile de la société.
L'intérêt supérieur de l'enfant doit être le guide de ceux qui ont la responsabilité de son éducation et de son orientation; cette responsabilité incombe en priorité à ses parents.
L'enfant doit avoir toutes possibilités de se livrer à des jeux et à des activités récréatives, qui doivent être orientés vers les fins visées par l'éducation; la société et les pouvoirs publics doivent s'efforcer de favoriser la jouissance de ce droit[43].

Les travaux du Conseil Economique et Social des Nations Unies et tout particulièrement de la Commission sur le statut de la femme, ont porté sur la question des droits et des devoirs des parents, y compris la tutelle. Dans une Résolution adoptée par le Conseil Economique et Social au mois de mai 1967, sur la base d'une proposition de la Commission sur le statut de la femme, le Conseil a recommandé aux Etats membres de prendre toutes les mesures possibles pour assurer l'égalité entre les hommes et les femmes dans l'exercice des droits et des devoirs parentaux, y compris la tutelle. Pour assurer cette égalité, le Conseil a recommandé quatre principes, à savoir:

a les femmes auront les mêmes droits et les mêmes devoirs que les hommes au regard de la tutelle de leurs enfants mineurs et de l'exercice de la puissance parentale sur eux, y compris les soins à donner, la garde, l'éducation et l'entretien;

b les deux époux auront des droits et des devoirs égaux en ce qui concerne l'administration des biens de leurs enfants mineurs, dans les limites légales nécessaires pour assurer que, dans la mesure du possible, ces biens soient administrés dans l'intérêt des enfants;

c l'intérêt des enfants sera la considération essentielle dans les instances relatives à la garde des enfants en cas de divorce ou d'annulation du mariage ou de séparation de corps;

d aucune discrimination ne sera faite entre les hommes et les femmes en ce qui concerne les décisions relatives à la garde des enfants ou à la tutelle et autres droits parentaux, en cas de divorce, d'annulation du mariage ou de séparation de corps[44].

On verra plus loin, dans les parties de ce Rapport consacrées à la loi nationale sur la garde, que les mêmes principes d'égalité entre les parents et de protection des intérêts de l'enfant ont très souvent fait leur apparition dans les lois nationales sur la garde, mais qu'ils sont encore loin d'avoir une portée universelle, quant à leur étendue et dans leur application.

[43] Document N.U. No ST/HR/1.1973, p. 98-99.
[44] Voir «*The United Nations and Human Rights*» (New York, 1968, *United Nations Publication, Sales* No E 67-I-29), p. 59.

IV — THE EXISTING LEGAL CONTEXT — LEGISLATION, CASE LAW AND TRENDS

A *Jurisdiction and substantive standards in custody matters*

This Report will not attempt to make a detailed review or a comparative study of the principles under which jurisdiction is assumed in the various States, nor will it attempt to analyse in detail specific legal rules which are applied in such cases. At most the effort in this section will be to describe certain points on which there is fairly broad agreement, at least in a particular region, to identify some trends in the development of legislation and case law, and to give useful references for further study[45].

For Western Europe, an excellent review of the subject is contained in the Council of Europe pamphlet entitled 'Legal Representation and Custody of Minors, Proceedings of the Fourth Colloquy on European Law held at the University of Vienna, 5-7 March 1974'. The general Report presented by Professor Jacques Foyer, at pp. 79-82, has been photocopied and attached as an annex to this Report for the convenience of the readers.
As far as trends are concerned, it was observed that minors were tending to become 'subjects of law' and that their opinion and even their consent, was sought on important matters affecting them, including determination of custody and right to access; this trend was considered to be of fundamental importance. A similar general trend was also noted towards the lowering of the age of full legal capacity, which has been reduced in many States of Western Europe. The Colloquy also felt that all States were 'at an experimental stage in endeavouring to improve the machinery for the protection of minors, and were hesitating between individualistic, family and State approaches to the question'. The fact was noted that almost all States at that time were either in the process of reforming their legislation on minors or had recently done so, and that differences in terminology made it more difficult to arrive at a comparison of the legal systems. Here the particular difference between States where legal representation was a broad concept encompassing protection both of the person and of the minor's property, this concept being closely bound up with the *patria potestas* of Roman law, and States taking a more pragmatic approach to the protection of minors, drawing a distinction between custody (relating to the person of the minor) and guardianship (relating to his property), was seen to bring on much of the difficulty of terminology. It should be recalled, however, that the problem of terminology already gave problems at the time of the preparation and entry into force of the 1902 Convention on guardianship of infants, as was pointed out previously in Part III (A) of this Report.

The Report of Professor Foyer undertakes to set out both a general synthetic definition of custody and a more general list of its contents developed on a concrete basis. Universal agreement on the criterion for the award of custody was found, this being the welfare of the child, but the difficulty of applying this principle in practice was noted.

[45] For a recent general comparative study with a bibliography, see Stoljar, 'Children, Parents and Guardians' (1973), which is Chapter 7 of Volume IV (*Persons and Family*) of the *International Encyclopedia of Comparative Law*; a wide range of references on matters concerning the rights and protection of children is also available in the publication of the *International Society on Family Law*, 'The Child and the Law, the Proceedings of the First World Conference of the Society held in Berlin, April 1975' (2 vols., 1976).

IV — LE CONTEXTE LÉGAL ACTUEL — LOIS, JURISPRUDENCE ET TENDANCES

A *Compétence et normes matérielles dans les affaires de garde des enfants*

Le présent Rapport ne cherchera pas à passer en revue ou à comparer en détails les principes qui déterminent la compétence des divers Etats, ni ne tentera de faire une analyse approfondie des règles de droit qui sont appliquées en ce domaine. Tout au plus s'efforcera-t-on dans cette section d'indiquer certains points sur lesquels l'accord a pu se faire, dans une région déterminée, pour identifier quelques tendances dans l'évolution des lois et de la jurisprudence; nous chercherons aussi à fournir des références qui permettront de poursuivre l'étude de la question[45].
Pour l'Europe occidentale, la brochure publiée par le Conseil de l'Europe sous le titre «Représentation légale et garde des mineurs, Actes du Quatrième Colloque de droit européen, Université de Vienne du 5 au 7 mars 1974» constitue une excellente étude de ce problème. Le Rapport de synthèse présenté par le professeur Jacques Foyer (p. 79-82) a été photocopié et annexé au présent Rapport, pour permettre aux lecteurs d'en prendre connaissance.
On y constate une tendance à faire du mineur, jadis objet de droit, un véritable «sujet de droit», et à solliciter son avis et même son consentement pour les mesures importantes qui le concernent, telles que la détermination de la garde et du droit de visite. Cette évolution a été considérée comme fondamentale. De même, on a constaté une tendance presque générale pour abaisser l'âge de la majorité légale, ce qui a déjà été réalisé dans un certain nombre de pays de l'Europe occidentale. Le Colloque a aussi reconnu que tous les Etats sont «au stade expérimental dans la recherche de la meilleure organisation de la protection des mineurs et hésitent entre les conceptions individualistes, familiales ou étatiques». Il est apparu, à quelques exceptions près, que dans tous les Etats représentés au Colloque, le droit des mineurs avait, soit récemment été rénové, soit était en cours de réforme. Le Rapport souligne aussi combien les différences de terminologie rendaient difficile la comparaison des droits. A cet égard, il y a une différence entre les Etats où la représentation légale est une notion large qui englobe à la fois la protection de la personne et des biens du mineur — une notion intimement liée à celle de *patria potestas* du droit romain et les Etats qui ont une notion plus pragmatique de la protection des mineurs, en distinguant la *custody* (qui entraîne des pouvoirs sur la personne) et le *guardianship* qui a des effets essentiellement patrimoniaux. Ce sont à ces différences que sont dues en grande partie les difficultés de terminologie qui se constatent. Il faut cependant rappeler que ce problème de terminologie avait déjà soulevé des difficultés à l'époque où la Convention de 1902 sur la tutelle des mineurs avait été préparée et quand elle était entrée en vigueur. Nous avons souligné ce point dans la troisième partie (A) du présent Rapport.
Le professeur Jacques Foyer, dans son rapport de synthèse, affirme qu'un certain consensus aurait été atteint pour définir le droit de garde et pour dégager plus concrètement le contenu de ce droit dont il énumère les principaux éléments. Si un grand nombre de participants ont déclaré que le droit de garde devait être exercé dans l'intérêt de l'enfant, on s'aperçut qu'il était difficile, dans la pratique, de mettre ce principe en application.

[45] Pour une étude comparative récente, complétée par une bibliographie, voir Stoljar, «*Children, Parents and Guardians*» (1973), qui constitue le chapitre 7 du volume IV (*Persons and Family*) de l'*International Encyclopedia of Comparative Law*; on trouvera aussi de nombreuses références aux droits et à la protection des mineurs dans la publication de l'*International Society on Family Law*, «*The Child and the Law, the Proceedings of the First World Conference of the Society held in Berlin, April, 1975*» (2 volumes, 1976).

Finally, Professor Foyer's Report discussed under No 5 at p. 82, the difficulties raised by the right of access to the child. The particular problems raised by visitation rights, and their relation to custody rights, will be dealt with in Part V of this Report.
Examples of recent reform legislation changing the situation of children in respect of their parents are the modification of 25 June 1976 to the Swiss Civil Code[46] and the amendments to the Austrian Civil Code[47].
Principles in North America are very similar to those described above for Western Europe. Custody awards are generally based on the 'welfare' or 'interests' of the child.

For the United States, in addition to the specific developments concerning the Uniform Custody Jurisdiction Act, which has been mentioned in the Introduction above and will be discussed below in Part VII, there are provisions in the Uniform Marriage and Divorce Act which reflect a similar trend. The expanding emphasis on the rights of children as subjects of the law rather than as objects of it is reflected in the legal literature, *e.g.* Foster and Freed, 'A Bill of Rights for Children', *Family Law Quarterly*, Winter 1972, pp. 343-376; Inker and Perretta, 'A Child's Right to Counsel in Custody Cases', *Family Law Quarterly*, March 1971, p. 108; Inker, 'Expanding the Rights of Children in Custody and Adoption Cases', *Family Law Quarterly*, December 1971, p. 417. A succinct review of the state of the law and current trends in the United States and Western Europe is contained in Glendon, *State, Law and Family. Family Law in Transition in the United States and Western Europe* (1977) at pp. 272-274.

As for Canada, the strong interest which its Government has shown in this question has been mentioned above in the Introduction; interest at the provincial level has also been demonstrated by the development of the Extra-Provincial Enforcement of Custody Orders Act. The approaches to the problem which are reflected in this Act will be discussed further in Part VII, below.
The Report of the Private International Law Committee to the Civil Code Revision Office of Quebec, on the other hand, has advanced a proposal which is closer in spirit to the Uniform Child Custody Jurisdiction Act, since it relies primarily on placing limitations on the jurisdiction of courts in child custody cases[48].
The underlying legal principles and the current situation for this type of case in Israel have been discussed in detail in the recent article by Shapira and Siehr[49]. This article offers a comparative view of the situation in West Germany and that in Israel.
Not much practical information concerning the case law of other Middle-Eastern countries in this field has been available to the researchers of the Permanent Bureau. It should be noted however that a number of the court decisions

Enfin, le Rapport du professeur Foyer fait état (No 5, p. 73) des difficultés que soulève le droit de visite. Nous étudierons la question du droit de visite et ses rapports avec le droit de garde dans la cinquième partie de ce Rapport.

Des exemples d'une législation récente qui transforme la situation du mineur au regard de ses parents peuvent être trouvés dans la modification du Code civil suisse du 25 juin 1976[46] et dans les amendements au Code civil autrichien[47].
En Amérique du Nord, les principes en ce domaine sont sensiblement les mêmes que ceux reconnus dans l'Europe occidentale. La garde est généralement confiée en tenant compte du «bien-être» ou des «intérêts» du mineur.
Aux Etats-Unis, en dehors des développements particuliers liés au *Uniform Custody Jurisdiction Act* que nous avons mentionnés dans notre Introduction et sur lesquels nous reviendrons plus loin (septième partie), on trouve dans l'*Uniform Marriage and Divorce Act* des dispositions qui reflètent la même tendance. L'accent est de plus en plus souvent mis sur le droit pour le mineur d'être considéré comme un sujet de droit plutôt que comme un objet de droit; cette idée se retrouve dans la littérature juridique, par exemple dans Foster and Freed, «*A Bill of Rights for Children*», *Family Law Quarterly*, hiver 1972, p. 343-376; Inker and Perretta, «*A Child's Right to Counsel in Custody Cases*», *Family Law Quarterly*, mars 1971, p. 108; Inker, «*Expanding the Rights of Children in Custody and Adoption Cases*», *Family Law Quarterly*, décembre 1971, p. 417. Un résumé sur l'état du droit et ses tendances aux Etats-Unis et dans l'Europe occidentale, a paru dans Glendon, *State Law and Family. Family Law in Transition in the United States and Western Europe* (1977), p. 272-274.
Nous avons souligné dans notre Introduction le vif intérêt que cette question avait soulevé au sein du Gouvernement canadien. A l'échelon provincial, cet intérêt aussi s'est manifesté par l'adoption du *Extra-Provincial Enforcement of Custody Orders Act.* Nous étudierons plus loin (septième partie) la manière dont ce problème avait été abordé.

La proposition avancée dans le Rapport que le Comité du droit international privé a soumis à l'Office de révision du Code civil du Québec se rapproche davantage, par contre, de l'esprit de l'*Uniform Child Custody Jurisdiction Act*, puisqu'elle tend essentiellement à limiter la compétence des tribunaux dans les affaires de garde de mineurs[48].
Shapira et Siehr, dans un article récent[49] ont fait un exposé détaillé des principes juridiques fondamentaux et de la situation actuelle en Israël. Cet article compare la situation en Allemagne de l'Ouest avec celle en Israël.

Les chercheurs du Bureau Permanent n'ont pas obtenu beaucoup de renseignements sur la jurisprudence qui, en ce domaine, s'est établie dans d'autres Etats du Moyen-Orient. Il importe cependant de signaler un certain nombre de

[46] See in this connexion the message of the Federal Council to the Federal Assembly concerning the modification of the Swiss Civil Code (filiation) of June 5, 1974; see also Hegnauer, '*Das neue Kindesrecht*' in *Schweizerische Juristenzeitung/ Revue suisse de Jurisprudence*, No 10, 15 May 1977, pp. 149-154 and No 11, June 1, 1977, pp. 165-170.
[47] *Bundesgesetzblatt für die Republik Österreich*, No 108, 29 July 1977 containing the law of 30 June 1977 on the new rules of children's law; see also the Report of the Justice Department on this law, No 587 of the offprints of the stenographic minutes of the National Assembly.
[48] *Report on Private International Law* (Montreal 1975), articles 50 (pp. 125 and 127) and 57 (p. 133):
Article 50
The authorities of the State in which a person is domiciled have jurisdiction to take any measures intended to protect such person and his property.
However, in cases of urgency or serious inconvenience, the authorities of Quebec may take such measures as they deem necessary for the protection of the person and property of a person domiciled abroad but present in Quebec. They may also terminate such protection.
Article 57
The courts of Quebec have no jurisdiction in matters of child custody and parental authority, unless the child is domiciled or present in Quebec.
[49] *Op.cit., Netherlands International Law Review*, 1978, Vol. 25, pp. 3-23.

[46] Voir à ce sujet le message du Conseil fédéral à l'Assemblée fédérale concernant la modification du Code civil suisse (filiation) du 5 juin 1974; voir aussi Hegnauer, «*Das neue Kindesrecht*» dans *Schweizerische Juristenzeitung, Revue suisse de jurisprudence*, No 10, 15 mai 1977, p. 149-154 et No 11, premier juin 1977, p. 165-170.
[47] *Bundesgesetzblatt für die Republik Österreich*, No 108, 29 juillet 1977, qui contient la loi du 30 juin 1977 sur les nouvelles règles du droit des mineurs; voir aussi le Rapport du Ministère de la Justice sur cette loi, No 587 des comptes rendus sténographiés des débats devant l'Assemblée nationale.
[48] *Rapport sur le droit international privé* (Montreal 1975), articles 50 (p. 124 et 126) et 57 (p. 132):
Article 50
Les autorités de l'Etat du domicile d'une personne sont compétentes pour prendre des mesures tendant à la protection de sa personne et de ses biens.
Toutefois, en cas d'urgence ou d'inconvénients sérieux, les autorités du Québec où se trouve une personne domiciliée à l'étranger, peuvent prendre les mesures qu'elles estiment nécessaires à la protection de sa personne ou de ses biens ou y mettre fin.

Article 57
Les tribunaux du Québec ne sont compétents en matière de garde d'enfants et d'autorité parentale que si l'enfant a au Québec son domicile ou s'il y est présent.
[49] *Op.cit., Netherlands International Law Review*, 1978, Vol. 25, p. 3-23.

reported in Sumampouw, *Les nouvelles Conventions de La Haye – Leur application par les juges nationaux* (1976), particularly those concerning article 3 of the 1961 Convention, which deals with parental authority by operation of law under the national law of the minor, have involved situations where the child had the nationality of a Middle-Eastern country. The courts of West Germany in particular have dealt with this problem and it would appear that the father often has custody of the minor children over the age of seven years by operation of law in most of such countries, either under Islamic law or pursuant to law codes based upon Koranic law. For many of these countries, as well as other countries throughout the world, the relevant texts may be found collected, in German, In Bergmann/Ferid, *Internationales Ehe- und Kindschaftsrecht.* In connexion with Middle-Eastern law in this field, attention should be drawn to the article by K. Dilger entitled *'Zum iranischen Recht im Rahmen des Haager Minderjährigenschutzabkommens', Zeitschrift für das gesamte Familienrecht: Ehe und Familie im privaten und öffentlichen Recht*, Volume 20, pp. 530-533 (October 1973).

For Japan, the texts on guardianship are collected, in German translation, in Bergmann/Ferid, *op.cit.* However, there has been no revision of this section since 1968. Articles cited in the *Index to Foreign Legal Periodicals*, 1974-1976, would seem to indicate strong interest in the subject of child custody and the standards for solving custody situations but these, being in Japanese, elude the present linguistic capabilities of the Permanent Bureau. The articles are cited as follows: Yuzawa, 'Standards for solving a dispute concerning child custody' in *Jurisuto* (Jurist) 540:37, 1 Ag. 1973; Akeyama, 'Protection of the child's rights after divorce' in *Jurisuto* 540:42, 1 Ag. 1973; Murata, 'Parent and child problems as seen by the Child Consultation Center' in *Jurisuto* 540:65, 1 Ag. 1973; Shimazu and others, 'Parent and child problems today', in *Jurisuto* 540:15, 1 Ag. 1973.

For Argentina and Brazil the texts on custody are also collected in Bergmann/Ferid, *op.cit.* The collected texts also include, for Argentina, the Treaty of Montevideo of 1940 on International Civil Law, which deals with the law applicable to guardianship, including custody, and which binds Argentina in its relations with Paraguay and Uruguay.

As for Australia, the texts are also collected in German translation in Bergmann/Ferid, *op.cit.* Problems of child abduction and smuggling have brought on some public notice in Australia, and ways of preventing the abduction and smuggling out of Australia of children are being studied, including possible action through amendment of the Passports Act 1939. See *Commonwealth Law Bulletin*, Vol. 4, No 1, January 1978, pp. 161-162.

Texts for the Eastern-European Members of the Hague Conference, Czechoslovakia and Yugoslavia, are also to be found in Bergmann/Ferid, *op.cit.* The increasing role of administrative action by the State in matters of protection of children, as reflected in the 1961 Convention on Protection of Infants, has been noted elsewhere[50]. This trend reaches perhaps its furthest point of extension in the laws of certain

[50] *E.g.* von Overbeck, 'Persons', Chapter 15 of Volume III (Private International Law) of the *International Encyclopedia of Comparative Law*, at pp. 20-22).

décisions de justice citées dans Sumampouw, *Les Nouvelles Conventions de La Haye – Leur application par les juges nationaux* (1976) – en particulier celles qui visent l'article 3 de la Convention de 1961 sur la puissance parentale reconnue selon la loi nationale du mineur. Ces décisions ont été rendues dans des affaires où l'enfant était ressortissant d'un pays du Moyen-Orient. Les tribunaux de l'Allemagne de l'Ouest se sont notamment prononcés sur cette question et il semble que c'est au père que la loi accorde la garde d'un enfant âgé de plus de sept ans dans la plupart des pays de la région, en vertu, soit du droit islamique, soit de lois qui s'inspirent du Coran. Pour un grand nombre de ces pays, et aussi pour d'autres pays à travers le monde, les textes les plus intéressants ont été publiés, en langue allemande, par Bergmann/Ferid, *Internationales Ehe- und Kindschaftsrecht.* En ce qui concerne le droit des pays du Moyen-Orient en ce domaine, attirons l'attention sur l'article de K. Dilger intitulé «*Zum iranischen Recht im Rahmen des Haager Minderjährigenschutzabkommens*»; *Zeitschrift für das gesamte Familienrecht: Ehe und Familie im privaten und öffentlichen Recht*, Volume 20, p. 530-533 (octobre 1973).

Pour le Japon, les textes relatifs à la tutelle ont été réunis (traduits en langue allemande) par Bergmann/Ferid, *op.cit.* Cependant, cette partie de l'ouvrage n'a pas été révisée depuis 1968. Les articles cités dans l'*Index to Foreign Legal Periodicals*, 1974-1976, semblent indiquer que la garde du mineur et les règles à suivre pour régler des conflits en matière de garde y soulèvent un grand intérêt, mais comme ces articles sont en japonais, le Bureau Permanent n'est pas actuellement capable d'en prendre connaissance. Voici les références de ces articles: Yuzawa, «Normes pour résoudre le conflit en matière de garde d'un mineur» dans *Jurisuto* (Le juriste) *540* :37, 1 Ag. 1973; Akeyama, «Protection des droits du mineur après le divorce» dans *Jurisuto 540*:42, 1 Ag. 1973; Murata, «Les problèmes entre parents et enfants, tels que vus par le Centre de consultation pour les mineurs», dans *Jurisuto 540*: 65, 1 Ag. 1973; Shimazu et autres, «Les problèmes actuels entre parents et enfants», dans *Jurisuto 540*: 15, 1 Ag. 1973.

C'est aussi dans Bergmann/Ferid, *op.cit.*, que l'on trouve les textes relatifs à la garde en Argentine et au Brésil. Parmi les textes qui y figurent, on trouve aussi, pour l'Argentine, le Traité de Montevideo de 1940, sur le droit civil international, qui détermine la loi applicable à la tutelle des mineurs, y compris la garde; ce Traité lie l'Argentine, le Paraguay et l'Uruguay.

Pour l'Australie, c'est encore dans Bergmann/Ferid, *op.cit.*, qu'ont été réunis les textes les plus intéressants, traduits en allemand. Les problème soulevés par l'enlèvement des enfants et leur transport illégal d'un pays à un autre ont soulevé un certain intérêt en Australie, où l'on a étudié les moyens d'empêcher les enlèvements d'enfants et leur déplacement illégal hors du pays: on a notamment envisagé de modifier la loi sur les passeports (*Passports Act 1939*). Voir *Commonwealth Law Bulletin*, Vol. 4, No 1, janvier 1978, p. 161-162.

En ce qui concerne les pays de l'Est de l'Europe qui sont des Membres de la Conférence de La Haye, c'est toujours dans Bergmann/Ferid, *op.cit.* que l'on trouve les textes pour la Tchécoslovaquie et la Yougoslavie. Le rôle toujours plus grand que jouent les autorités administratives en matière de protection des enfants, dont la Convention de 1961 sur la protection des mineurs est la preuve, a été signalé ailleurs[50].

[50] Par exemple, von Overbeck, «*Persons*», chapitre 15 du IIIe Volume (Droit international privé) de l'*International Encyclopedia of Comparative Law*, p. 20-22.

socialist States, such as Czechoslovakia, where the texts make the State and its social organisations partners along with the parents in assuring the education of children (*Family Law* of 4 December 1963, Sec. 30). This type of development is linked to a strong favour for the national law of the child as the applicable law in custody matters (see Part IV (C), below).

This brief tour of legislation, case-law and trends of legal thought around the world, with particular reference to countries which are Members of the Hague Conference, serves only as an introduction to the complexity of the problems of legal diversity among States in this field. The practical aspects of these situations should also be elucidated on a worldwide scale by the work which is presently being done by International Social Service, through the use of a Questionnaire sent to its branches throughout the world[51]. The scope of the research needed is beyond the present capabilities of the Permanent Bureau, both in terms of the size of its staff and their linguistic abilities. The Questionnaire accompanying this Report has therefore been designed, in part, to draw from Member States of the Conference more detailed and up-to-date information on their legal standards and jurisdictional principles in this field than the staff of the Permanent Bureau has been able to collect and verify.

B *Peremptory norms in national law*

It is not within the scope of this Report to discuss at length the problem of peremptory norms and the relationship between public and private law. These subjects have been discussed in full elsewhere: for example in Professor Eek's lectures at the Hague Academy of International Law in 1973[52] or those given there by Professor Riphagen in 1961[53]. See also the very recent and full work by Professor Rigaux entitled *Droit public et droit privé dans les relations internationales* (1977), also based on a special course given by the author.

The authors of the courses dealing with this subject have all found it necessary at some point to focus upon the '*Boll*' case in the International Court of Justice (case concerning the application of the Convention of 1902 governing the guardianship of infants, *Netherlands* v. *Sweden*). What may be viewed in one way as questions of characterisation (guardianship or protective measures?) may otherwise be viewed as 'peremptory norms' of national law, rules which are immediately applicable[54] on a territorial basis, without regard to normal conflict rules. It was in part the development of imperative administrative measures for protection of children that rendered the revision of the Convention of 1902 governing the guardianship of infants necessary and that shaped the form of the new Convention, the Convention of 1961 concerning the jurisdiction of the authorities and the law applicable in the matter of protection of infants.

Cette tendance atteint peut-être son point culminant dans les lois de certains pays socialistes, notamment la Tchécoslovaquie, où les textes associent l'Etat et les organisations sociales aux parents pour assurer l'éducation des enfants (*Loi sur la famille* du 4 décembre 1963, Sec. 30). Une telle évolution est liée à une préférence marquée à considérer comme applicable la loi nationale du mineur en matière de garde (voir quatrième partie, C, ci-dessous).

Ce rapide coup d'oeil jeté sur les lois, la jurisprudence et l'évolution des idées juridiques – plus particulièrement dans les Pays membres de la Conférence de La Haye – ne peut servir qu'à mettre en lumière les sérieuses difficultés que soulève, en ce domaine, la diversité des problèmes juridiques dans les divers Etats. De même, les aspects pratiques des situations qui sont créées devront être élucidés, à l'échelle mondiale, grâce au Questionnaire que le Service Social International a envoyé à ses branches dans le monde entier[51]. Les travaux de recherche souhaitables vont au-delà des possibilités actuelles du personnel du Bureau Permanent, tant en raison de son nombre que de ses connaissances linguistiques. C'est pourquoi le Questionnaire qui accompagne ce Rapport est destiné en partie à obtenir des Etats membres de la Conférence des informations plus détaillées, et plus récentes, sur leurs normes juridiques et sur leurs principes en matière de compétence, pour compléter celles que le Bureau Permanent a pu jusqu'ici recueillir et vérifier.

B *Les normes impératives du droit national*

Le présent Rapport ne saurait, dans les limites qu'il s'est assignées, étudier en détail le problème des normes impératives et des relations entre le droit public et le droit privé. Ces questions ont été longuement discutées par le professeur Eek dans le cours qu'il a donné en 1973 à l'Académie de La Haye de droit international[52] et dans celui que le professeur Riphagen y a donné en 1961[53]. Voir aussi les travaux très récents et très complets du professeur Rigaux, publiés sous le titre de *Droit public et droit privé dans les relations internationales* (1977): ils s'appuyent aussi sur les cours récents de leur auteur.

Tous les professeurs qui ont étudié cette question dans leurs cours n'ont pas manqué d'invoquer l'affaire «*Boll*» plaidée devant la Cour internationale de Justice (qui concernait l'application de la Convention de 1902 pour régler la tutelle des mineurs (*Pays-Bas* v. *Suède*)). Ce qui peut être considéré à un certain point de vue comme questions de qualification (par exemple: s'agit-il d'une tutelle ou de mesures de protection?) peut être regardé d'un autre point de vue comme des «normes impératives» du droit national, à savoir des règles qui sont immédiatement applicables sur une base territoriale[54], sans qu'il y ait lieu de se référer aux règles normales de conflit des lois. C'est en partie en raison de l'importance prise par les mesures administratives impératives pour assurer la protection des mineurs que la révision de la Convention de 1902 pour régler la tutelle des mineurs s'était révélée nécessaire, et ce sont ces mesures qui ont donné sa forme à la nouvelle Convention, la Convention de 1961 concernant la compétence des autorités et la loi applicable en matière de protection des mineurs.

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[51] The replies to that Questionnaire and an analysis to be prepared by the ISS staff are expected to be available before the first Special Commission meets.

[52] 'Peremptory Norms in Private International Law', *Recueil des Cours* 1973, II, pp. 1-74.

[53] 'The Relationship between Public and Private Law and the Rules of Conflict of Laws', *Recueil des Cours* 1961, I, pp. 215-333.

[54] See Francescakis, *La théorie du renvoi et les conflits de systèmes en droit international privé* (1958), p. 11 *et seq.* and *'Quelques précisions sur les 'lois d'application immédiate' et leurs rapports avec les règles de conflits de lois', Rev. cr. d.i.p.* 1966, p. 1; De Nova, *'I conflitto di leggi e le norme con apposita delimitazione della sfera di efficacia, Diritto internazionale'*, Vol. XIII, 1959, p. 13 (published in a French version under the title *'Conflits de lois et normes fixant leur propre domaine d'application'* in *Mélanges Maury*, Vol. I, 1960, p. 377 *et séq.*); Batiffol and Francescakis, *'L'arrêt Boll de la Cour internationale de Justice et sa contribution à la théorie du droit international privé', Rev. cr. d.i.p.* 1959, p. 259; Jacques Foyer, *'Les mesures d'assistance éducative en droit international privé', Rev. cr. d.i.p.* 1965, p. 62; Karaquillo, *op.cit.*, pp. 77-94.

[51] On espère que l'analyse que les services du SSI prépareront d'après les réponses au Questionnaire qu'il aura reçues pourra être prête avant que la première Commission spéciale se réunisse.

[52] «*Peremptory Norms in Private International Law*», *Recueil des Cours* 1973, II, p. 1-74.

[53] «*The Relationship between Public and Private Law and the Rules of Conflict of Laws*», *Recueil des Cours* 1961, I, p. 215-333.

[54] Voir Francescakis, «La théorie du renvoi et les conflits de systèmes de droit international privé» (1958), p. 11 et suiv. et «Quelques précisions sur les «lois d'application immédiate» et leurs rapports avec les règles de conflits de lois», *Rev. cr. d.i.p.*, 1966, p. 1; De Nova, «*I conflitto di leggi e le norme con apposita delimitazione della sfera di efficacia*», *Diritto internazionale*, Vol. XIII, 1959, p. 13 (publié en français sous le titre de «Conflits de lois et normes fixant leur propre domaine d'application» dans *Mélanges Maury*, Vol. I, 1960, p. 377 et suiv.); Batiffol et Francescakis, «L'arrêt Boll de la Cour internationale de Justice et sa contribution à la théorie du droit international privé», *Rev. cr. d.i.p.* 1959, p. 259; Jacques Foyer, «Les mesures d'assistance éducative en droit international privé», *Rev. cr. d.i.p.* 1965, p. 62; Karaquillo, *op.cit.*, p. 77-94.

Certainly this trend, which was reflected in the *Boll* decision and in the Convention of 1961, has not been halted or reversed. One should say rather that a new overlay of peremptory norms has been developing independently of administrative procedures, usually based on constitutional or other fundamental national law. This type of constitutional protection of the child's rights, or of the rights of one of the parents within the framework of the trend towards equality between the sexes, has appeared in important court decisions in West Germany and the United States, these having at the present time possibly the most rigourous constitutional bases on such points. Any Convention which is to be prepared dealing with problems of abduction of children by their parents must take into consideration these peremptory norms, whether in force through administrative measures or appearing in the guise of overriding constitutional provisions.

The norms of constitutional or other fundamental law frequently are enforced through the public policy exception, and one must consider also the possibility of a developing body of international public policy rules, based on universal rights within the sphere of family law in general, and in the law of child care and custody in particular. See Stöcker, '*Der internationale* ordre public *im Familien- und Familienerbrecht*', in *RabelsZ* 1974, pp. 79-127, especially pp. 114-117.

C *Choice-of-law rules applied by the courts*

Strange as it may seem, the problem of the applicable law is for the most part peripheral when one is concerned with problems of child abduction. The artful abductor will not knowingly remove the child to a jurisdiction which is expected to apply a law unfavourable to him. What is more, if the court in the country to which the child has been removed undertakes to consider the choice of the applicable law, this may substantially prolong the proceedings, and the abductor will then have practically won his point; for – as has been noted in Part II (C) 3, above – delay in legal proceedings favours the abductor by creating a new situation of stability.

Perhaps then the principal situation in which the choice of applicable law becomes crucial is where the abducting parent has exclusive custody or parental authority by operation of law under the legal rules of the country to which the child has been removed. In that situation if the country of destination makes the choice of its own law to apply on the merits, the deprived parent is effectively precluded from seeking any legal remedy. This is in fact the situation reported by social workers in the field, where the father has removed the child to a country which applies strictly a rule of *patria potestas*. The converse tends to be the case where the mother removes the child to a country where the practice – even though not prescribed by law – is to give exclusive custody to the mother in practically all cases. In some States this practice is formally applied by the courts, where the children are very young, under a principle known in some common law countries as the 'tender years' doctrine.

A now rather outdated review of conflict rules in connexion with custody and parental authority in respect of legitimate children is set out in Rabel, *The Conflict of Laws, a Comparative Study*, 2nd ed., Vol. I, 1958 at pp. 635-653.

An up-to-date analysis, which also takes account of the effect of ratification of the 1961 Convention, is contained in Batiffol/Lagarde, *Droit international privé*, Vol. II, 1976, Nos 494-502, pp. 133-144.

Modern tendencies on this subject are reflected in the Convention of 1961 on the protection of infants, where the law

Cette tendance, que reflétaient l'arrêt *Boll* et la Convention de 1961, ne s'est certainement pas arrêtée ni renversée. On pourrait plutôt dire qu'un nouvel ensemble de normes d'application immédiate s'est constitué, indépendamment des procédures administratives: elles reposent, le plus souvent sur le droit constitutionnel ou sur d'autres lois fondamentales du droit national. Cette protection constitutionnelle des droits de l'enfant, ou des droits de l'un de ses parents qui reposent sur l'égalité entre les sexes, a fait son apparition dans d'importantes décisions de justice prononcées en Allemagne de l'Ouest et aux Etats-Unis, deux nations dont à l'heure actuelle les règles constitutionnelles sont probablement les plus rigoureuses en ce domaine. Toute Convention qui sera conclue sur les problèmes d'enlèvements d'enfants par l'un de ses parents devra tenir compte de ces normes d'application immédiate, qu'elles soient en vigueur par le truchement de mesures administratives ou qu'elles prennent la forme de dispositions constitutionnelles obligatoires.

Il est fréquent que les règles constitutionnelles ou d'autres lois fondamentales soient appliquées en vertu de l'exception de l'ordre public et il faut aussi envisager la possibilité que se crée un ensemble de règles de droit international reposant sur des droits universels, dans le domaine du droit de la famille en général et, plus particulièrement, dans celui de la tutelle et des règles de protection des mineurs. Voir Stöcker, «*Der internationale* ordre public *im Familien- und Familienerbrecht*», dans *RabelsZ* 1974, p. 79-127, surtout p. 114-117.

C *Règles de conflit de lois appliquées par les tribunaux*

Aussi étrange que cela puisse paraître, le problème de la loi applicable n'est le plus souvent que marginal dans les affaires d'enlèvements d'enfants. Un ravisseur avisé ne conduira pas volontairement l'enfant dans un pays où il sait que la loi qui sera probablement appliquée lui est défavorable. De plus, si le tribunal du pays où l'enfant a été conduit entreprend de statuer sur la question de la loi applicable, cela risque de prolonger considérablement la procédure et le ravisseur aura alors pratiquement gain de cause, car – nous l'avons signalé plus haut dans la deuxième partie, C (3) – si la procédure judiciaire se prolonge, elle joue en faveur du ravisseur en donnant à la situation le temps de se stabiliser.

Le cas dans lequel le choix de la loi applicable est le plus crucial est celui où la loi attribue de plein droit au parent ravisseur la garde ou l'autorité parentale exclusive, en vertu des règles de droit du pays où l'enfant enlevé a été conduit. Si le pays de destination décide de choisir sa propre loi pour se prononcer dans l'affaire, le parent auquel l'enfant a été soustrait ne pourra pas obtenir une décision favorable. Les rapports dressés par des travailleurs sociaux portent en général sur des affaires de ce genre, dans lesquels le père a conduit l'enfant dans un pays qui applique strictement la règle de *patria potestas*. C'est le contraire qui semble se produire lorsque c'est la mère qui a amené l'enfant dans un pays où la pratique judiciaire – même si le droit n'en fait pas obligation – est d'accorder la garde exclusive à la mère dans la grande majorité des cas. Dans certains Etats, cette pratique est appliquée de manière formelle, lorsque l'enfant est très jeune, en vertu d'un principe, connu dans certains pays de *common law*, de la «*tender years*» doctrine.

Dans son ouvrage intitulé *The Conflict of Laws, a Comparative Study*, 2ème éd., vol. I, 1958, p. 635-653, Rabel a fait une étude – un peu dépassée aujourd'hui – des conflits de lois en matière d'autorité parentale à l'égard des enfants légitimes.

On trouvera une analyse plus actuelle qui tient compte des effets de la ratification de la Convention de 1961, dans Batiffol et Lagarde, *Droit international privé*, vol. II, 1976, Nos 494-502, p. 133-144.

Les tendances modernes en cette matière ont pris forme dans la Convention de 1961 sur la protection des mineurs,

of the State of habitual residence of the child and the law of the nationality of the child are both given a role, the tendency being for the court which is given jurisdiction under the rule to apply its own law. Mention should also be made of the role which may possibly fall to the law of the State where a proceeding for annulment, dissolution or relaxation of the conjugal bond between the parents of the minor is pending, since a reservation retaining jurisdiction to take measures of protection of the person of the minor is possible for such cases (article 15 of the Convention); nothing is said about the law to be applied and the opinions of the experts differ on this point[55].
Some States – particularly in the Western Hemisphere – retain a strong role for the 'domicile' of the child, an expression which covers very different concepts in the diverse States employing it.
A number of States – notably those of Eastern Europe – retain a very strong role for the national law of the child[56].

Preparation of a convention dealing with problems of child abduction by their parents probably should not entail revision of the conflict rules determining the law to be applied in assigning custody or taking other protective measures in respect of a minor. It should be noted however that the recent efforts of the Council of Europe Committee on Custody of Minors, and in particular the current preliminary draft of a Convention on recognition and enforcement of decisions concerning custody and on restoration of custody of children, while avoiding any effort to control the conflict rules applied in the court which made the original custody order, in effect sets up a ground for refusal of recognition and enforcement based on a substantive rule of private international law keyed to 'the interests of the child' (article 6 of the preliminary draft Convention, as it presently stands).

D *The special case of the court order expressly forbidding removal of the child from the territory of the State where the court sits*

One particular aspect which arises in some cases of child abduction by a parent is the existence of a provision in the court order granting custody which forbids the party having custody from removing the child from the jurisdiction, without prior authorisation of the court. Is a custodial parent who removes the child from the jurisdiction in violation of such an order, *i.e.* without previously obtaining permission of the court, guilty of childnapping?
This is a problem of definition in the first place which was faced by the author of this Report and the decision was to include this problem within the scope of the Report, even though it was recognised that this specific situation might create difficult drafting problems. The case is, in effect, the reverse of the usual child abduction case.
The Permanent Bureau does not presently have reliable information as to the frequency and importance of the existence of such clauses and their violation on the international level. It is known that such clauses are from time to time included in court orders in the State courts of the United States, particularly where the party being awarded custody has come originally from another State of the United States or from a foreign country and still has family ties or even a family centre in the place of origin.

dans laquelle la loi de l'Etat de la résidence habituelle du mineur et la loi de l'Etat dont il est ressortissant ont, l'une et l'autre, un rôle à jouer, la tendance étant de donner au tribunal déclaré compétent le droit d'appliquer son propre droit. Il faut aussi signaler le rôle que pourrait jouer la loi de l'Etat dans lequel une demande en annulation, dissolution ou relâchement du lien conjugal entre les parents du mineur est pendante, puisque cet Etat peut réserver la compétence de ses autorités pour prendre des mesures de protection de la personne ou des biens du mineur (article 15 de la Convention). Rien n'est dit au sujet de la loi à appliquer et les avis des experts diffèrent sur ce point[55].
Quelques Etats – en particulier ceux de l'hémisphère occidental – attribuent encore un rôle important au «domicile» du mineur, une expression qui vise des notions très différentes selon les Etats où elle est en usage.
Dans un certain nombre d'Etats – notamment ceux de l'Europe de l'Est – le rôle prépondérant est attribué à la loi de l'Etat dont le mineur est ressortissant[56].
La préparation d'une convention portant sur les problèmes des enlèvements d'enfants par leurs parents n'entraînera probablement pas la révision des règles de conflit pour déterminer la loi applicable à l'attribution de la garde ou aux mesures de protection en faveur du mineur. Il importe cependant de signaler les efforts récents du Conseil de l'Europe, dont le Comité d'experts sur la représentation légale et la garde des mineurs vient notamment d'établir un avant-projet de Convention sur la reconnaissance et l'exécution des décisions en matière de garde et le rétablissement de la garde, tout en évitant soigneusement de déterminer les règles de conflit à appliquer par le tribunal qui a rendu la première décision sur la garde, ce qui permet en fait de refuser de reconnaître et d'exécuter la décision, en invoquant une règle matérielle de droit international privé visant les «intérêts du mineur» (article 6 de l'avant-projet actuel).

D *Le cas spécial dans lequel le tribunal a expressément interdit que l'enfant soit conduit hors du territoire de l'Etat où il siège*

Les affaires d'enlèvement d'enfants présentent parfois un aspect particulier lorsque la décision qui accorde la garde à un des parents interdit à celui-ci de faire quitter à l'enfant le territoire sur lequel le tribunal a compétence, sans son autorisation préalable. Le parent gardien qui fait quitter le territoire à l'enfant, en violation de l'interdiction, c'est-à-dire sans avoir obtenu l'autorisation préalable du tribunal, s'est-il rendu coupable d'un enlèvement d'enfant?
Il y a là tout d'abord un problème de définition, auquel l'auteur de ce Rapport s'est heurté: il a pris la décision de faire entrer ce problème dans le cadre de son Rapport, tout en admettant que dans cette situation spéciale, de délicats problèmes de rédaction pourraient se poser. Il s'agit, en fait, du contraire d'un cas normal d'enlèvement d'enfant.
A l'heure actuelle, le Bureau Permanent ne possède pas d'informations dignes de foi sur la fréquence et l'importance de ces interdictions et sur leur violation à l'échelle internationale. On sait que, de temps à autre, aux Etats-Unis, les décisions des tribunaux des Etats contiennent de telles interdictions, en particulier quand la partie à laquelle la garde a été dévolue est originaire d'un autre Etat des Etats-Unis, ou d'un pays étranger, et qu'elle a conservé des liens de famille, ou même un centre familial, dans son lieu d'origine.

[55] The reservation has been made by France, Luxemburg, the Netherlands and Switzerland. For an analysis of some of the problems which may arise under this reservation, see Droz, *'La protection des mineurs en d.i.p. français depuis l'entrée en vigueur de la Convention de La Haye du 5 octobre 1961', Journal du droit international*, 1973, at pp. 631-635.
[56] See Sosniak, *Précis de droit international privé polonais* (1976) at pp. 200-203.

[55] La réserve a été faite par la France, le Luxembourg, les Pays-Bas et la Suisse. Pour une analyse des problèmes que cette réserve fait surgir, voir Droz, «La protection des mineurs en d.i.p. français depuis l'entrée en vigueur de la Convention de La Haye du 5 octobre 1961», *Journal du droit international*, 1973, p. 631-635.
[56] Voir Sosniak, *Précis de droit international privé polonais* (1976), p. 200-203.

The incidence of the use of such clauses elsewhere is less well-known to the Permanent Bureau. In some countries the inclusion of such a clause in the order might be deemed to exceed the court's authority, since it treats with a matter which goes beyond the territorial jurisdiction of the court. Whether the judge is so restricted in legal theory or not, it is clear that the enforcement of such a provision may be very difficult on the practical level once the party to whom it has been directed has escaped the territorial jurisdiction of the judge and his supporting administrative authorities.

In at least one European State, France, efforts have been made to protect the visitation rights of the non-custodial parent who justifiably fears removal of the child abroad by the custodial parent and subsequent denial of his visitation rights. It is possible when such a removal is feared to request the court to pronounce, at the time of commencement of the divorce proceeding or at any time thereafter, an order forbidding the departure of the child from France, which order might then be used to obtain administrative action within the district where the child had his place of residence to prevent his removal from the territory. See *La Lettre de la Chancellerie, Bimensuel du Ministère de la Justice*, Paris, No 4, July 30, 1977.

The problem referred to in this section of the Report will come up again in Part V, where the special problems of visitation rights – the denial and the abuse thereof – will be dealt with in more detail.

V — THE RELATIONSHIP BETWEEN VISITATION RIGHTS AND CHILD ABDUCTION

Among the elements of the typical childnapping situation which we have listed in Part II (B) of this Report is opportunity to carry out the abduction. Clearly the simplest format for an international abduction is to get the custodial parent to send the child to the country where the would-be abductor lives, in the belief that the trip is purely for purposes of a temporary sojourn.
Next best for the would-be abductor is to have the child in tow legally within the country of the child's habitual residence, ostensibly for visitation within that country. Where border formalities have been relaxed, the visiting parent may remove the child to an adjoining country without difficulty. Otherwise, if the child has the nationality of the visiting parent, it is sometimes possible for the parent to obtain a passport for the child from the embassy or consulate of his State within the country of the child's habitual residence. Armed with such a passport he may then clear the border with the child. Aware of the opportunities which visitation offers for child abduction to a foreign country or simple retention in that country, many custodial parents fear and resist claims for the exercise of visitation rights. In this they are aided and abetted by courts in their countries of residence, which may share their concern over possible abduction of the child, but also in some instances have been influenced by certain theories concerning the 'interests of the child'. In a nutshell, these theories insist upon the *overriding* importance for the child of maintaining a stable relationship of trust and confidence with at least one 'psychological parent'. This insistence is sometimes carried so far as to hold that visitation with the non-custodial parent should be entirely excluded during the minority of the child or, in any event, that such visitation should be granted or withheld entirely at the discretion of the custodial parent.

These theories constitute a direct challenge to the more traditional wisdom in many States which holds that a child

L'incidence de telles interdictions dans d'autres pays est moins connue du Bureau Permanent. Dans certains pays, on pourrait juger qu'en assortissant sa décision d'une pareille interdiction, le tribunal a outrepassé ses pouvoirs, cette matière n'étant pas de sa compétence. Que la compétence du juge soit ou ne soit pas juridiquement limitée, il est évident que, dans la pratique, l'exécution d'une interdiction de ce genre présenterait de sérieuses difficultés, une fois que la partie à laquelle elle est faite a fui le territoire dans lequel siège le tribunal et les autorités administratives qui lui prêtent main-forte.
Dans un pays européen tout au moins, la France, des dispositions ont été prises pour protéger le droit de visite du parent qui n'a pas la garde, s'il a des motifs légitimes de craindre que l'enfant soit conduit à l'étranger par le parent gardien, lui interdisant ainsi d'exercer son droit de visite. Quand cette crainte d'une soustraction existe, il est possible de demander au tribunal, soit au moment d'introduire une action en divorce, soit plus tard à tout moment, de rendre une ordonnance qui fait interdiction au mineur de quitter la France. En vertu de cette décision, des mesures administratives peuvent alors être prises dans la région où le mineur a sa résidence, pour empêcher qu'il quitte le territoire. Voir *La Lettre de la Chancellerie*, Bimensuel du Ministère de la Justice, Paris, No 4, 30 juillet 1977.
Nous reviendrons sur cette question dans la cinquième partie de ce Rapport, et nous traiterons de façon plus approfondie les problèmes particuliers que soulève le droit de visite, son refus et son abus.

V — LES RAPPORTS ENTRE LE DROIT DE VISITE ET L'ENLÈVEMENT D'UN ENFANT

Un des éléments d'un cas typique de rapt d'enfant, énumérés dans la deuxième partie (B) de ce Rapport, est la possibilité matérielle de procéder à l'enlèvement. Bien entendu, le scénario le plus simple d'un enlèvement international est celui où le parent gardien se laisse persuader d'envoyer l'enfant dans le pays où habite le futur ravisseur, en s'imaginant qu'il s'agit d'une simple visite.
Le second procédé auquel le futur ravisseur peut recourir sans trop de peine consiste à se trouver légitimement en compagnie de l'enfant dans le pays de la résidence habituelle de celui-ci, dans le but déclaré de lui rendre visite. Dans les pays où les formalités frontalières sont devenues moins strictes, le parent en visite peut, sans difficultés, faire passer l'enfant dans un pays voisin. Sinon, lorsque l'enfant a la même nationalité que le parent visiteur, ce dernier peut parfois obtenir un passeport pour l'enfant, en s'adressant à l'ambassade ou au consulat de son Etat dans le pays de la résidence habituelle de l'enfant. Armé de ce passeport, il peut alors franchir sans encombres la frontière accompagné de l'enfant. Sachant que le droit de visite crée des occasions d'enlever l'enfant et de le conduire dans un pays étranger, ou tout simplement de le retenir dans le pays, de nombreux parents gardiens se méfient du droit de visite et refusent d'accéder aux demandes tendant à l'exercer. Ils trouvent dans cette attitude l'aide et l'encouragement des tribunaux de leur pays de résidence, qui peuvent partager leurs craintes au sujet d'un enlèvement, mais qui sont parfois influencés par certaines théories relatives à «l'intérêt de l'enfant». Ces théories, en bref, mettent l'accent sur l'importance *vitale* pour l'enfant de maintenir des relations stables de confiance totale avec au moins un «parent psychologique». On va parfois jusqu'à soutenir que le droit de visite doit être refusé au parent qui n'a pas la garde pendant toute la minorité de l'enfant, ou en tout cas que l'autre parent doit pouvoir accorder ou refuser librement le droit de visite.
De telles théories battent en brèche la traditionnelle sagesse des nations selon laquelle l'enfant a besoin de s'identifier

needs psychological identification with parents of both sexes, that the fact that the child's interests as determined at one point in time call for him to be in the care or custody of one particular parent should not preclude maintenance of a continuing psychological tie with the other parent, and that the vagaries of human life are such that to put all of the child's eggs in the basket of the one custodial parent may deprive the child of the psychological, or even financial insurance which may be provided by the existence of a non-custodial but still functional second parent. Death or physical disability of the custodial parent may bring the need to call up in reserve the non-custodial parent, as may also be the case when changes in stages and phases of life on the part of the child or the custodial parent or both may throw out of phase a relationship which at an earlier period called for that parent to have custody in the best interests of the child. The complete denial of visitation rights to the non-custodial parent, or the imposition on the exercise of such rights of such severe and humiliating restrictions as to vitiate their meaningfulness, may with time have the effect of severing the relationship between child and non-custodial parent. Regrettably, due to bitterness arising from the break-up of the former marital relationship or to insecurity in a new marital relationship and the desire to cement the same by substitution of the step-parent for the natural parent of the child, the wish or intent of the custodial parent may frequently be precisely this severance.

Certainly there are hazards in the continuation of visitation with the child by the non-custodial parent. Contact between this parent and the child may reinforce emotional bonds, give both the child and the parent a sense of what each has lost, and in some cases trigger pressure within one or both for immediate change to regain the lost relationship – pressure which will not always wait on the delays and uncertainties of litigation with a view to changing custody. Such pressures are human, and recognition of their existence may well be the source of the usual rule in many States that a custody decree is freely modifiable upon showing of a change of circumstances; to this it must be added that in practice the courts may not look too critically at the means by which the non-custodial parent has brought the child within their jurisdiction.

The dilemma is that complete denial of visitation rights may not only deprive the child of the psychological and financial insurance provided by the existence of a second functioning parent; it may also lead to frustration – on the part of both parent and child – which may then bring on the precise evil which is feared: abduction of the child. And this may be the worst of all possible abductions from the point of view of its adverse effects on the child, since a sudden 'snatch' by a parent from whom the child has been isolated for an extended period of time may cause much greater fear and confusion to the child than a more relaxed 'skipping out' with a parent who has maintained a bond of confidence and understanding.

Certainly, efforts must be made to prevent the abuse of visitation rights for the purpose of obtaining an advantage in a change of custody suit. On the other hand, denial of visitation rights or unduly severe restriction on the exercise of visitation rights – particularly when these already suffer under the disadvantages of an international separation of the child's family – may lead to complete severance of the relationship between child and non-custodial parent. What is worse, the fear of such a severance may lead to sudden, traumatic kidnappings which bring on the greatest possibility for a harmful aftermath.
The best answer to this dilemma may well consist in the

psychologiquement avec ses deux parents et que si, à un moment donné, l'intérêt de l'enfant a exigé qu'il soit confié à l'un de ses parents, il ne faut pas pour cela rompre tous liens affectifs avec l'autre parent. Cette sagesse affirme encore, que les vicissitudes de la vie sont telles que mettre tous les oeufs de l'enfant dans le panier d'un seul des parents, celui qui a la garde, pourrait priver l'enfant de la sécurité psychologique ou même financière que pourrait lui assurer l'autre parent, lequel, même s'il n'a pas la garde, n'a pas renoncé à sa qualité d'ascendant. Si le parent gardien vient à mourir, ou s'il devient physiquement incapable, il faudra peut-être «faire appel à la réserve», c'est-à-dire à l'autre parent; c'est aussi le cas si des modifications dans la manière dont se déroule l'existence de l'enfant, ou du parent gardien – ou des deux – rendent difficile de maintenir entre eux les bons rapports qu'ils avaient entretenus et qui justifiaient que la garde ait alors été confiée à ce parent dans l'intérêt de l'enfant. Refuser tout droit de visite au parent qui n'a pas la garde, ou imposer à l'exercice de ce droit des restrictions tellement rigoureuses et humiliantes qu'elles lui enlèvent toute signification, peut en définitive avoir pour effet de dénouer à tout jamais les liens entre l'enfant et ce parent. Malheureusement, en raison de l'amertume qui naît si souvent de la rupture du lien conjugal, ou parce qu'un nouveau mariage semble fragile et que l'on voudrait le cimenter en substituant le nouveau conjoint au parent naturel de l'enfant, le parent gardien peut souvent avoir précisément le désir et l'intention de rompre les liens qui unissent l'enfant à l'autre parent.
Bien entendu, quand le parent non gardien continue à exercer son droit de visite, cela doit nécessairement faire naître des risques. Au cours de ces rencontres entre le parent et l'enfant, des liens affectifs peuvent se renforcer de sorte que l'enfant et le parent peuvent se rendre compte de ce que chacun a perdu. Parfois, l'un des deux – ou l'un et l'autre – est soumis à une pression si violente qu'elle exige un changement immédiat qui permettra de renouer les liens défaits, une pression qui refuse les incertitudes et les lenteurs d'un procès pour faire modifier la garde. Ces pressions sont humaines, et c'est peut-être pour reconnaître leur existence que, dans de nombreux pays, il est de règle qu'une décision en matière de garde puisse être modifiée, s'il est établi que les circonstances ne sont plus les mêmes. Au surplus, dans la pratique, les tribunaux se montrent souvent tolérants à l'égard des procédés employés par le parent non gardien pour amener l'enfant dans leur ressort.
Voici donc le dilemme tel qu'il se pose: d'un côté, refuser totalement un droit de visite peut non seulement priver l'enfant de l'aide morale et pécuniaire que l'autre parent peut lui assurer, mais encore, ce refus peut créer une frustration – ressentie tant par l'enfant que par le parent – dont le résultat sera de provoquer précisément ce que l'on redoutait: l'enlèvement de l'enfant. Et cet enlèvement sera peut-être le pire de tous les enlèvement possibles, en raison du mal qu'il pourra faire à l'enfant, car un «rapt» soudain commis par un parent que l'enfant n'a pas vu depuis longtemps risque de faire naître en lui une crainte et un désarroi beaucoup plus profonds que si l'enfant avait été «subtilisé» par un parent auquel il était encore lié par des sentiments de confiance et de compréhension.
Certes, il faut s'efforcer d'empêcher un parent d'abuser de son droit de visite dans le but d'obtenir un changement du droit de garde en sa faveur. D'un autre côté, le refus du droit de visite, ou l'imposition de restrictions d'une sévérité excessive – surtout lorsque ce droit souffre déjà des inconvénients d'une séparation internationale de la famille du mineur – peut provoquer une rupture totale des rapports entre l'enfant et le parent qui n'a pas la garde. Pis encore, la crainte d'une telle rupture peut conduire à des enlèvements brusques et traumatisants, c'est-à-dire ceux dont les conséquences sont les plus redoutables.
Peut-être la meilleure solution à ce dilemme consiste-t-elle à

creation of a mechanism for cooperation among legal authorities of the different countries which will assure full and free exercise of visitation rights while providing substantial guarantees against the abuse of such rights. The search for such a mechanism should be one of the important preoccupations of the Commission which will deal with the overall problem of 'legal kidnapping' within the Conference.

créer un mécanisme de coopération entre les autorités compétentes des différents pays, pour assurer l'exercice libre et complet du droit de visite, tout en fournissant des garanties sérieuses pour éviter l'abus de ce droit. La recherche d'un mécanisme de ce genre devrait être une des principales préoccupations de la Commission qui, au sein de la Conférence, sera saisie du problème général du «kidnapping légal».

VI — PENAL LEGISLATION AND EXTRADITION OF THE ABDUCTOR

The terms which are used to describe the phenomenon dealt with in this Report tend to have a flavour of criminality. The original term adopted by the Thirteenth Session, 'legal kidnapping', is on its face an oxymoron: can what is legal in fact be kidnapping and, conversely, can what is kidnapping be viewed as legal?

Indeed a number of legislations provide criminal penalties for the person who unjustifiably or 'improperly' interferes with peaceful care and custody of the child by the lawful custodian. In some jurisdictions there may be instead – or in addition – the possibility of criminal contempt proceedings against the party to a divorce or other custody proceeding who has wilfully violated the terms and conditions of custody or visitation as provided in the temporary or final order of the court.

The efficacy of criminal penalties to deal with the problem of abduction of a child by one of his parents has however been severely questioned and this Report will attempt a brief summary of certain types of penal legislation and the criticisms directed against it. This seems to be necessary even though reform or revision of international rules for recognition of decisions in criminal cases or for extradition of the abductor on criminal charges would be beyond the scope of this Conference's purposes as set forth in the first article of its governing statute; for if the most appropriate remedy to stem the rising tide of child abductions by parents were to lie in the area of recognition of criminal decisions and extradition, then the subject-matter of this Report would have to come before an international forum other than the Hague Conference on Private International Law. The conclusion of this Report will be that the Hague Conference is in fact the proper forum for dealing with this problem.

First a few examples of existing legislation on this subject.

The Revised Penal Code of New York provides for an offence entitled 'custodial interference'. Under Section 135.45 a person is guilty of custodial interference in the second degree when 'being a relative of a child less than 16 years old, intending to hold such child permanently or for a protracted period, and knowing that he has no legal right to do so, he takes or entices such child from his lawful custodian . . .'. Custodial interference in the first degree is specified in Section 135.50 as where a person commits custodial interference in the second degree 'under circumstances which expose the person taken or enticed from lawful custody to a risk that his safety will be endangered or his health materially impaired'.

A recent Californian statute (*California Laws* 1976, *Chapter 1399*, effective January 1, 1977) provides that any person not having a right to custody who takes, entices away, detains or conceals a child from the parent, guardian or other person having lawful charge of the child, shall be punished by imprisonment for a period of not more than ten years, a fine

VI — DROIT PÉNAL ET EXTRADITION DU RAVISSEUR

La terminologie à laquelle on a recours pour décrire le phénomène sur lequel porte ce Rapport n'est pas sans rappeler celle du droit pénal. L'expression que la Treizième session avait tout d'abord adoptée, «*legal kidnapping*», ressemble fort à un oxymoron: un acte légal peut-il constituer un rapt et, à l'inverse, un rapt peut-il être considéré comme légal?

Un certain nombre de législations prévoient bien des peines pénales pour celui qui, sans motif légitime ou «abusivement», trouble le gardien légal dans l'exercice de ses fonctions. Dans certains pays, des poursuites pénales peuvent être exercées – qu'elles soient la seule voie possible ou qu'elles s'ajoutent à d'autres remèdes – contre une partie à une action en divorce (ou à tout autre action relative à la garde) qui a volontairement violé les termes et les conditions du droit de garde, ou de visite, fixés par le tribunal par une décision, provisoire ou définitive.

L'efficacité de peines pénales pour régler le problème de l'enlèvement d'un enfant par l'un de ses parents a été sérieusement mise en doute, et le présent Rapport cherchera à résumer brièvement certaines lois pénales particulières et les critiques qui leur ont été adressées. Cet examen semble indispensable, bien que la réforme ou la révision des règles internationales sur la reconnaissance de décisions en matière pénale ou sur l'extradition d'un ravisseur sur lequel pèsent des charges pénales n'entrent pas dans l'objet de la Conférence, tel qu'il résulte du premier article de ses statuts: en effet, si le remède le plus approprié pour faire échec à la vogue croissante des enlèvements d'enfants par leurs parents doit être trouvé dans le domaine de la reconnaissance des décisions en matière pénale ou celui de l'extradition, alors le sujet dont traite ce Rapport doit être porté devant un autre *forum* international que celui de la Conférence de La Haye de droit international privé. Or la conclusion de ce Rapport est justement d'affirmer que la Conférence de La Haye est, en réalité, le *forum* approprié pour traiter de ce problème.

Voici, tout d'abord, quelques exemples de lois en vigueur en cette matière.

Le Code pénal révisé de New York prévoit une infraction appelée «*custodial interference*» (troubles dans l'exercice du droit de garde). Aux termes de l'article 135-45, se rend coupable de cette infraction au second degré, «toute personne, ayant un lien de parenté avec un mineur âgé de moins de 16 ans, dans l'intention de retenir ce mineur de façon permanente, ou pour une durée prolongée, et sachant qu'elle n'a juridiquement aucun droit de le faire, qui a soustrait le mineur de la garde de son gardien légal ou l'y a incité». Aux termes de l'article 135-50, commet une *custodial interference* au premier degré une personne «qui commet une *custodial interference* du second degré dans des circonstances qui exposent la personne enlevée ou incitée à un risque tel que sa sécurité sera menacée ou sa santé fortement altérée».

Une loi californienne récente (*California Law* 1976, *Chapter 1399*, entrée en vigueur le premier janvier 1977) prévoit que toute personne n'ayant pas la garde qui soustrait un mineur de la garde du parent gardien ou de toute autre personne qui a légalement la garde, ou qui l'y incite, le retient ou le dissimule, sera puni d'un emprisonnement d'une durée non

of not more than ten thousand dollars, or both. This law also provides that any person, in violation of a custody decree, who takes or conceals a child from his legal guardian or person with custody pursuant to an order, judgment, or decree granting visitation rights with the intent to deprive the other person of such rights, shall be punished by imprisonment in the county jail for not more than one year or a fine of not more than one thousand dollars, or both.

On the federal level in the United States there have been several proposed bills seeking to amend Title 18, *United States Code*, Section 1201 (the so-called 'Lindbergh Act') in order to make child abduction across State lines 'a federal crime' subject to a fine of not more than one thousand dollars or imprisonment for not more than one year, or both. Under existing Section 1201 parents who abduct their children are expressly exempted from the 'Lindbergh Act' and bills such as *H.R. 4486, 94th Congress, 1st Session*, would qualify the exemption by adding 'unless such parent is under judicial order not to interfere with the custody of such minor or not to remove such minor from the jurisdiction of the court'.

The information set out in the three preceding paragraphs has been drawn from the article by Foster and Freed entitled 'Proposed legislation on child abduction', published in the Winter 1977 issue of the *Family Law Newsletter of the American Bar Association*, Section of Family Law (Vol. 17, No 2, pp. 1-3)[57]. In the Spring 1976 issue of the same Newsletter (Vol. 16, No 4) Susan Wendall Whicher has discussed the criminal legislation of Colorado (*CRS* 1973, 18-3-304) in connexion with the problem of childnapping, in a short article entitled 'Beware the Baby Snatch' (pp. 1 and 5).

The commentators describing the laws mentioned above have almost uniformly noted the inefficacy of such laws, arising both from the number of defences available due to the detailed requirements of intent under the laws, the fact that they usually are construed to refer only to the decisions handed down by the courts in the State having passed such law and, finally, due to widespread reluctance of police forces and courts to pursue criminal investigation and prosecution in these types of family disputes.

Generally speaking, the response elsewhere has tended to be unfavourable to the reliance on criminal penalties as a means of deterring abduction of children by one of their parents. For example, during a debate in the French National Assembly on 24 June 1977, the Minister of Justice asked whether legislative or administrative measures (including those of a penal nature) could be taken in order to prevent parents who had the custody of children from removing them from France and subsequently frustrating the visitation rights which the French courts had given to the non-custodial parent, gave a detailed review of the civil and administrative remedies available through the Office for International Co-operation; but, with regard to penal remedies, he observed that the experience acquired by the Chancellery showed that in the current state of international relations penal law seemed to be not very suitable for

[57] A more up-to-date review of proposed federal legislation on this subject is contained in the Winter 1978 issue of the *Family Law Quarterly*, in the article by Russell M. Coombs at pp. 407-426.

supérieure à dix ans, ou d'une amende non supérieure à dix mille dollars, ou des deux peines. La loi prévoit aussi que quiconque, en violation d'une décision en matière de garde, enlève un enfant à son tuteur légal ou à la personne qui en a la garde, en vertu d'une ordonnance, d'un jugement ou d'une décision qui lui accorde un droit de visite, ou qui dissimule l'enfant, avec l'intention d'empêcher l'autre personne d'exercer ce droit, sera puni d'un emprisonnement d'une durée non supérieure à une année ou d'une amende non supérieure à mille dollars, ou des deux peines.

A l'échelon fédéral, plusieurs projets de lois ont été déposés en vue d'amender l'article 1201 du Titre 18 de l'*United States Code* (la «Loi Lindbergh») pour faire de l'enlèvement d'un enfant, en lui faisant franchir les frontières de l'Etat, une «infraction fédérale», punie d'une amende non supérieure à mille dollars ou d'un emprisonnement non supérieur à une année, ou des deux peines. L'article 1201, dans sa teneur actuelle, prévoit expressément qu'il ne vise pas les parents qui enlèvent leur propre enfant, mais des projets de lois tels que *H.R. 4486, 94th Congress 1st Session* voudraient apporter à cette exception la réserve suivante: «sauf si en vertu d'une décision judiciaire, il a été fait interdiction à ce parent d'apporter un trouble à la garde du mineur ou de faire quitter à celui-ci le ressort du tribunal».

Les informations données dans les trois paragraphes précédents ont été puisées dans un article de Foster et Freed intitulé *Proposed legislation on child abduction* (projet de loi en matière d'enlèvement de mineurs), publié dans le numéro d'hiver 1977 de la *Family Law Newsletter of the American Bar Association, Section of Family Law* (Vol. 17, No 2, p. 1-3)[57]. Dans le numéro du printemps 1976 de la même *Newsletter* (Vol. 16, No 4), Susan Wendall Whicher a étudié la législation pénale de l'Etat du Colorado (*CRS* 1973, 18-3-304) au sujet du problème des enlèvements de mineurs, dans un court article qu'elle a intitulé «*Beware the Baby Snatch*» (p. 1 et 5) («Prenez garde aux soustractions de bébés»).

Les commentateurs qui ont étudié ces lois sont presque unanimes à relever leur inefficacité: celle-ci résulte tout d'abord du grand nombre de moyens de défense qui peuvent être valablement invoqués, parce que ces lois imposent des conditions très sévères pour établir l'intention coupable, ensuite parce qu'elles seraient interprétées comme si elles ne visent que les décisions prononcées par les tribunaux de l'Etat où ces lois sont en vigueur, et enfin parce que les forces de l'ordre et les tribunaux hésiteraient à ouvrir des enquêtes et à prononcer des condamnations pénales pour des querelles de famille de ce genre.

Ailleurs, on tend en général, à se prononcer contre le recours à des sanctions pénales comme moyen de dissuasion des enlèvements d'enfants par leurs parents. Par exemple, le 24 juin 1977, au cours d'un débat devant l'Assemblée nationale française, il fut demandé au Ministre de la Justice s'il n'estimait pas utile de mettre à l'étude des mesures législatives ou réglementaires plus dissuasives, afin d'éviter l'emploi de procédés destinés à faire échec aux prétentions légitimes du parent auquel la garde des enfants n'a pas été confiée, notamment lorsque le parent qui a la garde s'installe à l'étranger. Dans sa réponse, le Ministre brossa un tableau détaillé des mesures civiles et administratives qui peuvent être prises grâce aux services de l'entraide judiciaire internationale. Il ajouta qu'il résultait de l'expérience acquise qu'en l'état des relations internationales, le droit pénal apparaît peu apte à donner une solution satisfaisante aux

[57] Un commentaire plus récent sur les lois fédérales proposées en cette matière est contenu dans le fascicule hiver 1978 du *Family Law Quarterly*, dans l'article de M. Russell M. Coombs, p. 407-426.

offering a satisfactory solution to the problems posed by protection of minors when those were abroad, above all where the persons in question were citizens of the State where refuge was taken or possessed double nationality[58].

In like manner the brief prepared by the Canadian Ministry of Justice, mentioned in the Introduction, noted that it is a criminal offence in Canada for anyone, with intent to deprive a parent or guardian or any other person who has lawful care or charge of a child under the age of 14 years of the possession of that child, unlawfully to take, entice away, detain, receive or harbour the child; the section however does not apply to a person who, claiming in good faith a right to possession of the child, obtains possession of the child. Parents generally under provincial law having equal rights to the custody of their children until a court decree orders otherwise; it was noted that there had never been a criminal conviction of a parent in Canada for abduction of his or her child except in cases where there was an order of a court of competent jurisdiction granting custody to the other parent prior to the abduction of the child[59]. The brief further noted that even in cases where there was an existing custody order it was difficult to motivate police and prosecutors to lay charges – and judges and juries to convict because of a widespread belief that criminal law was an inappropriate method of resolving what are essentially domestic disputes of a civil nature. The brief went on to point out the very considerable difficulties and obstacles to obtaining extradition of an abducting parent when the removal was international and further observed that extradiction of the abducting parent does not guarantee the return of the abducted child, as the child was the victim not the perpetrator of the offence, and the child might be cared for and retained by the family of the abducting parent in the foreign jurisdiction.

The final communiqué of the meeting of Commonwealth Law Ministers to which the Canadian brief was submitted recommended 'that early examination be given to greater cooperation in the enforcement of custody orders, particularly as criminal proceedings were generally unsuited for use in a family context'[60].

The efficacy of criminal contempt proceedings, as distinguished from specifically defined criminal offences of interfering with custody, is not at all clear. In England, under the Guardianship of Minors Act, failure to comply with an order for custody made in the High Court or a county court is punishable with committal until the child is handed over to the parent to whom custody has been granted[61]. If the order is made in a magistrate's court the party refusing to carry it out may be ordered to pay a sum not exceeding one pound sterling for every day that he is in default up to a maximum of 20 pounds sterling or committed to prison until he has complied with the order or for a period of two months whichever be the shorter[62]. Similar provisions are probably available for violation of a custody order by a party to the lawsuit in most other jurisdictions which have derived their court procedures from the English common law.

[58] *Revue critique de d.i.p.*, 1977, pp. 608-609. See also *La Lettre de la Chancellerie*, Paris, Ministry of Justice, No 4, 30 July 1977.

[59] In connection with a recent acquittal, where a custody order had been entered before the abduction, the Court of British Columbia noted that the father, due to lack of knowledge of the English language, had not well understood the legal situation at the time and, further, that his ex-wife had enticed him to come to Canada in the first place in order that she might obtain a more favourable court in which to litigate a custody proceeding. See *Le Monde*, 16-17 April 1978, p. 22.

[60] *Communiqué*, 26 August 1977, No 36.

[61] Bromley, *Family Law*, 4th ed. 1971, p. 283, citing *R.S.C.*, 0.45, s. 5 and *County Court Rules*, 0.25, s. 67.

[62] *Id.*, p. 283, citing *Guardianship of Minors Act* 1971, s. 13(1) and *Magistrate's Courts Act* 1952, s. 54.

Les problèmes que pose la protection des mineurs dès que ceux-ci sont à l'étranger, surtout dans les cas où les personnes en cause sont ressortissantes de l'Etat de refuge ou possèdent la double nationalité[58].

De même, la Note préparée par le Ministre de la Justice du Canada – mentionnée dans l'Introduction – a souligné qu'au Canada, commet une infraction pénale quiconque, dans l'intention de priver de la possession d'un mineur âgé de moins de 14 ans un parent ou tuteur, ou toute personne auquel la garde de ce mineur a été confiée, s'empare illégalement de ce mineur ou l'incite à le suivre, ou le retient, le reçoit ou lui donne refuge illégalement. Cependant, cette disposition ne s'applique pas à une personne qui obtient la possession de l'enfant si elle croit de bonne foi avoir droit à cette possession. En général, au Canada, le droit provincial accorde aux deux parents un droit égal à la garde des enfants, tant qu'une décision judiciaire n'en a pas jugé autrement, et on a constaté qu'aucun parent n'a été pénalement condamné dans ce pays pour avoir enlevé son propre enfant, sauf dans les cas où un tribunal compétent avait confié sa garde à l'autre parent avant l'enlèvement[59]. La Note signalait aussi que, même dans les affaires où une décision judiciaire avait été prononcée, la police et le ministère public acceptaient rarement d'exercer des poursuites et les juges et les jurys de prononcer des condamnations, et ce, en raison de l'idée très répandue que le droit pénal est inapte à résoudre des problèmes qui sont essentiellement des querelles de famille relevant du droit civil. La Note faisait ensuite état des difficultés et des obstacles considérables que l'on rencontrait quand on cherchait à obtenir l'extradition du parent ravisseur lorsqu'il s'agissait d'un enlèvement international, et ajoutait que l'extradition du parent coupable n'assurait pas la restitution de l'enfant enlevé, puisque celui-ci n'était pas l'auteur de l'infraction, mais sa victime, et que la famille du ravisseur pouvait décider de s'occuper de l'enfant et le retenir dans le pays.

Le communiqué final de la réunion des Ministres de la Justice du Commonwealth, au cours de laquelle la Note canadienne fut présentée, recommanda «que l'on s'efforce au plus tôt d'assurer une plus grande coopération dans l'exécution des décisions en matiere de garde, en particulier parce que des poursuites pénales ne sont pas appropriées dans le contexte familial»[60].

L'efficacité des procédures pénales engagées pour l'infraction de *contempt*, par opposition à des infractions pénales spécialement prévues en cas de troubles apportés à la garde, est loin d'être évidente. En Angleterre, aux termes du *Guardianship of Minors Act* (loi sur la tutelle des mineurs), le refus d'obéir à une décision qui accorde la garde, prononcée par la *High Court* ou une *county court*, est passible d'une détention qui dure tant que le mineur n'a pas été remis au parent gardien[61]. Si la décision émane d'une *magistrate's court*, la partie qui refuse de s'y conformer peut être condamnée, soit à payer une astreinte non supérieure à une livre sterling par jour (avec un maximum de 20 livres sterling), soit à être détenue en prison aussi longtemps qu'elle n'aura pas obéi, ou pendant deux mois, selon ce qui est le plus court[62]. Des dispositions semblables peuvent sans doute être invoquées, quand une décision de garde n'a pas été respectée, dans la plupart des pays dont la procédure judiciaire a été empruntée à la *common law* anglaise.

[58] *Revue critique de d.i.p.* 1977, p. 608-609. Voir aussi La Lettre de la Chancellerie, Paris, Ministère de la Justice, No 4, 30 juillet 1977.

[59] En ce qui concerne un acquittement récent, dans une affaire où un jugement avait été prononcé avant l'enlèvement, la Cour royale provinciale de Colombie britannique a relevé que le père ne parlant pas l'anglais, n'avait pas eu une connaissance claire de la situation juridique et, au surplus, que l'ex-épouse de l'accusé avait incité son mari à venir s'installer au Canada pour plaider la garde de leur enfant devant une cour qui lui était plus familière. Voir *Le Monde*, 16-17 avril 1978, p. 22.

[60] *Communiqué*, 26 août 1977, No 36.

[61] Bromley, *Family Law*, 4ème éd. 1971, p. 283, citant *R.S.C.*, 0.45, s. 5 et *County Court Rules*, 0.25, s. 67.

[62] *Id.*, p. 283, citant le *Guardianship of Minors Act* 1971, s. 13(1) et le *Magistrate's Courts Act*, 1952, s. 54.

It should also be recalled, for example, that procedures described by the French Ministry of Justice call for a parent who fears unlawful removal of the child by the custodial parent to seek an appropriate order and sanction from the court, by means of which an administrative order forbidding departure of the child from the territory may be obtained.
As was mentioned in Part IV (D), above, the practice of the legal profession in some areas, particularly in common law jurisdictions, may call for inclusion in the order, where removal of the child from the jurisdiction is contemplated as a possibility, of a provision forbidding removal of the child outside of the jurisdiction without prior permission of the court; in common law jurisdictions this would then be enforced by the usual remedy of criminal contempt proceedings.
It seems fairly clear however that criminal remedies, whether by specified offence or by use of the power of contempt, cannot be very effective in the international context. A recent article in *The Sunday Times* (April 16, 1978) described an organised effort by divorced and unmarried Danish fathers to enable them to kidnap their children and remove them abroad, for the purpose of obtaining custody. Although criminal penalties are available under the Danish Penal Code, they have apparently not sufficed to deter acts of self-help by Danish fathers.

Il faut aussi rappeler par exemple les procédures décrites par le Ministre de la Justice français: elles permettent au parent qui craint de voir le parent gardien faire disparaître l'enfant, de requérir du tribunal une ordonnance en vertu de laquelle des mesures administratives pourront être prises pour empêcher le départ de l'enfant. Comme nous l'avons signalé ci-dessus dans la quatrième partie (D), des hommes de loi ont pris l'habitude, dans certaines régions – surtout dans les pays de *common law* – de demander, lorsque l'on redoute que l'on conduise le mineur hors du pays, que la décision interdise le déplacement de l'enfant hors des frontières du pays sans une autorisation préalable du tribunal: dans les pays de *common law*, une action pénale pour *contempt* peut être introduite pour assurer l'exécution d'une telle décision.

Il semble cependant clair que le recours à des sanctions pénales pour punir, soit des infractions spécifiquement prévues, soit l'infraction générale de *contempt*, ne peuvent pas être d'une grande efficacité dans le contexte international. Un article récent du *Sunday Times* (daté du 16 avril 1978) décrit une tentative organisée au Danemark, par des pères divorcés ou célibataires, pour enlever leurs enfants et les conduire à l'étranger, dans l'espoir d'en obtenir la garde. Bien que des peines soient prévues par le Code pénal danois en pareil cas, elles ne semblent pas avoir eu un effet dissuasif sur ces pères danois, bien décidés à se faire justice à eux-mêmes.

VII — POSSIBLE METHODS FOR REDUCING OR AMELIORATING PROBLEMS OF CHILD ABDUCTION THROUGH ACTION BY THE CONFERENCE

A *Possible remedies through the courts*

1 *Facilitating the enforcement of decisions*

Provision for facilitating and expediting the enforcement of custody decisions among States is one very important way in which problems of child abduction might be reduced. Many childnappings occur after a custody decision has been handed down, and rapid and certain enforcement of the prior custody decision would take away the envisaged effect of the abduction.
It will be recalled that the Convention of 1961 on the protection of infants stopped short of providing procedures for enforcement of custody decisions, even where it provided for recognition of them (article 7). The work in the Council of Europe Committee on the Legal Representation and Custody of Minors proceeded along these lines and now is dealing with a draft of a text providing for enforcement of decisions, capping this off with an additional treaty text providing for an international tribunal to resolve the problems caused by conflicting decisions handed down in different countries.

Imperative rules in many countries, however, which call for deciding custody matters on the basis of the 'best interests of the child', make it difficult to avoid the intrusion of a defence against enforcement based on changed circumstances and a new view of the child's interests. When the substantive standard is brought in, we are already faced with the possibility of delay in the proceeding, while the merits are litigated, which ultimately favours the kidnapper by providing the essential element for the adaptation of the child – lapse of time.

Enforcement of custody decisions also does not meet the full problem, since stronger enforcement of custody decisions on the international level might only impel would-be abductors to make their moves sooner, in order to anticipate a custody decision that might be handed down. Cases of abrupt removal of the child by one parent during the break-up of a

VII — MÉTHODES SUSCEPTIBLES DE RÉDUIRE OU D'ATTÉNUER LES PROBLÈMES D'ENLÈVEMENTS D'ENFANTS PAR UNE ACTION DE LA CONFÉRENCE

A *Les moyens judiciaires possibles*

1 *Faciliter l'exécution des décisions*

Des dispositions qui facilitent et rendent plus rapide entre les Etats l'exécution des décisions constituent un des meilleurs moyens d'atténuer les problèmes que posent les enlèvements de mineurs. Les enfants sont souvent enlevés après le prononcé d'une décision sur la garde, et une exécution rapide et certaine des mesures déjà prises réduiraient à néant les effets escomptés de l'enlèvement.
Il faut rappeler que la Convention de 1961 sur la protection des mineurs ne va pas jusqu'à prévoir des procédures pour l'exécution des mesures relatives à la garde, même si elle prévoit leur reconnaissance (article 7). Au Conseil de l'Europe, les travaux du Comité d'experts sur la représentation légale et la garde des mineurs vont dans le même sens et le Comité cherche actuellement à rédiger l'avant-projet d'un texte prévoyant l'exécution des mesures, en couronnant le tout d'un traité supplémentaire qui créerait un tribunal international compétent pour régler les conflits nés de mesures contradictoires prises dans des pays différents.
Cependant, les règles impératives en vigueur dans de nombreux pays, selon lesquelles les questions relatives à la garde doivent être réglées en tenant compte de «l'intérêt supérieur du mineur» rendent difficile d'écarter un moyen de défense qui invoquerait des circonstances nouvelles, ou un point de vue modifié sur les intérêts du mineur. Déjà, quand cette règle positive est invoquée, on risque de voir la procédure se prolonger, afin que le tribunal puisse statuer sur le fond, ce qui joue en définitive en faveur du ravisseur, en lui apportant l'élément essentiel qui assure l'adaptation de l'enfant – le temps qui s'écoule.
L'exécution des décisions sur la garde ne résoud d'ailleurs pas le problème dans son ensemble, car si ces décisions étaient exécutées avec une plus grande rigueur à l'échelon international, cela pourrait simplement contraindre ceux qui envisagent un enlèvement d'agir plus tôt, avant qu'une décision sur la garde ne soit prononcée. On connaît des

marriage or other relationship – and before a custody order has been entered – are not unknown, and more rigorous enforcement of custody decrees might increase their number.

Still, this line of action offers one possible direction for the work of the Conference, which would then tend towards completion of the 1961 Convention – perhaps even by means of a protocol on enforcement of decisions.

2 *Creation of an international tribunal*

Mention has been made above of the Council of Europe's preparation of a draft text on an international tribunal for the purpose of solving cases of conflicting custody decisions in different States. Because of the different jurisdictional and legal standards among the States in respect of custody, conflicting decisions in different States are not uncommon. The mechanism of an international tribunal to resolve such conflicts has on the face of it a certain appeal, since it calls for international cooperation on the most scientific level – that of the judges of the different countries.

The difficulty which this offers, with judges of different States sitting on such a tribunal, is to define the perspective that should be used by any supposedly neutral judge of such a tribunal in appreciating the merits of cases in which the interests of persons of different nationality or residence (from the court) are involved, among which predominantly the 'welfare' of the child. The interests of the child may appear very different from the perspectives of different countries and cultures, to say nothing of the fact that they may differ depending on whether one looks at the short-term, the medium-term or the long-term 'interests' of the child. An international tribunal would have the merit – the authors seem to hope – of providing the machinery for resolving such conflicts and giving a definitive judgment. It would seem to carry the risk, however, of a more arbitrary nature – due to the lack of sufficiently defined standards – than would be the case for judges within a single legal system, who can develop continuity and perhaps even consistency in the development of standards for determination of custody cases. Moreover a tribunal presupposes litigation, and once the interested parties have come to that stage there is little if any chance to find a reasonable solution for what may have become a matter of prestige.

It seems more important to avoid conflicting judgments – or even judgments that cannot be recognised.

The idea of an international tribunal is more unwieldy in the context of the Hague Conference than it is within the regional framework of the Council of Europe, for the obvious reason that the worldwide scope of the Conference involves greater differences and more diverse cultural patterns. The 'global village' is not with us quite yet and one hesitates to predict results which would inspire confidence emanating from *ad hoc* courts joining members from widely scattered parts of the globe. The idea, however, is on the table and is open for discussion as a possible means of resolving those very difficult disputes where each party has ranged the legal authority of a different State in his support.

3 *Expediting the return of the child*

The difficulties which have been pointed out above regarding the possible effectiveness of treaty provisions for rapid enforcement of custody decisions or for the resolution of conflicting decisions by an international tribunal led in the

affaires dans lesquelles l'un des parents a soudainement enlevé le mineur quand son mariage, ou toute autre union, semblait sur le point de se désagréger, et avant qu'une décision sur la garde ait été prononcée; le nombre de tels cas pourrait s'accroître si les jugements sur la garde étaient plus rigoureusement exécutés.
Les travaux de la Conférence pourraient cependant s'engager dans cette voie, et ils tendraient alors à compléter la Convention de 1961, peut-être même au moyen d'un protocole sur l'exécution des décisions.

2 *La création d'un tribunal international*

Nous avons signalé plus haut que le Conseil de l'Europe préparait le projet d'un texte créant un tribunal international chargé de se prononcer dans les affaires où des décisions contradictoires sur la garde sont rendues dans des Etats différents. Parce que les règles de compétence et de droit en matière de garde diffèrent selon les Etats, les décisions qui y sont rendues sont très souvent contradictoires. Faire appel à un tribunal international pour régler ces conflits est un procédé qui, à première vue, ne manque pas d'attrait, puisqu'il demande, au niveau scientifique le plus élevé, une coopération internationale entre des magistrats venus de pays différents.
Cette solution qui verrait des juges d'Etats différents siéger au même tribunal, présenterait une difficulté, celle de définir la perspective dans laquelle le juge, supposé neutre, doit étudier des litiges opposant les intérêts de personnes de nationalité et de résidence différentes (vis-à-vis du tribunal) – «l'intérêt» du mineur devant, bien entendu, prendre le pas sur toutes autres considérations. L'intérêt du mineur peut sembler très dissemblable, dans la perspective de pays différents, de cultures différentes, pour ne rien dire du fait que ces perspectives peuvent différer selon que l'on envisage «l'intérêt» du mineur à long terme, à moyen terme ou à court terme. L'avantage d'un tribunal international – les auteurs semblent l'espérer – serait d'offrir un mécanisme susceptible de régler de tels conflits et de prononcer des décisions en dernier ressort. Mais – faute de règles assez clairement définies – il porterait en lui le risque d'avoir un caractère plus arbitraire que s'il était composé de juges d'un même système de droit, qui pourraient établir une continuité de décisions et même créer une jurisprudence constante, dans les affaires de garde de mineurs. Au demeurant, l'existence d'un tribunal présuppose celle d'un procès, et quand les parties en sont arrivées à cette extrémité, les chances sont minimes que l'on puisse trouver une solution raisonnable pour régler ce qui est peut-être devenu une question de prestige.
Il semble plus important d'éviter des jugements contradictoires ou même des jugements qui ne peuvent pas être reconnus.
L'idée d'une cour de justice internationale est plus malaisée à admettre dans le contexte d'une Conférence de La Haye que dans le cadre régional du Conseil de l'Europe, pour la raison évidente que la portée mondiale de la Conférence implique des différences plus profondes et des cultures plus dissemblables. Nous n'en sommes pas encore au «village mondial» et nous hésitons à affirmer que des tribunaux *ad hoc* où siégeraient des magistrats venus des quatre coins du monde pourraient aboutir à des résultats qui inspireraient une grande confiance. L'idée cependant est dans l'air, et des discussions permettront de voir si elle constitue un moyen susceptible de résoudre des conflits très compliqués, dans lesquels chaque partie appelle à son secours l'autorité judiciaire d'un Etat différent.

3 *Accélérer la restitution du mineur*

En raison des doutes que l'on éprouve sur l'efficacité des clauses d'un traité relatives à l'exécution rapide des décisions en matière de garde ou au recours à un tribunal international en cas de décisions contradictoires, le Conseil

Council of Europe to a new suggestion which was advanced by the Swiss Delegate. This consists of the restoration of custody by the courts or authorities of the country to which the child has been removed, restricting the defenses to avoid, as often as possible, a hearing on the merits, where the child has been 'arbitrarily' or 'improperly' removed from the custodian. This would have the advantage of avoiding the delays which would come with the normal hearing on enforcement of a custody decision, since it is difficult to avoid the hearing on a custody decision from getting involved with the reconsideration of the merits, the 'welfare' or 'best interests' of the child.
Some courts – for example, within the United Kingdom – have experimented with 'summary' decisions on their own, these tending to avoid a hearing on the merits unless special circumstances are shown which clearly show that such a hearing is in the best interests of the child.
The difficulty with formulating this proposal in an international treaty is that, to the extent to which it restricts the capacity of the judge to hear the case on its merits, it makes him appear as a 'rubber stamp' rather than a judge. Judges persist in believing that they are trained and paid to judge, and it may be difficult for some of them to accept that when a child in dispute is presented before them they should abstain from considering that child's interests.

To draw a mandatory rule under which the judge must restore custody and to base this on a somewhat vague standard, such as that the child has been 'improperly' or 'arbitrarily' removed from that custody, is an invitation to the judges to read the standard on a highly subjective basis – resulting in relatively arbitrary decisions.
Still, the principle of an *almost* automatic, and above all speedy turnover of the child who has been 'improperly' removed from custody in another State is on the table for discussion, and it might ultimately provide the best available remedy.

B *Elimination of the abductor's access to the courts*

1 *Defining more narrowly the jurisdiction of courts over custody suits*

Refusal of the courts in the country to which the child has been removed to exercise jurisdiction over the custody issue is another possible means of depriving the abductor of the fruits of his kidnapping. This may occur under a jurisdiction-selecting rule, such as those which are contained in the Convention of 1961. The rule might specify that the courts of a single State have exclusive jurisdiction over determination of the child's custody.
The greatest continuity would be given by designating the court of the child's nationality for this purpose, since nationality is changed less frequently than residence or domicile. The disadvantage of course is when the child habitually resides in a State other than that of his nationality. The child's needs are more readily determined in most cases by the courts of the State where the child habitually resides. This is the reason why the Convention of 1961 gave prior jurisdiction to the courts of the child's habitual residence, even though it was found necessary in the context of an international convention to give the courts of the State of the child's nationality jurisdiction to intervene if they found that the interests of the minor so demanded, after having informed the authorities of the State of his habitual residence. We have noted that the Convention of 1961 also gave the possibility of a reservation (in article 15) by which the State where a petition for divorce or annulment of a marriage or a legal separation was pending might retain jurisdiction for determination of custody issues arising in the context of that proceeding.

de l'Europe a été saisi par le Délégué suisse d'une nouvelle suggestion. Elle consiste à prescrire aux tribunaux ou aux autorités du pays où le mineur a été amené, le devoir de rétablir la garde en limitant le plus souvent possible les moyens de défense, afin que l'action ne porte pas sur le fond, dans les affaires où l'enfant a été soustrait «arbitrairement» ou «irrégulièrement» à son gardien. L'avantage serait d'éviter les lenteurs inhérentes à une action normale relative à l'exécution d'une décision sur la garde, puisqu'il est difficile, dans une action de cette nature, que la question du «bien-être» ou «de l'intérêt supérieur» du mineur ne soit pas replaidée sur le fond.
Certains tribunaux – notamment ceux du Royaume-Uni – ont tenté l'expérience de prononcer des décisions «sommaires» en évitant de statuer sur le fond du litige, sauf si des circonstances spéciales ont clairement montré qu'un tel examen servait l'intérêt supérieur du mineur.
La difficulté que l'on éprouverait à formuler cette clause dans un traité international viendrait du fait que, dans la mesure où elle limiterait le droit du juge à statuer sur le fond, son rôle serait celui d'un simple «automate» plutôt que celui d'un juge. Or, les juges persistent à croire qu'ils ont été formés et qu'ils sont payés pour juger, et certains d'entre eux accepteraient difficilement que, lorsqu'une affaire relative à la garde d'un mineur est plaidée devant eux, ils doivent s'abstenir de prendre en considération l'intérêt de l'enfant.
Etablir une règle impérative qui oblige le juge à rétablir la garde, en fondant cette règle sur un principe plutôt vague, par exemple que le mineur a été «irrégulièrement» ou «arbitrairement» soustrait à son gardien, c'est inviter les juges à asseoir ce principe sur une base extrêmement subjective, d'où des décisions relativement arbitraires.
L'idée d'une restitution *presque* automatique, et par-dessus tout, rapide, de l'enfant qui a été «irrégulièrement» soustrait à son gardien dans un autre Etat a néanmoins été avancée, et elle mérite d'être discutée, car ce serait peut-être en définitive la meilleure solution à ce problème.

B *Refuser au ravisseur l'accès aux tribunaux*

1 *Restreindre la compétence des tribunaux dans les affaires de garde des enfants*

Refuser aux tribunaux du pays où l'enfant a été conduit compétence pour se prononcer sur sa garde est un autre moyen possible de priver le ravisseur des fruits de l'enlèvement. Ce serait le cas si une règle attributive de compétence – du genre des règles que l'on trouve dans la Convention de 1961 – était enoncée. On pourrait attribuer aux autorités d'un seul Etat compétence exclusive pour se prononcer sur la garde du mineur.
Pour assurer le mieux possible la continuité du régime appliqué au mineur, ces autorités devraient être celles de l'Etat dont le mineur est ressortissant, puisque la nationalité est changée moins souvent que la résidence ou le domicile. L'inconvénient, bien entendu, serait que le mineur ait sa résidence habituelle dans un autre Etat que celui dont il est ressortissant. Dans la plupart des cas, les autorités judiciaires de l'Etat où le mineur a sa résidence habituelle sont les mieux placées pour connaître ses besoins. C'est pour ce motif que la Convention de 1961 a attribué tout d'abord compétence aux autorités de l'Etat de la résidence habituelle du mineur, même si, dans le contexte d'une convention internationale, il fut jugé nécessaire de donner compétence aux autorités judiciaires de l'Etat dont le mineur est ressortissant pour prendre des mesures de protection, si elles considèrent que l'intérêt du mineur l'exige – après avoir avisé les autorités de l'Etat de sa résidence habituelle. Nous avons signalé que la Convention de 1961, dans son article 15, donnait aussi la possibilité à un Etat de réserver la compétence de ses autorités appelées à statuer sur une demande en annulation, dissolution ou relâchement du lien conjugal, pour prendre des mesures de protection de la personne du mineur.

From what has been said above, it can be seen that at the time of the Ninth Session of the Conference (less than 20 years ago) it was not possible to reach agreement on a single jurisdiction which would have the exclusive right to determine definitively the custody of the child.

Attention may be pointed here to the variation which exists under the *Uniform Child Custody Jurisdiction Act*, prepared in the United States, by which the courts of the place where a child has lived with his parents, a parent, or a person acting as parent, for at least six consecutive months preceding the initiation of the litigation have jurisdiction and the courts of the State where the child is merely present do not (Sections 2 and 3 of the Act). This jurisdiction-defining provision – like all standards which are based on a fixed time element – might create problems in some cases due to the rigidity of the time element and the almost nomadic existence of some families. Still, a combination of some such time factor with the concept of habitual residence might possibly allow the Conference to come closer to designation of an exclusive jurisdiction for custody than was possible at the time of negotiation of the text of the 1961 Convention.

2 *Giving the courts the power to decline jurisdiction for reasons of misconduct by a parent*

Rigid jurisdiction-selecting standards are not always sufficient to meet the ingenuity of individuals. This has led to provisions, for example, in the Uniform Child Custody Jurisdiction Act (Section 8), which are supplementary to provisions for jurisdiction or for enforcement of custody orders, whereby the parent who has acted improperly may be denied his day in court. This approach is generally known in common-law jurisdictions as the 'clean hands' doctrine. It bears an analogy to the type of approach which was suggested for the 1961 Convention and included in the preliminary draft of that Convention (article 6), by which jurisdiction might be denied in case of the fraudulent removal of the child. Because of the difficulty of formulating that provision, it was however dropped in the final draft of the 1961 Convention.

This same problem will face the Conference in the context of child abduction, as the current efforts of the Council of Europe to define 'improper' removal of the child from the custodian tend to show. The definitions of 'improper', 'evasion' or 'fraud' vary so much from country to country, and the difficulties of finding a standard definition within the Treaty are so great, that this approach may not be very useful to the Conference – even as a supplement to one of the other possible methods discussed in this Report.

3 *Granting to courts the discretion to decline jurisdiction or stay proceedings under the doctrine of* 'forum non conveniens'

Under some legal systems – notably some of those based on the common law – a court may have discretion to decline or to defer the exercise of jurisdiction over a case if it finds that the jurisdiction should not be exercised for the reason that another jurisdiction is more conveniently located for hearing the parties, obtaining necessary evidence or ultimately judging the dispute. To avoid misunderstanding we should stress that in the particular field of abduction this means that the courts in the country where the child has been brought refuse to take a decision at the request of the abductor, whether he violated a foreign custody order or not. This is more flexible than a standard based upon the conduct of a party and it has the advantage that it does not result in

On constate, de ce qui précède, qu'à l'époque où la Neuvième session de la Conférence s'était tenue (il y a moins de vingt ans), il n'avait pas été possible de se mettre d'accord pour attribuer une compétence exclusive aux autorités d'un seul Etat pour statuer en dernier ressort sur la garde du mineur.
Il faut ici attirer l'attention sur une variante que l'on trouve aux Etats-Unis dans l'*Uniform Child Custody Jurisdiction Act*: elle attribue compétence aux tribunaux du lieu où le mineur a vécu avec ses parents, un de ses parents, ou une personne agissant en tant que parent, pendant au moins six mois consécutifs avant l'introduction de l'action; la compétence est refusée aux tribunaux de l'Etat où le mineur ne fait qu'être présent (articles 2 et 3 de l'*Act*). Cette clause attributive de compétence – comme toutes les règles qui reposent sur un facteur tenant compte du temps écoulé – pourrait poser des problèmes, en raison de la rigidité de ce facteur de temps et de l'existence presque nomade de certaines familles. Néanmoins, si un facteur tenant compte du temps pouvait se combiner avec la notion de la résidence habituelle, peut-être la Conférence serait-elle alors plus proche d'une clause attributive de compétence en matière de garde qu'elle le fut à l'époque où le texte de la Convention de 1961 était en discussion.

2 *Donner aux tribunaux le droit de se déclarer incompétents en raison de la conduite répréhensible d'un parent*

Etablir des règles rigides de compétence ne suffit pas toujours à faire échec à l'ingéniosité des individus. C'est pourquoi certaines clauses ont été adoptées, par exemple dans l'article 8 de l'*Uniform Child Custody Jurisdiction Act*. Elles complètent les dispositions relatives à la compétence des tribunaux et à l'exécution des décisions sur la garde: ces clauses refusent au parent qui a agi de façon répréhensible le droit de saisir le tribunal. Dans les pays de *common law*, cette approche du problème porte en général le nom de «*clean hands doctrine*» (doctrine des mains propres). Elle n'est pas sans analogie avec une approche qu'avait envisagée la Convention de 1961 et que l'on trouvait dans l'article 6 de l'avant-projet de cette Convention. Elle refusait le droit d'engager une action dans le cas d'un déplacement frauduleux de l'enfant. En raison de la difficulté que l'on éprouva à formuler cette clause, elle fut finalement écartée du texte définitif de la Convention de 1961.
Le même problème se posera à la Conférence au sujet de l'enlèvement d'un mineur; les efforts que fait actuellement le Conseil de l'Europe pour donner une définition de la soustraction «abusive» d'un mineur le montrent clairement. Ce que l'on considère comme un «abus», un «subterfuge», une «fraude» varie considérablement d'un pays à un autre, et les difficultés d'en donner une définition, dans le texte du Traité, sont tellement grandes qu'une telle approche ne serait peut-être pas très utile à la Conférence – même si elle ne devait servir qu'à compléter une des autres méthodes possibles que nous avons étudiées dans ce Rapport.

3 *Donner aux tribunaux le droit de se déclarer incompétents ou de suspendre l'action en vertu de la doctrine de* «forum non conveniens»

Dans certains systèmes de droit – notamment ceux qui reposent sur la *common law* – un tribunal peut, à son entière discrétion, se déclarer incompétent, ou renvoyer l'examen de l'affaire, s'il estime ne pas avoir compétence pour le motif qu'un autre tribunal est mieux placé que lui pour entendre les parties en cause, recueillir les preuves nécessaires, ou se prononcer, en dernier ressort, sur le litige. Pour éviter tout malentendu, il faut souligner que, dans ce domaine particulier de l'enlèvement d'un mineur, cela signifie que les tribunaux du pays où le mineur a été conduit refuseront de prononcer une décision à la requête du ravisseur, que celui-ci ait ou n'ait pas violé une décision sur la garde. Ce système est plus souple qu'une règle qui reposerait sur le

possibly penalising the child for the misconduct of one of his elders. On the other hand, the breadth of discretion under this standard might be rather troubling for courts, where custody disputes involving the interests of minors are involved, so that it is not clear how appropriately this doctrine might be applied. In addition, many legal systems – particularly those based on the civil law – strongly avoid giving discretion to a court as to whether or not it should take jurisdiction, and substantial opposition might be met to inclusion of a clause permitting such discretion in the ultimate draft of a convention. Still, if the difficulties of defining the sort of misconduct which might lead to refusal of jurisdiction became too great, the inclusion of a clause based on a principle of *forum non conveniens* might be conceivable. A very complete example of such a clause can be found in Section 7 of the Uniform Custody Jurisdiction Act, mentioned above.

C *Administrative co-operation*

Administrative powers of authorities in different countries in regard to the situation of a child who has been abducted, or retained following visitation by a parent may vary substantially. Also, the exercise of such powers may be centralised in the Ministry of Justice, for example, or it may be dispersed among the local authorities throughout the country.

Because of the wide differences in the scope of such powers, it would probably be very difficult to co-ordinate their use under a treaty text, unless the treaty established a Central Authority on the model of the Conventions on service of process and taking of evidence abroad and set out certain specific powers and duties of the Central Authorities.

The powers and duties to be given to the Central Authorities by the Convention might be of rather different types. In the first place, they could be limited to furnishing information to the authorities of other Contracting States, upon request, concerning the location and legal situation of the child in the State of the Central Authority and its relevant laws. This informational function among governmental authorities might speed up the process of finding the child and clarifying the legal context, all of which would be in the interest of the child – who otherwise must with time adapt to the change in the practical situation.

Second, Central Authorities could be used to obtain and channel social reports concerning the child and his family to the courts and administrative authorities of concerned States. An international organisation of social workers dealing with international family problems has stressed the importance of such reports; a centralised authority might even serve by facilitating the channels of communication to improve the quality of such reports.

Third, the Central Authorities could be given an active role in seeking the early return of the abducted or retained child, either through the establishment of investigatory and mediation services or through a grant of powers to pursue return of a child by acting as a party in court or before an administrative tribunal. This latter possibility has been contemplated in the tentative text which is under consideration within the Council of Europe's Committee.

Finally, the Central Authorities might serve a preventive function by assisting in the establishment of firm guaranties for the return of a child visiting with a non-custodial parent

comportement d'une des parties, et il présente l'avantage de ne jamais pénaliser l'enfant en raison de l'inconduite d'un de ses ascendants. D'un autre côté, les tribunaux pourraient être embarrassés par l'étendue du pouvoir discrétionnaire que cette règle leur accorde quand ils sont saisis d'affaires qui mettent en jeu les intérêts d'un mineur, de sorte qu'il n'est pas sûr que cette règle serait toujours appliquée comme il le faudrait. De plus, de nombreux systèmes de droit –surtout ceux de droit civil–sont fortement opposés à ce qu'un tribunal soit libre de décider lui-même s'il doit ou ne doit pas se déclarer compétent, et une résistance très sérieuse pourrait être rencontrée à ce qu'une clause qui accorderait ce droit aux tribunaux figure dans le texte définitif d'une convention. Cependant, s'il devenait trop difficile de définir le type d'inconduite qui pourrait entraîner l'incompétence du tribunal, l'insertion d'une clause reposant sur le principe de *forum non conveniens* n'est pas inconcevable. On trouvera un exemple très complet d'une clause de ce genre dans l'article 7 de l'*Uniform Custody Jurisdiction Act*, cité plus haut.

C *Coopération administrative*

Dans les divers pays, les autorités ont des pouvoirs très différents pour prendre des mesures administratives, lorsqu'un mineur a été enlevé ou retenu par un parent à la suite d'une visite. De même, l'exercice de ces pouvoirs peut, soit être centralisé (au sein du Ministère de la Justice par exemple), soit réparti entre les autorités locales dans le pays tout entier.

Comme l'étendue de ces pouvoirs diffère tellement, il serait probablement extrêmement difficile de coordonner leur emploi en vertu des dispositions d'un traité, sauf si le traité crée des Autorités centrales, sur le modèle des dispositions de la Convention sur la signification et la notification des actes à l'étranger et de celle sur l'obtention de preuves à l'étranger, et s'il définit les pouvoirs spéciaux et les attributions de ces Autorités centrales.

La Convention pourrait donner aux Autorités centrales des pouvoirs et des attributions de nature très différente. Ces autorités pourraient tout d'abord avoir pour rôle de fournir aux autorités d'autres Etats contractants tous les renseignements que ceux-ci lui demanderaient sur le lieu où l'enfant se trouve, sur sa situation juridique dans l'Etat dont dépend l'Autorité centrale et sur les lois applicables en la matière. Cette fonction de caractère purement informatif permettrait aux autorités gouvernementales intéressées d'accélérer les recherches engagées pour retrouver l'enfant, et elle rendrait plus clair le contexte juridique, ce qui serait dans l'intérêt de l'enfant – à défaut de quoi celui-ci, avec le temps, finirait par s'adapter à la situation dans laquelle il se trouve.

En second lieu, les Autorités centrales pourraient être chargées d'obtenir des rapports sociaux sur l'enfant et sa famille et les transmettre aux autorités judiciaires et administratives des Etats intéressés. Une association internationale de travailleurs sociaux qui s'occupe des problèmes de famille d'un caractère international, a mis l'accent sur l'importance de ces rapports: une autorité centralisée pourrait même se rendre utile en facilitant les moyens de communication, afin d'améliorer la qualité de ces rapports.

Troisièmement, les Autorités centrales pourraient se voir confier un rôle actif pour obtenir le plus rapidement possible le retour de l'enfant enlevé ou retenu, soit en créant des services de recherche et de médiation, soit en donnant à l'Autorité qualité pour intervenir devant un tribunal judiciaire ou administratif, pour exiger la restitution de l'enfant. Cette dernière possibilité est envisagée dans le texte de l'avant-projet qui est actuellement soumis au Comité du Conseil de l'Europe.

Enfin, les Autorités centrales pourraient jouer un rôle préventif en contribuant à assurer, par des garanties sérieuses, le retour d'un enfant en visite auprès d'un parent

(see Part V of this Report) or for the continued exercise of visitation rights following removal of the custodian and the child from one country to another. Such services might help to prevent abduction of children by avoiding the frustration which would otherwise result from denial of visitation rights, whether the denial has been made by a court granting custody to the other party, or by the custodian himself, violating the visitation rights for fear of losing control of the child (see Part II, B). Such guaranties might involve the holding of passports, written restrictions on passports or identity cards, cash bonds, sworn undertakings by parents or other relatives of the child, or consent orders.

In connection with the issuance and use of passports, the Central Authorities could serve as a centralised data center to provide on request information on outstanding custody orders, pending divorce or custody suits, visitation rights, etc. Against the possible benefits to be derived from such services one must set off the potential disadvantages in terms of loss of privacy which might result from over-efficient data banks on subjects which touch closely the personal lives of the people involved.

qui n'en a pas la garde (voir la cinquième partie de ce Rapport), ou encore en assurant le respect du droit de visite quand le gardien et le mineur ont quitté le pays pour un autre. En rendant de tels services, les Autorités concourraient à prévenir les enlèvements d'enfants, dans la mesure où elles empêcheraient que naisse le sentiment de frustration qu'engendre le refus d'un droit de visite, que ce refus émane du tribunal qui a accordé la garde à l'autre parent, ou du gardien lui-même, qui viole le droit de garde de crainte d'être incapable de bien surveiller l'enfant (voir la troisième partie, B). Ces garanties pourraient notamment consister à retenir le passeport, à porter des mentions restrictives sur les passeports ou les pièces d'identité, à obtenir des cautions pécuniaires ou des déclarations sous serment des parents du mineur ou d'autres membres de sa famille, ou des ordonnances entérinant un accord mutuel.
En ce qui concerne la délivrance et l'utilisation des passeports, ces Autorités pourraient jouer le rôle d'un bureau central qui réunirait – et fournirait sur demande – tous les renseignements sur les décisions en vigueur sur la garde, sur les actions pendantes en matière de divorce, de droit de garde ou de visite, etc. Mais, si en assumant de telles fonctions les Autorités rendaient d'incontestables services, de graves inconvénients pourraient en découler pour la protection de la vie privée, dans le cas où un centre de données se révélerait trop détaillé au regard de questions qui touchent de très près à la vie privée des intéressés.

VIII — CONCLUSION

From this Report it can be seen that the problems of child abduction by parents are even more complex than they would seem at first glance. The situations which give rise to abductions engage very deep human emotions and involve the welfare of society's most precious asset – its children.

The Permanent Bureau of the Conference cannot provide pat answers for such difficult questions. The sociological dimension needs to be studied and developed further before it can be fully coordinated with the legal tools at hand. These concurrent aspects of the problem – sociological needs and legal remedies – will make up the grist for the mill of the Special Commission which can be expected to hold its first meeting for the purpose of attacking this problem in the course of 1979 – the 'International Year of the Child'.

VIII — CONCLUSION

Ce Rapport aura permis de constater que les problèmes que posent les enlèvements d'enfant par des parents sont encore plus compliqués qu'on l'aurait imaginé de prime abord. Les enlèvements créent des situations qui font naître des sentiments humains très violents, et qui menacent le bien-être de ce que la société a de plus précieux – ses enfants.
Le Bureau Permanent n'est pas capable de donner, sans hésitation, des réponses à des questions aussi ardues. Il lui faudra étudier plus attentivement et dans une perspective plus large la dimension sociale des besoins, avant que les instruments juridiques dont on dispose puissent être utilisés dans ce domaine. Ce sont ces deux aspects du problème – les besoins sociologiques à satisfaire et les mesures juridiques à prendre – qui apporteront l'essentiel du blé que devra moudre le moulin de la Commission spéciale, quand elle se réunira comme prévu en 1979 pour s'attaquer à ce problème – 1979, «l'année internationale de l'enfant».

Annex I

Excerpt from *Legal Representation and Custody of Minors. Proceedings of the Fourth Colloquy on European Law, University of Vienna, 5-7 March 1974*
(Council of Europe)

GENERAL REPORT BY JACQUES FOYER

Professor at the Faculty of Law and Economics and Political Science of the University of Paris XII (Saint-Maur)

The participants at the Colloquy took note of the written reports on the legal representation and custody of minors presented for the following groups of States: the Common Law countries (Mr BROMLEY), the Germanic countries (Mr WELSER), the Scandinavian countries (Mr MALMSTRÖM) the 'Code Civil' countries (Mr FOYER) and the Netherlands (Mr PETIT), which will be reproduced in the proceedings of the Colloquy.
Speeches were delivered at the opening session by Professor Erich STREISSLER, Dean of the Faculty of Law at the University of Vienna, Professor Siegfried KORNINGER, Rector of the University of Vienna, Dr Heribert GOLSONG, Director of Legal Affairs of the Council of Europe and His Excellency Dr Christian BRODA, Minister of Justice of the Republic of Austria.
The Colloquy's first working session began with an introductory statement by its Chairman, Professor Fritz SCHWIND who recalled that the 20th century had been described as the century of the young and the problems attendant on this phenomenon.
Professor BROMLEY, Dean of the Faculty of Law of the University of Manchester, then presented his Introductory Report, setting out the various theoretical and practical aspects of the theme of the Colloquy. In particular, he suggested certain definitions of custody and legal representation, which were subsequently taken as working hypotheses by the following rapporteurs.
A wide-ranging discussion then took place, a number of ideas being put forward by various speakers regarding the position of minors in the present state of social development in the different western European States which had sent experts (university professors, judges, barristers and civil servants) to the Colloquy.
It was observed that from being traditionally objects of law, minors were tending to become veritable *subjects of law*: their opinion, and even their consent, was sought on important matters affecting them, such as adoption, residence, determination of custody and rights of access, medical and surgical treatment needed, etc. This trend was considered by the experts participating in the Colloquy to be of fundamental importance.
Similarly, an almost general trend was noted towards *lowering the age of full legal capacity*, which had already been reduced in a number of Council of Europe Member States.
It also seemed that all States were at an experimental stage in endeavouring to improve the machinery for the protection of minors, and were hesitating between individualistic, family and State approaches to the question.
All the countries represented – with very few exceptions – had either reformed their legislation on minors recently or were in the process of doing so.
Finally it was pointed out that differences of terminology were making it more difficult to arrive at a comparison of the legal systems.
In order to enhance the practical character of the Colloquy's work, the rapporteurs and participants decided to use as basic guidelines for the discussion, as far as possible, the questions which the Council of Europe Committee of Experts had selected for study, so that the latter might be provided with material which would afford constructive

Annexe I

Extrait de *Représentation légale et garde des mineurs, Actes du Quatrième Colloque de droit européen, Université de Vienne, 5-7 mars 1974*
(Conseil de l'Europe)

RAPPORT DE SYNTHÈSE PAR JACQUES FOYER

Professeur à la Faculté de Droit et des Sciences politiques et économiques de l'Université de Paris XII (Saint-Maur)

Les participants au Colloque ont pris connaissance des rapports écrits sur la représentation légale et les mineurs, concernant les groupes de pays suivants: pays de Common Law (M. BROMLEY), pays germaniques (M. WELSER), pays scandinaves (M. MALMSTRÖM), pays de droit civil (M. FOYER), Pays-Bas (M. PETIT), qui seront reproduits dans les Actes du Colloque.

Au cours de la séance d'ouverture, des discours ont été prononcés par le Professeur Erich STREISSLER, Doyen de la Faculté de Droit de l'Université de Vienne, le Professeur Siegfried KORNINGER, Recteur de l'Université de Vienne, M. Heribert GOLSONG, Directeur des Affaires juridiques du Conseil de l'Europe et Son Excellence M. Christian BRODA, Ministre de la Justice de la République d'Autriche.
Les travaux ont débuté par un exposé introductif de M. le Professeur Fritz SCHWIND, Président du Colloque, qui a rappelé que le XXe siècle a été appelé le siècle de la jeunesse et des problèmes que ce phénomène soulève.

Ensuite, le Professeur BROMLEY, Doyen de la Faculté de Manchester, a présenté un Rapport d'ouverture, dans lequel il a exposé les divers aspects théoriques et pratiques du thème du Colloque. Il a notamment suggéré certaines définitions de la garde et de la représentation légale qui ont ensuite été reprises comme hypothèses de travail par les rapporteurs suivants.
Un large débat s'est ouvert ensuite au cours duquel certaines idées ont été avancées par différents orateurs concernant la situation des mineurs en l'état actuel du développement de la société dans les différents Etats de l'Europe occidentale ayant envoyé des experts au Colloque (professeurs d'université, magistrats, avocats et fonctionnaires).
Ainsi, a-t-on affirmé, que le mineur, traditionnellement objet de droit, tend à devenir un véritable *sujet de droit*: son avis et même son consentement est sollicité pour les mesures importantes le concernant, telles que l'adoption, la résidence, la détermination de la garde et du droit de visite, les interventions médicales et chirurgicales qu'il doit subir, etc. Cette évolution a été considérée comme fondamentale par les experts participant au Colloque.
De même, on a constaté une tendance presque générale pour *abaisser l'âge de la majorité légale* qui a déjà été réalisée dans un certain nombre d'Etats membres du Conseil de l'Europe.
Egalement, il semble que tous les Etats en soient au stade expérimental dans la recherche de la meilleure organisation de la protection des mineurs et hésitent entre des conceptions individualistes, familiales ou étatiques.
Il est apparu qu'à quelques exceptions près, tous les Etats représentés ont soit rénové récemment leur droit des mineurs, soit sont en cours de réforme.
On a enfin souligné les différences de terminologie qui rendent plus difficile la comparaison des droits.

Pour accentuer le caractère pratique des travaux du Colloque, les rapporteurs et les participants ont décidé d'essayer d'orienter les débats sur la base des questions retenues pour étude par le Comité d'experts du Conseil de l'Europe afin de lui fournir les éléments lui permettant d'arriver à des solutions constructives au plan européen. Ils ont décidé de

solutions at European level. It was decided to reverse the order in which the problems were tackled and start with custody, which gave rise to more difficulties than the administration of the minor's property.
The subsequent stages of the Colloquy were marked by the oral presentation of Mr MALMSTRÖM's Report on the custody of persons under age and Mr WELSER's Report on the administration of property – obligations and contracts, which will be reproduced in the Proceedings of the Colloquy.
Certain observations are possible on the basis of the various reports and the many oral interventions following their presentation.
It was apparent that, notwithstanding the theoretical differences between the systems of law a constant concern of our age seemed to be how to give minors their proper place in the family and in society. This protection took place on two levels: protection of the child himself, which Mr BROMLEY described for the purposes of discussion by the term 'custody' of the minor, and protection of his property, referred to for the same purpose as 'legal representation'.
Various objections were raised to these terms because they did not always mean the same things. In some continental States legal representation was a broad concept encompassing protection both of the person and of the minor's property, custody ('*garde*') being merely one of the consequences of this institution. Furthermore, the concept was closely bound up, when the parents were living, with that of the '*patria potestas*' of Roman law, which as legal systems evolved had taken the form either of traditional paternal authority or of parental authority shared between father and mother; this latter conception seemed to lie at the root of a number of reforms already carried through or under way in various Member States.
On the other hand, the Common Law countries – with the exception of Scotland – appeared to have a more pragmatic approach to the protection of minors. From an analytical standpoint, they distinguished between custody, which entailed powers in respect of the child's person, and guardianship, which was concerned essentially with property aspects. A similar conception appeared to underlie Swedish law (and in large measure the other Scandinavian systems of law) where it drew a distinction between custody ('*vårdnad*' in Swedish) and guardianship ('*förmynderskap*').
In order to avoid theoretical arguments which would be unlikely to produce any tangible result, it was thought preferable to use more neutral terms such as protection of the person of the minor on the one hand, and protection of his interests in the broad sense (administration of his property and ability to perform certain legal acts) on the other. One expert was of the opinion, however, that this notion of protection was now in the process of disappearing and that it would be more appropriate to speak of the legal status of the minor.

renverser l'ordre des problèmes, en commençant par la garde qui soulève des difficultés plus fréquentes que la gestion du patrimoine du mineur.

Les étapes suivantes du Colloque ont été marquées par la présentation orale des Rapports de M. MALMSTRÖM sur la garde des mineurs et de M. WELSER sur la gestion du patrimoine, les obligations et les contrats des mineurs, qui seront reproduits dans les Actes du Colloque.

A partir de ces différents rapports et des nombreuses interventions orales qui les ont suivis, il est possible de faire certaines constatations.
Il est ainsi apparu que, malgré les différences théoriques séparant les droits, l'une des préoccupations de notre époque paraît être la détermination de la position exacte du mineur dans la famille et dans la société. Cette protection se situe à un double niveau: celui de la personne même du mineur, qui a été qualifiée par M. BROMLEY, pour les besoins de la discussion, par les termes de «garde» des mineurs et celui des biens lui appartenant, qualifiée pour les mêmes raisons, par les termes de «représentation légale».
Ces expressions ont fait l'objet de diverses critiques, parce qu'elles n'ont pas toujours le même contenu. Dans certains Etats continentaux, la représentation légale est une notion large qui englobe à la fois la protection de la personne et des biens du mineur et la garde n'est qu'une des conséquences de cette institution. De surcroît, cette notion est intimement liée, lorsque les parents sont vivants, à celle de «*patria potestas*» du droit romain, qui, avec l'évolution des systèmes juridiques, a pris la forme soit de puissance paternelle traditionnelle, soit de l'autorité parentale partagée entre le père et la mère; cette dernière conception semble inspirer un certain nombre de réformes déjà accomplies ou en cours dans différents Etats membres.
A l'inverse, les pays de Common Law, mis à part l'Ecosse, semblent avoir une notion plus pragmatique de la protection des mineurs. De manière analytique, ils distinguent la «*custody*», qui entraîne des pouvoirs sur la personne et la «*guardianship*», qui a des effets essentiellement patrimoniaux. C'est une conception analogue qui semble inspirer le droit suédois (et dans une large mesure les autres droits d'Etats nordiques) lorsqu'il distingue entre la garde (en suédois «*vårdnad*») et la tutelle (en suédois «*förmynderskap*»).
Pour éviter des discussions théoriques qui n'aboutiraient probablement pas à un résultat concret, il est apparu préférable d'utiliser des termes plus neutres, tels que ceux de protection de la personne du mineur, d'une part, et de protection de ses intérêts au sens large (gestion de ses biens et aptitude à accomplir certains actes juridiques), d'autre part. Un expert a, cependant, fait remarquer que cette notion de protection était en voie de disparition et qu'il serait préférable de parler de statut juridique du mineur.

I PROTECTION OF THE PERSON OF THE MINOR

A consensus appeared to have emerged regarding the definition of custody as a complex of rights, duties and powers with respect to the person of the child. As a great many participants emphasised, custody must be exercised in the child's interest, particularly in ensuring his physical, moral, mental and social well-being.

1 However, this being a very broad definition, the participants at the Colloquy endeavoured to determine the content of custody on a more concrete basis. It was observed that it included the following:

a physical care of the child, especially the duty of feeding and clothing him;

I LA PROTECTION DE LA PERSONNE DU MINEUR

Il semble qu'un certain consensus s'est dégagé sur la définition du droit de garde, conçu comme un ensemble de droits, de devoirs et de pouvoirs vis-à-vis de la personne de l'enfant. Comme il a été souligné par un grand nombre de participants, ce droit doit être exercé dans l'intérêt de l'enfant, notamment afin de lui assurer un bien-être physique, moral, intellectuel et social.

1 Mais cette définition étant très générale, les participants au Colloque ont essayé de dégager, de manière plus concrète, le contenu de ce droit. Il a été notamment indiqué que ce droit comporte:

a le soin de la personne de l'enfant et spécialement le devoir de le nourrir et de le vêtir;

b choice of the child's residence, with some modifications depending on the child's age which differ from one legal system to another;

c the child's secular and religious education, where marked differences may derive from social and religious structures, educational systems, etc;

d medical, surgical and dental treatment, for which however the child's consent is required above a certain age which varies from one system of legislation to another;

e discipline in general and the possibility of inflicting punishment. Legislation on this right differs greatly from one country to another, from giving a right to chastise to forbidding corporal punishment altogether;

f the possibility of concluding contracts of employment and apprenticeship on the child's behalf;

g consent to the child's marriage which depends on the child's age and the system of law in question.

2 On the other hand, determination of the person awarded custody under the law revealed far more marked divergencies between the different systems of law.

Three situations could arise:

a The complete family, the father and mother being married and living together. In such cases custody was awarded either to the father alone or to the father and mother, acting either jointly or independently of each other. It appeared that even in those systems which gave priority to the father there was a tendency to increase the rights of the mother.

b The incomplete family, covering several hypotheses (legitimate child with both parents deceased, child of divorced parents or parents separated *de facto* or *de jure*, child born out of wedlock). No common trend appeared to be discernible here, the problems being resolved in very different ways from one system of law to another, and from one case to another. Where one parent died, the tendency was certainly to award custody to the surviving parent. However, in the case of a broken marriage the custody arrangements varied widely: the award of custody could be rigidly laid down by law, or arranged by agreement between the parents, or the court might be left entirely free to decide in accordance with the child's interest: there might, moreover, be a combination of these different criteria.
Lastly, where children born out of wedlock were concerned, there were signs of a tendency to award custody to the mother, although recognition by the father could have a part to play. In this connection, a distinction might be made between the free union which was to a certain extent comparable with a complete family and the short-lived union. In the latter case the father's rights were more doubtful if he took no interest in the child.

c The non-existent family, both parents being deceased or forbidden to exercise any rights in respect of the child. In such cases the public authorities intervened to ensure the child's welfare.

3 Regarding the authority entitled to decide on the granting of custody, in most cases this power lay with a judicial body, though under some systems of law administrative authorities could intervene.
In every country the criterion for the award of custody was the welfare of the child. This principle, while quite evident in theory, gave rise to a great many problems on the one hand because many different questions were involved and on the other hand because there were difficulties of assessment by the competent authorities. Under some systems of law, recourse was bad to teams of psychologists, sociologists, educationalists and doctors in an endeavour to arrive at the most appropriate solution for the child; when the child itself

b le choix de la résidence de l'enfant, avec certaines atténuations en fonction de l'âge de l'enfant, qui diffère selon le système juridique considéré;

c l'éducation civile et religieuse de l'enfant, qui est susceptible de différences sensibles selon le type de société, la religion dominante, les systèmes d'éducation, etc.;

d les soins médicaux, chirurgicaux, dentaires, pour lesquels cependant le consentement de l'enfant est requis à partir d'un certain âge qui diffère selon les droits;

e la discipline en général et la possibilité d'infliger des punitions à l'enfant. L'exercice de ce droit est conçu très différemment d'un pays à l'autre, allant du droit de correction à l'interdiction de tout châtiment corporel;

f la possibilité de conclure au nom de l'enfant des contrats de travail et d'apprentissage;

g le consentement au mariage du mineur, variable selon l'âge du mineur et le droit concerné.

2 En revanche, la détermination de la personne qui se voit attribuer, par la loi, le droit de garde a fait apparaître des divergences beaucoup plus prononcées dans les différents droits.
Dans ce contexte, il convient de distinguer trois situations:

a La famille complète, à savoir l'hypothèse où les père et mère sont mariés et vivent ensemble. Dans ce cas, la garde est attribuée soit au père seul, soit au père et à la mère, agissant ou bien conjointement, ou bien indépendamment l'un de l'autre. Il semble que même dans les droits qui accordent la priorité au père, il y ait une tendance à étendre les droits de la mère.

b La famille incomplète, qui recouvre plusieurs hypothèses, à savoir l'enfant légitime orphelin de père ou de mère, l'enfant de parents divorcés ou séparés de fait ou de droit et l'enfant né hors mariage. Il ne paraît pas possible de dégager une tendance commune, les solutions variant sensiblement d'un système à l'autre et d'une hypothèse à l'autre. Sans doute, en cas de mort d'un des parents, la tendance est-elle à attribuer la garde au survivant. En revanche, lorsqu'il s'agit d'un ménage désuni, l'attribution de la garde est réglée de manière très différente, soit impérativement par la loi, soit par accord entre les parents, soit en laissant toute liberté au tribunal de choisir en fonction de l'intérêt de l'enfant. Ces différents critères d'ailleurs peuvent se combiner.

Enfin, pour l'enfant né hors mariage, une certaine tendance semble se dégager en faveur de l'attribution de la garde à la mère, bien que la reconnaissance par le père puisse jouer un certain rôle. Dans ce contexte, une distinction pourrait être faite entre l'union libre, assimilable dans une certaine mesure à la famille complète, et l'union passagère dans laquelle les droits du père paraissent plus discutables s'il s'est désintéressé de l'enfant.

c Absence de famille, à savoir l'hypothèse où les deux parents sont décédés ou se voient interdire d'exercer tout droit sur l'enfant. Dans ce cas, la protection du mineur est assurée par l'intervention d'autorités publiques.

3 En ce qui concerne les autorités habilitées à décider de l'attribution du droit de garde, dans la grande majorité des cas, il s'agit d'une autorité judiciaire, mais, dans certains droits, des autorités administratives peuvent intervenir.
Le critère de l'attribution est, dans tous les pays, l'intérêt de l'enfant. Ce principe, qui est tellement évident en théorie, pose cependant bien des problèmes, d'une part, parce qu'il recouvre des questions très diverses et, d'autre part, parce qu'il existe des difficultés d'appréciation par les autorités compétentes. Dans certains droits, il est fait appel à des équipes de psychologues, de sociologues, d'éducateurs et de médecins en vue de rechercher la solution la plus adéquate pour le mineur; lorsque l'on consulte l'enfant lui-même, il

was consulted, the wish it expressed at that particular time might not be in keeping with its essential interests, especially if it had been influenced by one parent or a third party. Some participants stressed in this connection that the child's interests must not be considered in isolation, regardless of the human and emotional concerns of the parents. It was felt that in deciding who should be granted custody, it should not be possible to deprive a father or mother of custody on the ground that he or she is morally responsible for the dissolution or breakdown of the marriage. The decisive ground should only be the welfare of the children. It was also observed that in this field it was difficult to draw a distinction between substantive law and rules of procedure owing to the concrete and human nature of the questions, which required the intervention of an authority acting more as a conciliator than as a judge.

4 The revocability of decisions as to custody raised no special difficulties; these decisions were always taken on the basis of an existing situation, and any change in that situation was likely to bring about a change in the custody position.

5 The difficulties raised by right of access were essentially practical ones. Under most systems of law, when custody was awarded to a divorced spouse, the other spouse was entitled to communicate with the child under various arrangements. The only exceptions were legal systems which were severe with regard to the fault of one of the parents. Traditionally this right had been envisaged from the standpoint of the father or mother, but some participants wondered whether it ought not to be reconsidered from that of the child's interests: should the child not be allowed to deny the exercise of this right to the parent to whom it was attributed? The point of this suggestion was that the child should be able to avoid the undue influence of a parent motivated not by the child's real interest but rather by personal rancour towards the parent exercising custody. At any rate, this right would have to be applied with due respect to the interests both of the child and of the parents.

The situation was rather different where children born out of wedlock were concerned: the granting of a right of access presupposed that the other parent manifested some interest in the child. It would probably be desirable for a right of access to be granted under the provisions of the legal system concerned. One would have to differentiate in accordance with the factual situation; where the parents had lived together for some time it would be more proper to grant a right of access than when the child had never lived with its father.
Finally, some participants emphasised the dangers inherent in a right of access where the parents were of different nationalities. It often happened that a parent who did not have custody and who was a national of a State other than the child's country of residence took advantage of the right of access to take the child to his country of origin or another country, and then refused to return the child to the parent to whom custody had been given.

peut arriver que sa volonté momentanée ne soit pas en conformité avec son intérêt réel, du fait notamment qu'il a pu subir l'influence d'un de ses parents ou d'un tiers; dans ce contexte, quelques participants ont souligné que l'intérêt de l'enfant ne doit pas être envisagé en soi, abstraction faite des préoccupations humaines et affectives des parents. L'avis a été exprimé qu'il ne devrait pas être possible de priver le père ou la mère de la garde pour le motif que l'un ou l'autre est moralement responsable de la dissolution ou de la faillite du mariage. Le critère décisif devrait être uniquement le bien-être des enfants. On a également fait remarquer que dans ce domaine, il est difficile de distinguer entre droit matériel et règles de procédure, en raison du caractère concret et humain de ces questions qui supposent l'intervention d'une autorité agissant plus en conciliateur qu'en juge.

4 La révocabilité des décisions sur le droit de garde n'a pas soulevé de difficultés particulières; ces décisions sont toujours rendues sur la base d'une situation existante et toute modification de cette situation est susceptible d'entraîner un changement dans l'attribution du droit de garde.

5 Le droit de visite soulève des difficultés essentiellement d'ordre pratique. En effet, dans la plupart des droits, lorsque la garde est attribuée à un époux divorcé, l'autre époux se voit reconnaître un droit de communiquer avec l'enfant selon des modalités variables. Font exception, les droits qui sont très sévères à l'égard de la faute d'un des parents. Traditionnellement, ce droit a été envisagé sous l'angle du père ou de la mère, mais certains participants se sont interrogés sur le point de savoir si ce droit ne devrait pas être repensé sous l'angle de l'intérêt de l'enfant: ne devrait-on pas lui permettre de refuser l'exercice de ce droit au parent qui en est investi? L'avantage de cette suggestion consisterait à permettre à l'enfant d'échapper à l'influence abusive d'un parent qui ne serait pas mû par l'intérêt véritable de l'enfant, mais plutôt par des rancoeurs personnelles à l'encontre du parent chargé de la garde. De toutes manières ce droit doit, semble-t-il, être apprécié en fonction des intérêts aussi bien de l'enfant que des parents.
La situation est assez différente en ce qui concerne les enfants nés hors mariage: l'attribution d'un droit de visite suppose que l'autre parent manifeste un certain intérêt à son égard. Il serait, sans doute, souhaitable qu'un droit de visite lui soit reconnu selon les modalités du système juridique concerné. Il faudrait sans doute distinguer en fonction des situations de fait; si les parents ont vécu ensemble un certain temps, il paraît plus normal d'accorder un droit de visite que lorsque l'enfant n'a jamais vécu avec son père.

Enfin, certains participants ont souligné les dangers découlant du droit de visite pour les enfants de parents de nationalité différente. Il arrive fréquemment qu'un parent qui n'a pas la garde de l'enfant et qui est ressortissant d'un État autre que celui de la résidence du mineur, profite du droit de visite pour emmener l'enfant dans son pays d'origine ou dans un autre pays et refuse ensuite de le rendre à celui auquel la garde a été confiée.

Annex II

Family Law Newsletter – Volume 17, Number 2, Winter 1977, pp. 30-31:

REPORT OF CUSTODY COMMITTEE – 1975-76

It is apparent that custody is more than likely the most ardently litigated area in family law today, both on a *pendente lite* basis and also a post-decretal basis and at the same time is probably the least understood area of family law. There seemed to be a trend developing in the United States both as to 'best interest and welfare of a child' as the determining issue and guideline for determining a custody case and the emergence of the Uniform Child Custody Jurisdiction Act. In the decisions perused by the undersigned from various states, one fact seemed to be prevalent: there is total disagreement and variety as to what aspects of life make up 'best interest and welfare'. As a result of that analysis, be it correct or incorrect, I undertook the task of compiling a list of what constitutes best interest and welfare from a cross section of the members of the Family Law Section throughout the United States. Since the responses involved purely subjective application of some of the responses and since continuity was extremely important in determining a complete analysis of the subject in question, it was impossible for me to delegate the task to the Regional Vice-Chairman although it would have eased my burden considerably. Accordingly, I sifted through some 414 responses and spent approximately 75 hours in going through these responses, varying from one item listed up to 26 items listed, as well as responses that did not bother to list any items but were highly critical of my request and task to be undertaken.

Fortunately there were responses that included positive comments on the task involved. Those, that commented favorably indicated that it was a necessary step to attempt uniformity and application of ground rules in the field of custody which might lend itself to a possible reduction in the number of borderline custody hearings. This in turn would lessen acrimony between competing parties and thereby reduce trauma suffered by children.

It seems that 10-12 items are, in the opinion of the vast majority, much more prevalent in the litigation than others.

In the coming year, I would like to see the Custody Committee continue its viable aspect and determine from a consensus of those in the Custody Section if there should be a stronger effort to have universal passage of the Uniform Child Custody Jurisdiction Act and whether the term 'best interest and welfare of a child' should carry with it the results as tabulated herein to insure some sort of uniformity. Any other suggestion in the areas of interest would be greatly appreciated by the Chairman as it is the desire of the undersigned to have a full working committee of Vice-Chairman so that all can gain from input.

Respectfully submitted,
Stanley F. Kaplan,
Chairman,
Custody Committee.

Annexe II (traduction)

Family Law Newsletter – Volume 17, Numéro 2, Hiver 1977, p. 30-31:

RAPPORT DU COMITÉ SUR LE DROIT DE GARDE – 1975-76

Selon toutes probabilités, la garde est, dans le domaine du droit de la famille, la matière qui donne lieu aux batailles judiciaires les plus acharnées, tant lorsque l'affaire est pendante qu'après le prononcé de la décision; et, en même temps, c'est sans doute le domaine du droit de la famille qui est le moins bien compris. Deux tendances semblaient se dessiner aux Etats-Unis, l'une pour considérer «l'intérêt supérieur et le bien-être de l'enfant» comme la question essentielle et le guide à suivre en statuant dans une affaire de garde d'enfant, l'autre découlant de l'apparition de l'*Uniform Child Custody Jurisdiction Act*. Ce qui ressort des décisions prononcées dans plusieurs états différents que le soussigné a étudiées, c'est le désaccord total que l'on constate sur les aspects de l'existence qui constitueraient «l'intérêt supérieur et le bien-être», ainsi que la variété des opinions exprimées à ce sujet. A la suite de cette analyse, qu'elle soit exacte ou erronée, j'ai entrepris la tâche de dresser une liste de ce qui constitue «l'intérêt supérieur et le bien-être» à partir des données fournies par les membres de la Section du Droit de la Famille répartis sur tout le territoire des Etats-Unis. Comme certaines réponses reposaient sur une application purement subjective, et comme la continuité était d'une grande importance pour une analyse très complète de cette question, il ne m'a pas été possible de déléguer ce travail au Vice-président régional, ce qui aurait pourtant considérablement allégé ma tâche. En conséquence, j'ai dû passer au crible 414 réponses et consacrer quelque 75 heures à parcourir ces réponses. Le nombre des points figurant sur ma liste auxquels il était répondu allait d'un seul à vingt-six; parfois aussi, les réponses ne prenaient pas la peine d'indiquer de point quelconque et se contentaient de critiquer sévèrement ma demande et le travail à entreprendre.

Quelques réponses, heureusement, contenaient des commentaires positifs sur ce travail. Celles qui exprimaient une opinion favorable estimaient qu'un tel examen constituait une étape indispensable pour atteindre une certaine uniformité et pour que des règles fondamentales soient appliquées en matière de garde, ce qui réduirait éventuellement le nombre des cas limites en ce domaine. Ce dernier résultat, à son tour, pourrait atténuer l'acrimonie entre les parties en litige et, par voie de conséquence, réduire le trauma ressenti par les enfants.

A en croire l'opinion exprimée par une forte majorité des réponses, dix à douze questions reviennent plus fréquemment que les autres dans les litiges.

Je voudrais que l'année prochaine, le Comité sur le droit de garde conserve toute sa vitalité pour déterminer si, de l'avis de la plupart des membres de la Section sur le droit de garde, il faudrait faire un effort plus soutenu pour que l'*Uniform Child Custody Jurisdiction Act* soit universellement adopté, et si l'expression «l'intérêt supérieur et le bien-être de l'enfant» doit porter en elle les résultats énumérés ici, pour qu'une certaine uniformité puisse être atteinte. Le Président serait très heureux de recevoir des suggestions portant sur d'autres points intéressants, et le soussigné souhaite qu'une réunion plénière du comité de travail du Vice-président soit tenue, afin que tous puissent profiter de ces efforts.

Soumis respectueusement par
Stanley F. Kaplan,
Président,
Comité sur le droit de garde.

The results as tabulated are as follows:	*Number of Votes*
Ranking Category	
1 Emotional and physical health of parents	126
2 Preference of child – predicated upon age, maturity and motivation	117
3 Physical environment and comparison of same	105
4 Economic environment of custodial parent	101
5 Inter-action and inter-relationship of child with his parent, siblings, and any other person who may significantly affect the child's best interest	82
6 Home giving moral and spiritual training	81
7 Home which will show more love and affection	76
8 Educational needs and opportunities	72
9 Whether change of custody will require removal from surroundings, both physical and familial, *i.e.* stability	65
10 Necessaries – meals, clothing and health care (physical well-being)	61
Employment and work hours of the parents and supervisory provisions	61
11 Stable consistent supervision, care and guidance	58
12 Child's adjustment at home, school and community	57
13 Mental and physical health of child	51
14 Age and sex of the parents/child	48
15 Parents' ability to discipline selves and children	47
16 Religious needs	45
17 Personal habits of the custodial parent a child may acquire by example (character)	40
18 Comparative empathic and emotional responsiveness of respective parents toward the child	37
19 Economic environment of non-custodial parent	33
20 Which parent would better promote relationship between the child and the non-custodial parent	31
Educational and cultural backgrounds of parents	31
21 Social adjustment record (employment, residency)	30
22 Enhancement of child's particular talents and motivation of same – background of child	29
23 Wishes of the child's parent	26
Possible remarriage	26
24 Splitting of siblings – whether there will be	25
25 Recommendations of trained social worker, family court counselor, psychiatrists and psychologists	24
Length of time child is in the custody of one parent	24
Presence of psychological parent	24
26 Home that has built-in playmates	15
Harassment (emotional and/or physical) by either party toward the child	15
Decision resulting in the least disruption to the child's established routine	15
27 Motivation of parent in seeking custody	14
28 Grounds for divorce	12
29 Tender years doctrine	9
Fitness of parent	9
30 Intellectual and emotional history of child	8

Voici la liste telle qu'elle a été établie:	*Nombre de voix*
Enumération par ordre d'importance	
1 Equilibre affectif et bonne santé des parents	126
2 Préférence de l'enfant – en tenant compte de l'âge, de la maturité et de la motivation	117
3 Cadre de vie matériel, et comparaison	105
4 Milieu économique du parent gardien	101
5 Relations et rapports entre l'enfant et ses parents, ses frères et soeurs et d'autres personnes susceptibles d'affecter de façon significative l'intérêt supérieur de l'enfant	82
6 Un foyer qui assure une formation morale et spirituelle	81
7 Un foyer qui donnera plus de preuves d'amour et d'affection	76
8 Les besoins éducatifs et les occasions de les satisfaire	72
9 Le changement de garde obligera-t-il à abandonner l'environnement tant physique que familial: stabilité	65
10 Les besoins essentiels – repas, vêtements, soins de santé (bien-être physique)	61
Emplois et heures de travail des parents et mode de surveillance de l'enfant	61
11 Surveillance, soins et conseils constants	58
12 Manière dont l'enfant s'adapte chez lui, à l'école et dans la collectivité où il vit	57
13 Santé mentale et physique de l'enfant	51
14 Age et sexe des parents/enfant	48
15 Aptitude des parents à exercer une discipline sur eux-mêmes et sur l'enfant	47
16 Besoins religieux	45
17 Habitudes personnelles du parent gardien que l'enfant est susceptible d'acquérir par l'exemple (caractère)	40
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QUESTIONNAIRE FROM THE CUSTODY COMMITTEE

In an effort to determine the feasibility of uniform laws dealing with custody, it is my position as Chairman of the Custody Committee, that the adoption of a uniform act such as the Uniform Child Custody Jurisdiction Act would be advisable, at the least. In order to determine how much strength the Uniform Act has in the opinion of specialists in the area of family law, I am soliciting either an affirmative or negative and would appreciate a check mark on the appropriate line (see below) and a return to my office so I can calculate the results and put them in the form of a report to each state committee considering the passage and adoption of the Uniform Child Custody Jurisdiction Act.

Thank you for your prompt attention to this.

Very truly yours,
Stanley F. Kaplan,
Chairman of Custody,
Grant, Kaplan & Grant, P.C.,
69 West Washington Street,
Chicago, Illinois 60602.

_____ Affirmative _____ Negative

QUESTIONNAIRE ÉTABLI PAR LE COMITÉ SUR LE DROIT DE GARDE

En cherchant à déterminer si des lois uniformes sur la garde sont possibles, j'estime, en ma qualité de Président du Comité sur le droit de garde, que l'adoption d'une loi uniforme telle que l'*Uniform Child Custody Jurisdiction Act* serait pour le moins souhaitable. Afin de nous rendre compte quelle valeur les spécialistes du droit de la famille accordent à l'*Uniform Act*, je sollicite une réponse positive ou négative, que je vous serais reconnaissant d'indiquer sur la ligne appropriée (voir ci-dessous) et de me faire parvenir à mon bureau, pour me permettre de calculer les résultats, et de leur donner la forme d'un rapport à soumettre à chaque comité d'état qui étudie la question de l'adoption et de la mise en vigueur de l'*Uniform Child Custody Jurisdiction Act*. Je vous remercie pour votre aimable et rapide collaboration.

Stanley F. Kaplan,
Chairman of Custody,
Grant, Kaplan & Grant, P.C.,
69 West Washington Street,
Chicago, Illinois 60602.

_____ Réponse affirmative _____ Réponse négative

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Informations de caractère sociologique

Question 1

Le nombre de mariages conclus entre ressortissants de nationalité différente ne cesse de se multiplier. Aussi le nombre de «mariages mixtes» rompus ne cesse-t-il de s'accroître et de ce fait le danger d'enlèvements d'enfants par un de leurs parents.
En tout cas le nombre des enlèvements d'un enfant par un de ses parents est si grand et les conséquences négatives qui en résultent pour les enfants sont tellement importantes qu'il s'agit en l'occurrence d'un problème qui doit être pris au sérieux.

Question 2

Autrefois, des mariages entre ressortissants de nationalité différente étaient conclus, dans la plupart des cas, entre des personnes issues de la même culture occidentale. Celle-ci est caractérisée par le fait que la famille est fondée sur les mêmes bases sociologiques dans les deux pays et en ce qui concerne l'éducation des enfants par une forte prédominance de la femme. En effet, en règle générale, les deux conjoints partent de l'idée selon laquelle le soin de la personne de l'enfant est confié à la mère en cas de rupture du mariage. Or des enlèvements d'un enfant par un de ses parents se produiront notamment si tous les deux parents revendiquent la garde de l'enfant. Cela est le cas notamment si le père est ressortissant d'un Etat où la préférence est accordée aux droits paternels plutôt qu'à ceux de la mère, et si la mère est ressortissante d'un Etat où la mère a plus de chances de se voir confier seule la garde de l'enfant. Selon la législation et la culture de l'Etat respectif où chaque conjoint a été élevé, chacun est persuadé de pouvoir prétendre légitimement à la garde de l'enfant. Or les mariages entre ressortissants de pays différents ayant une culture totalement différente n'ont été conclus, en nombre sans cesse croissant, qu'au cours des dernières années. Cela s'explique par le grand nombre de travailleurs immigrés ainsi que par le fait que la République fédérale d'Allemagne est prête à permettre l'accès des étudiants étrangers aux universités allemandes.

Question 3

En République fédérale d'Allemagne, il n'existe pas de statistiques officielles sur le nombre d'affaires d'enlèvements d'enfants. Ces affaires sont traitées par les autorités judiciaires allemandes comme des cas qui entrent dans la catégorie des décisions judiciaires en matière de garde d'enfants et ne sont pas enregistrées séparément. La branche allemande du Service Social International, qui est l'organe de liaison entre les autorités allemandes d'une part (Offices d'assistance sociale à la jeunesse et tribunaux de tutelle) et l'étranger d'autre part, est saisie au moins une fois par semaine d'une affaire d'enlèvement d'enfant. Or cela ne représente qu'un pourcentage minime des cas se produisant réellement. Dans la grande majorité des cas, les Offices d'assistance sociale à la jeunesse et les tribunaux de tutelle ne sont pas saisis de toutes les affaires en la matière et ces derniers ne font pas toujours appel au Service Social.

Question 4

Dans cet ordre d'idées, il y a lieu de citer le travail de recherche «*Kindesentführung durch einen Elternteil ins Ausland*» (Enlèvement d'un enfant à l'étranger par l'un de ses parents), publié par la *Interessengemeinschaft der mit Ausländern verheirateten deutschen Frauen e.V.* (communauté d'intérêt des femmes allemandes mariées avec des étrangers, association déclarée), Frankfurt/Main 1978, rédaction: Rosi Wolf-Almanasreh.

Conventions

Questions 5 à 7

a La Convention de La Haye concernant la compétence des autorités et la loi applicable en matière de protection des mineurs du 5 octobre 1961 (*Bundesgesetzblatt* 1971, II, p. 217, voir Rapport *supra*, p. 25 à 32).

b La Convention de La Haye pour régler la tutelle des mineurs du 12 juin 1902 (*Reichsgesetzblatt* 1904, p. 240).

c L'Accord austro-allemand concernant la tutelle du 5 février 1927, publié le 21 octobre 1959, *Bundesgesetzblatt*, II, p. 1250.

Cet Accord précède la Convention de La Haye concernant la protection des mineurs (article 18 II).
En matière d'enlèvement, un certain rôle est à attribuer à la Convention de La Haye concernant la protection des mineurs. Or, c'est justement dans ce domaine que son application n'est pas uniforme. Certains sont d'avis qu'en vertu de l'article 1 de la Convention susvisée l'Etat compétent de la résidence du mineur est celui où le mineur a son domicile légal. Or à leur avis le domicile légal est précisément l'Etat d'où le mineur a été enlevé et il le reste tant que le nouvel Etat n'est pas devenu le centre d'existence du mineur. Jusqu'à ce moment-là il leur paraît donc justifié de considérer le pays de résidence antérieure comme le seul compétent. D'autres pensent que dès le moment du déplacement du mineur dans un autre Etat la compétence de ce dernier Etat et l'application de sa législation s'imposent. Cela pose des problèmes dans tous les cas notamment où les dispositions du droit de la famille du nouvel Etat accordent la priorité à celui des parents qui a procédé à l'enlèvement. Souvent, ces dispositions suffiront à inciter un parent à l'enlèvement, étant donné qu'il sait que la législation de son Etat lui donnera raison.
Les mesures de coopération entre les autorités des différents Etats prévues à la Convention de La Haye relative à la protection des mineurs sont fort utiles (articles 4, 5, 10, 11). Malheureusement on n'en fait que trop peu d'usage.

Question 8

La République fédérale d'Allemagne n'est pas partie à une convention où à une entente administrative quelconque contenant des dispositions spécialement destinées à prévenir ou à traiter des enlèvements d'enfants par leurs parents. Depuis assez longtemps, toutefois, des délibérations sont en cours, à l'échelon du Conseil de l'Europe, sur des projets de conventions dans ce sens. Le Conseil et la Conférence des Ministres de la Justice des Etats membres des Communau-

tés Européennes ont également étudié cette question à Luxembourg le 9 octobre 1978.

Législation et jurisprudence

Question 9

La compétence internationale des tribunaux allemands découle notamment des dispositions de la Convention de La Haye concernant la compétence des autorités et la loi applicable en matière de protection des mineurs ou d'un autre traité international. Dans la mesure où une telle réglementation basée sur un traité n'existe pas, la jurisprudence récente se rattache notamment à la compétence locale. Font foi, en premier lieu, les dispositions prévues aux articles 36 et 43 de la loi allemande relative aux affaires relevant de la jurisdiction en matière gracieuse (*FGG*) du 17 mai 1898 dans la version publiée le 20 mai 1898 dans le *Reichsgesetzblatt*, p. 711. Le libellé de l'article 36, alinéa 1 de cette loi est le suivant:

Est compétent, dans les affaires de tutelle, le tribunal dans la circonscription duquel le pupille avait son domicile ou à défaut de domicile sa résidence à l'époque où la tutelle doit être ordonnée ou prend effet en vertu de la loi. S'il s'avère nécessaire d'ordonner une tutelle pour des frères et soeurs ayant leur domicile ou résidence dans les circonscriptions de différents tribunaux de tutelle et si une procédure de tutelle est déjà pendante pour un des pupilles, le tribunal compétent pour ce dernier pupille est également compétent pour ses frères et soeurs, sinon la compétence relève de la juridiction dans la circonscription de laquelle le pupille le plus jeune a son domicile ou sa résidence.

Le libellé de l'article 43, alinéa 1 de la loi allemande relative aux affaires relevant de la juridiction en matière gracieuse est le suivant:

La compétence pour un acte du tribunal de tutelle qui n'a pas pour objet l'institution d'une tutelle ou une curatelle est définie par les dispositions de l'article 36, alinéas 1 et 2, dans la mesure où la loi ne dispose pas autrement; le facteur déterminant dans chaque cas d'espèce est le moment où la juridiction est saisie de l'affaire en question.

Ici, selon la jurisprudence allemande, l'applicabilité de la législation étrangère ne s'oppose nullement à l'affirmation du principe de la compétence internationale allemande. Même la reconnaissance à l'étranger de la décision allemande ne constitue, en principe, aucun facteur important. La procédure devant les tribunaux de tutelle allemands se déroule selon la loi du for (*lex fori*). Les actes étrangers relevant de la juridiction en matière gracieuse, notamment les décisions en matière de garde de mineurs, doivent en principe être reconnus. Une procédure de reconnaissance spéciale n'est pas prévue selon la législation allemande. L'article 328 du Code allemand de procédure civile n'est pas directement applicable, mais il convient de s'y référer dans une certaine mesure. L'article 328 du Code allemand de procédure civile (dans la version du 12 septembre 1950, *Bundesgesetzblatt*, p. 533) traite de la reconnaissance à l'intérieur de jugements et de décisions rendus à l'étranger. Or cette reconnaissance est exclue, entre autres, si les tribunaux de l'Etat dont dépend la juridiction étrangère ne sont pas compétents selon la législation allemande ou si le défendeur perdant est allemand et n'a pas paru en justice, lorsque la citation introduisant l'instance ou l'ordonnance n'a été signifiée à sa personne ni dans le tribunal chargé de l'instance ni par la voie d'une entraide judiciaire accordée par les autorités allemandes, ou si la reconnaissance du jugement est contraire aux bonnes moeurs ou à l'objectif poursuivi par la loi allemande. Il est donc nécessaire que la décision étrangère soit en conformité avec l'ordre public allemand.

Question 10

En vertu de l'article 3 de la Convention de La Haye concernant la protection des mineurs, les tribunaux allemands doivent se déclarer incompétents si cela comportait une intervention dans un rapport d'autorité résultant de plein droit de la loi interne de l'Etat dont le mineur est ressortissant.

Question 11

a Lorsque les parents vivent séparés au cours du mariage, le tribunal de la famille décide aux termes de l'article 1672 en combinaison avec l'article 1671, alinéas 2 à 4, du Code civil auquel des parents la garde de l'enfant commun doit être confiée. Il se base à cet effet sur les propositions communes des parents à moins que celles-ci ne soient pas contraires à l'intérêt de l'enfant. C'est donc seul l'intérêt de l'enfant qui est décisif, c'est-à-dire le droit de l'enfant à une éducation garantissant une formation physique, morale et sociale adéquate.

b Après le divorce des parents il est décidé conformément aux principes ci-dessus (article 1671 du Code civil).

c Après le décès d'un des parents, la garde est confiée à l'autre parent exclusivement (article 1681 du Code civil).

d Dans tous les cas, le tribunal est tenu de décider dans l'intérêt de l'enfant. A ce point, il est renvoyé aux *litt. a* à *c supra.*

Question 12

Non.

Question 13

Néant.

Question 14

Non.

Question 15

D'après le droit en vigueur, l'influence de l'opinion de l'enfant n'est pas clairement définie. Elle est prise en considération par les tribunaux selon des critères très variés.
Le projet de loi sur la réforme du droit de garde des parents, qui est actuellement délibéré au sein du Comité juridique du *Bundestag*, prévoit que la volonté de l'enfant devra être respectée dans une plus large mesure. Aux termes de l'article 1671, alinéa 2, du projet de Code civil et de l'article 50*b* du projet de loi relative à la juridiction en matière gracieuse, le tribunal est tenu dans tous les cas d'écouter l'enfant, de connaître sa volonté et d'en tenir compte lors de la décision, dans la mesure où l'âge de l'enfant le permet.

Question 16

Non.

Question 17

Voir réponse à la question 9.

Question 18

Les règles habituelles de conflit de lois en matière de droit de garde ne s'appliquent que dans la mesure où elles ne se heurtent pas à l'ordre public allemand.
L'article 30 de la loi introductive du Code civil est libellé comme suit: «*L'application d'une loi étrangère est exclue*

lorsque l'application serait contraire aux bonnes moeurs ou au but d'une loi allemande.»

Droit de visite

Question 19

Oui, aux termes de l'article 1634 du Code civil.

Question 20

En principe, l'enfant peut, pour une durée déterminée, être conduit dans un autre pays que celui de sa résidence habituelle pour permettre l'exercice du droit de visite. Ceci ne pourra cependant se faire que lorsque les deux parents sont d'accord de rendre l'enfant à l'expiration de la durée de la visite. Selon l'article 1634, alinéa 2, du Code civil, le tribunal de la famille peut réglementer ces rapports en détail.
Il peut déterminer le lieu, la fréquence, la durée et les autres circonstances des rapports personnels. Le tribunal peut ordonner de faire appel à un tiers comme personne de confiance, si la crainte est justifiée que la personne à laquelle le droit de visite a été reconnu et qui réside à l'étranger ne puisse retirer l'enfant du champ d'application du pouvoir judiciaire et exécutif national. Dans ces cas il devrait être fait appel à l'office d'assistance sociale à la jeunesse aux termes des articles 48*c* et 52*a* de la loi sur l'assistance sociale à la jeunesse, dans la version publiée le 25 avril 1977 (dans le *Bundesgesetzblatt* I, p. 633). Car la présence d'un représentant de l'office d'assistance sociale à la jeunesse peut empêcher que la personne à laquelle le droit de visite a été reconnu n'entreprenne avec l'enfant des voyages illicites, ce qui a pour conséquence que le droit de visite ne doit pas être entièrement refusé, bien qu'il y ait des doutes justifiés à l'égard des intentions de la personne à laquelle le droit de visite a été reconnu.

Question 21

Non.

Questions 22 et 23

En principe, l'enlèvement d'enfants n'est pas favorisé par l'exercice du droit de visite. Etant donné que dans le droit allemand (comme il a déjà été exposé) le droit de visite peut être assorti d'injonctions, il est pratiquement exclu, lorsque les autorités et tribunaux compétents procèdent avec l'attention requise, qu'un parent prépare un enlèvement sous le prétexte d'exercer le droit de visite. D'autre part, l'existence du droit de visite ne saura, le cas échéant, empêcher qu'un parent réalise effectivement l'enlèvement au mépris des droits et des lois du pays de séjour.

Solutions actuelles non conventionnelles

Question 24

Voir réponse à la question 20.

Solutions conventionnelles possibles

Questions 25 et 26

Une solution conventionnelle possible paraît désirable. A cet égard l'on pourrait, le cas échéant, se référer aux résultats des travaux du Comité d'experts du Conseil de l'Europe. Ce Comité délibère actuellement le projet de Convention sur la reconnaissance et l'exécution des décisions en matière de garde des enfants et le rétablissement de la garde des enfants, projet qui a été élaboré par un groupe de travail du Comité. Il échet d'attirer l'attention sur l'article 103 de ce projet qui prévoit que dans le cas où au moins toutes les personnes qui ont participé à l'enlèvement de l'enfant (le père, la mère et l'enfant) possèdent la même nationalité et seulement *une* nationalité et où, de plus, l'enfant a eu sa résidence habituelle dans l'Etat d'origine, les autorités de l'Etat requis (celui où l'enfant a été enlevé) doivent sans plus rétablir le droit de garde originel. Si d'après le droit national la restitution de l'enfant ne peut se faire que par intervention d'un tribunal, il faudrait assurer au moins qu'aucun des motifs pour le refus de la reconnaissance de l'exécution, qui peuvent être invoqués en vertu d'autres dispositions du projet n'entrera en ligne de compte.
Enfin, il faudrait rappeler que lors de la réunion du Conseil et de la Conférence des Ministres de la Justice des Etats membres des Communautés Européennes, tenues les 9 et 10 octobre 1978 à Luxembourg, il a été décidé d'instituer un groupe de travail qui a pour mission de favoriser les travaux dans le cadre du Conseil de l'Europe et d'examiner la question de savoir si la solution du problème dans le cadre du Conseil de l'Europe est suffisante.

Australie/Australia

Sociological information

Questions 1 and 2

No comprehensive or regular statistics are available of the number of cases in which children have been removed from Australia by one parent without the consent of the other (hereinafter termed 'child removal'). It is therefore impossible to state with certainty that there has been an increase in the number of cases of child removal from Australia during the past 5 years.
There are statistics showing that there has been an increase in the divorce rate in Australia during the last 5 years. Taking these statistics together with the increased facility for international air travel, there might have been an increase in incidence of child removal during the period.
Considerable media coverage has been given in Australia to cases of child removal and, as a result, there is certainly increasing public awareness of and concern at the problem.

Question 3

No statistics have been kept on a regular basis. It has been claimed that one child per week was being removed from Australia. However official records indicate that of approximately 200,000 children departing from Australia each year, only about 10 cases of child removal come to the Government's notice each year.

Question 4

To the best of our knowledge no research studies of the causes or effects of child removal have been published in Australia.

Treaties

Questions 5 and 6

No.

Question 7

Australia is a signatory to the Universal Declaration of Human Rights and has signed, but not yet ratified, the International Covenant on Civil and Political Rights.

Question 8

No. Section 68 of the Family Law Act and regulation 140 of the Family Law Regulations provide for the registration and enforcement by courts in Australia of custody orders made in prescribed overseas countries. Section 69 of the Act and regulation 141 of the Regulations provide for the sending of custody orders made in Australian courts to prescribed overseas countries for enforcement there. So far only New Zealand and Papua New Guinea have been prescribed for the purposes of these provisions although neither country has yet afforded Australia reciprocity. Enquiries have been made with at least 28 other countries to see whether they are interested in entering into arrangements with Australia for reciprocal enforcement of custody orders.

Legislation and case law

Question 9

Under section 39 of the Family Law Act 1975 of Australia, proceedings between the parties to a marriage with respect to the custody or guardianship of, or access to, a child of the marriage may be instituted in the Family Court of Australia, the Family Court of Western Australia, the Supreme Court of the Northern Territory and a court of summary jurisdiction in a State or Territory of Australia if -

a either party to the marriage is an Australian citizen;

b either party to, or the child of, the marriage is present in Australia.

Child of the marriage is defined in section 5 of the Act to mean the natural or adopted child of the parties to the marriage.

Where a child of a marriage who is the subject of custody or access proceedings in Australia is the subject of a custody or access order made in an overseas country -

a where that country is a prescribed country for the purposes of sections 60 and 68 of the Family Law Act (see answer to question 8, above) and the order has been registered in Australia, section 69 provides that the order has the same force and effect as if it had been made in Australia;

b where the overseas order is not and cannot be registered, the degree of recognition accorded to the order by the Australian court hearing the custody or access proceedings is commented on in Attachment A (see below).

Under section 64 of the Family Law Act, in custody or access proceedings the court 'shall regard the welfare of the child as the paramount consideration'. Where the child is 14 years or older, the court shall not make an order contrary to the child's wishes unless satisfied that there are special circumstances.

Question 10

See answer to question 9, above.

Question 11

a-d Part VII of the Family Law Act 1975 of Australia governs the welfare and custody of a child of the marriage. By virtue of sub-section 4(2) these provisions apply equally during the marriage of the parties and after their divorce.

Section 43 of the Act requires courts, when exercising jurisdiction under the Act, to have regard to, *inter alia*, 'the need to protect the rights of children and promote their welfare'. The answer to question 9, above, indicates the considerations to which the court shall have regard in custody and access proceedings. Subject to that, the court is to make such order as it thinks proper.

Sub-section 61(4) of the Act provides that on the death of a party to a marriage in whose favour a custody order has been made in respect of a child of the marriage, the other party is entitled to custody only if the court so orders on application by that party and, upon such an application, any other person who had the care and control of the child at the time of the application is entitled to be a party to the proceedings.

In relation to ex-nuptial children and children of a previous marriage of one of the parties to a custody dispute, custody is governed by the provisions of the laws of the States and Territories.

In general, relevant laws of the States and Territories provide that the interests or welfare of the child is the paramount consideration for the courts in resolving custody disputes over such children.

Question 12

No. On the contrary, sub-section 61(1) of the Family Law Act provides that subject to any order of a court for the time being in force, each of the parties to a marriage is a guardian of any child of the marriage who has not attained the age of 18 years and those parties have the joint custody of the child.

Question 13

It is implicit in sub-section 64(1) and (3) of the Family Law Act, and accepted by courts exercising jurisdiction under the Act, that they may make an order placing a child of a marriage in the sole custody of either of the parents.

Question 14

As indicated in the answer to question 9, above, sub-section 64(1)(b) of the Act provides that where a child has attained the age of 14 years, the court shall not make a custody or access order contrary to the wishes of the child unless the court is satisfied that, by reason of special circumstances, it is necessary to do so. Sub-section 61(2) provides that a custody or access order shall not be made in respect of a child who has attained the age of 18 years or is or has married, and an order made in respect of a child ceases to be in force when the child attains the age of 18 or marries.

Question 15

See the answer to question 14, above. In addition, under sub-section 62(4) of the Act the court may adjourn contested proceedings for custody or guardianship of, or access to, a child of a marriage who has not attained the age of 18 years until a report has been obtained from a welfare officer on such matters relevant to the proceedings as the court considers desirable. Under this provision the court may order preparation of a welfare report on the wishes of the child and such a report may be received in evidence.

Question 16

Yes, under sub-section 64(1)(c) of the Act. It is usual for such orders to be made together with orders for delivery up to the court of passports under sub-section 64(6) where the court is of the opinion that there is a possibility or threat that a child will be removed from Australia. Orders for delivery up of passports may also be made under sub-section 70(6)(c) where the court has found that a person knowingly and without reasonable cause interfered with a person's right to exercise custody of, or access to, a child pursuant to a court order under the Act. Approximately 80 orders for delivery up of passports were made in the Family Court of Australia and the Family Court of Western Australia during the 9 months from January to September 1978.

The total number of applications for custody and access during that period was 8,582.

The powers referred to are considered to be reasonably effective, although persons with dual nationality can obtain another passport from their other country of nationality. In at least one recent case a parent took advantage of this opportunity and removed his children in defiance of a court order.
As to other measures, see the answer to question 24, below.

Question 17

Under the Family Law Act, if the court has jurisdiction to hear an application for custody of, or access to, a child (see answer to question 9, above), it applies the provisions of the Act governing the determination of custody and access applications regardless of the nationality or place of domicile or habitual residence of the child. If the child is the subject of a custody or access order made in a prescribed overseas country and registered in Australia, see the answer to question 9, above. If the overseas order cannot be so registered, the consideration given to the order is set out in Attachment A (see below).

Question 18

See answer to question 17, above.

Visitation and access

Question 19

Where a court makes an order placing a child of a marriage in the custody of a party to the marriage (or some other person), under sub-section 64(3) it may include provision in the order for access to the child by any person. Where the court declines to make an order for sole custody, or makes an order for joint custody, under sub-section 64(4) it may make such access orders as it thinks proper.
The current view of courts having jurisdiction under the Family Law Act is that the right of access is a right of the child, rather than the parent, and that the welfare of the child is usually promoted by having access to both parents. Therefore it is usual in Australia that in resolving a custody dispute, a court orders that one parent have custody of the child and the other parent have access to the child.

Question 20

There is little information available on the decisions of courts on applications by parents having access for authority to take the child overseas during an access visit. In the few known cases in which courts have approved such applications, the conditions imposed have been that, where possible, the passport of the applicant be issued for only a limited period and that the applicant provide a surety for a substantial sum of money against the possibility that the child might not be returned.

Question 21

No. As stated in the answer to question 12, above, where no court order has been made regarding custody of, or access to, a child of a marriage, both parties to the marriage have joint custody. As indicated in the answer to question 19, where a sole custody order is made, it is for the court to make any order for access by the other parent.

Question 22

As it is essential to removal of a child that the person intending to remove the child gain possession, an access period can provide the opportunity. Accordingly, it is common in cases of child removal that the child was removed during or immediately after exercise of access by a parent.

Question 23

This may be so but there is no information on hand upon which such a conclusion could be made. As indicated in the answer to question 19, it is unusual to deprive a parent of all access to a child.

Existing non-treaty remedies

Question 24

Apart from those referred to in the answer to question 16, measures for prevention of child removal are available under the Migration Act 1958, and by passport-issuing procedures.

a Migration Act 1958

Section 62 of the Migration Act 1958 provides that where a child is the subject of a custody or access order, or proceedings for such an order have been instituted, it is an offence for a party to the proceedings or a person acting on his behalf to take the child from Australia without the consent of any other person having custody or access pursuant to the order or of a party to the proceedings, or unless otherwise authorised by a court order.
When a person who has been granted a custody or access order or who has instituted proceedings for such an order in respect of a child has a suspicion that the child may be removed from Australia, he may give notice of the existence of the order or proceedings to the police for entry on appropriate warning lists at departure points.
Section 63 of the Migration Act 1958 provides that a person having rights under a custody or access order or who has instituted custody or access proceedings, can serve a statutory declaration containing details of the order or proceedings on a carrier, and the carrier is thereupon forbidden to transport the child who is the subject of the order or proceedings from Australia without the consent of the person or the authority of a court order.

b Passport-issuing procedures

A procedure is available at the Department of Foreign Affairs passport-issuing offices throughout Australia whereby a parent may complete a passport enquiry form objecting to the issue of a passport to the other parent or their child. This causes the names of that other parent and their child to be included on a passports stop list thereby preventing passport facilities being made available in respect of the child until the Department of Foreign Affairs is satisfied that:

(*i*) the applicant for a passport for the child has a court order for sole custody of the child and there is no existing court order for access; or

(*ii*) the objecting parent has consented to the grant of passport facilities in respect of the child; or

(*iii*) the applicant has been granted a court order requesting the Department to extend passport facilities to that person in respect of the child.

Possible treaty remedies

Question 25

At this stage, Australia would be interested in the inclusion in an international convention on preventing the removal of children from one country to another of provisions for facilitating the reciprocal enforcement between countries of orders regarding the custody of, and access to, children, and

the strengthening of administrative co-operation between countries (paragraphs *a* and *g* of question 25). In view of the specific provisions in the Family Law Act regarding the jurisdiction of courts over custody and access disputes and the limitation on that jurisdiction where an order relating to the child made in a prescribed overseas country has been registered in Australia, Australia would have reservations at this stage about provisions in such a convention along the lines of paragraphs *b*, *d*, *e* and *f* of the question. Australia would prefer to hear discussion on the proposal in paragraph *c* of the question before determining its attitude.

Question 26

Australian experience suggests that it would be useful if countries concerned about the problem of child removal would consider implementing procedures whereby -

a a passport would not be issued to a person without prior notification of the person's application for a passport to the spouse of that person;

b a passport would not be issued to a child of a marriage without the authenticated written consent of both parties to the marriage (or former marriage, if dissolved) or, where the consent of a parent had been refused or was unobtainable, the order of a court authorizing the travel of the child from the country notwithstanding that parent's objections;

c a duplicate passport would not be issued to a person or a child where the existing passport of the person or the child had been surrendered to a court by order of the court for the purpose of preventing the person or the child from leaving or being removed from the country concerned.

ATTACHMENT A

COMMENT ON INTERNATIONAL CHILD ABDUCTION

The increased facility for international air travel has also made it increasingly possible for children to be abducted across national boundaries.

The problem is being considered by a number of international organisations, such as the Council of Europe, the Commonwealth Law Ministers at their meeting in Winnipeg, Canada, in August 1977, the European Economic Community and the Hague Conference on Private International Law. In Australia, an interdepartmental committee has been set up to consider ways and means of preventing the removal of children from Australia, see *Information Bulletin* No 31, October 1978.

There are two aspects of this problem:

a children brought to Australia in defiance of a foreign custody order, and

b children abducted from Australia in defiance of an Australian custody order.

The recognition of a foreign custody order in Australia

The Family Law Act in section 68 makes provision for the enforcement in Australia by registration of an overseas custody order made in a 'prescribed country'. Upon registration, the order has the same force and effect as if it were an order made by the court of registration: section 68(2). Consequently, the prohibitions of section 70: see section 70(4), and the enforcement proceedings of section 64(9) and (10) become applicable.

What is more important, upon registration of the overseas order, a court in Australia shall not exercise jurisdiction in respect of the custody, or access, of the child concerned unless:

a every person having rights of custody or access under the overseas order consents, or

b the court is satisfied that there are substantial grounds for believing that the welfare of the child will be adversely affected if the court does not exercise jurisdiction in the proceedings: section 68(3).

Even if jurisdiction is assumed in such a case, the onus lies on the party seeking an order for custody or access to satisfy the court: (*a*) that the welfare of the child is likely to be adversely affected if the order is not made, or (*b*) that there has been such a change in the circumstances of the child that the order ought to be made: section 68(4).

Unfortunately, the only countries which are 'prescribed countries' for the purposes of section 68, are New Zealand (s. 4(1)), and Papua New Guinea (*Family Law Regulations*, r. 170). Recognition of overseas custody orders made in other countries, continues to depend upon common law principles.

Any discussion of those principles must start with the opinion of the Privy Council in *McKee* v. *McKee* (1951) AC 352. In that case a Californian court had awarded custody of a child to the mother. The father abducted the child to Ontario. The mother sought to assert her right to custody in the Supreme Court of Ontario. The Privy Council, taking as its starting point the well-established principle that the child's welfare is the paramount consideration, held that the Supreme Court of Ontario was not obliged to 'blindly follow an order made by a foreign court' and 'that it must form an independent judgment on the question, though in doing so it will give proper weight to the foreign judgment' (at 364).

The Privy Council did not say that in every case the forum should consider the issue *de novo*. Indeed, their Lordships said, at 363, that *it is possible that a case might arise in which it appeared to the court, before which the question of custody of an infant came, that it was in the best interests of that infant that it should not look beyond the circumstances in which jurisdiction was invoked and for that reason give effect to the foreign judgment without further enquiry.* The main point of the opinion is that a consideration of the best interests of the child, rather than the foreign judgment, should be the starting point.

Nor should a desire to punish the abducting parent be a starting point. It is true that some cases support the principle that a parent should not be allowed to reap the advantage of his or her misdoing: per Harman LJ. in *Re H. (Infants)* (1966) 1 All ER 886 at 893; *Re T. (Infants)* (1968) Ch. 704. But this is clearly contrary to the opinion of the Privy Council and to the principle that the child's welfare is paramount. As Goldstein J. pointed out in *In the Marriage of Kress* (1976) 2 *Fam.L.R.* 11,330 at 11,339:

Kidnapping cases, as cases of this sort have come to be called, have certain features peculiar unto themselves. It must be kept constantly in mind that whatever the wrongs of the taking of a child from a parent by stealth and the keeping of such child's whereabouts secret, it is not the court's function to punish the taking parent in deciding the issue of custody of the child. The welfare of the child is the paramount consideration of the court. The fact that a parent has taken a one year old child from his mother, cut the mother off from all contact with the child and the child likewise with the mother, are matters which, whatever disapproval the court may have of such behaviour, the court must view as they bear on the welfare of the child rather than in deciding the issue of custody on whether they were objectively good or bad things to do.

In recent years the courts have come to a greater appreciation of the need to provide a stable environment for a child. It clearly is not in the interests of a child to become a

football between contending parents and a fugitive from police and enquiry agents. That consideration may induce a court to give effect to the foreign order so as to restore the *status quo* as soon as possible. As Buckley LJ. said in *Re L. (Minors)* (1974) 1 All ER 913 at 925, 926:

To take a child from his native land, to remove him to another country where, maybe, his native tongue is not spoken, to divorce him from the social customs and contacts to which he has been accustomed, to interrupt his education in his native land and subject him to a foreign system of education, are all acts (offered here as examples, and of course not as a complete catalogue of possible relevant factors) which are likely to be psychologically disturbing to the child, particularly at a time when his family life is also disrupted. If such a case is promptly brought to the attention of a court in this country, the judge may feel that it is in the best interests of the infant that these disturbing factors should be eliminated from his life as speedily as possible. A full investigation of the merits of the case in an English court may be incompatible with achieving this.

There is also more appreciation of the need for judicial comity: that the forum should pay greater respect to the judgment of another court which has exhaustively considered the matter. As Speight J. said in *C.* v. *C.* (1973) 1 NZLR 129 at 130:

. . . the findings of the foreign court which considered the same matters on a prior occasion should be given some weight, greater or lesser, depending, among other things, on the status of the court, the type of hearing, whether it was a full one or a mere formality and the similarity or otherwise of the laws of the country in question.

The issue was fully discussed by the Full Court of the Family Court in *In the Marriage of Khamis*, Unreported, 21 August 1978. In that case a custody order had been made in California in 1975 awarding custody of the children to the mother who was permitted to take them to Australia. Orders were made that the father have access. The mother apparently failed to comply with the order for access and at the end of 1976 the Californian court made an *ex parte* order calling on the mother to show cause why she should not be found guilty of contempt of court and why the custody and access orders should not be modified so as to grant custody to the father and access to the mother. In early 1977 those orders became final. At the same time as he made application in California, the father applied for custody and interim access in California to the Family Court of Australia. He was denied both and allowed only restricted access within Australia.

It will be seen that this was not a case of abduction. The mother had been granted custody of the children by the Californian court in the first instance. It is true that the Californian court afterwards deprived her of her custody rights, but this was done on an *ex parte* application whilst she and the children were residing in Australia. Although the mother apparently knew of the second Californian proceedings, she made no effort to be represented. Despite this, it was accepted by the Full Court that the second Californian order lacked sufficient force to warrant serious consideration by an Australian court.

In that case the question of the effect of the Californian order did not really arise. The first order had been rescinded, and the second order being made *ex parte* was not considered worthy of recognition. Nevertheless, the court made some very interesting comments.

In the first place, the Full Court set its face firmly against a too ready assumption of jurisdiction. As the joint judgment of Evatt CJ. and Ellis J. states:

A too great willingness of courts to assume custody jurisdiction de novo *where a party has taken a child from a country in breach of an order of the local court could encourage such behaviour. It is not in the interests of children to be put at the risk of endless series of abductions. It remains true, however, that the custody order is never final, and an overseas order cannot have a higher standing than a local order. Nothing that has been said derogates from the main principle that the welfare of the child is the paramount consideration. Nevertheless, the welfare of the child is not served by repeated litigation unless there is clearly a case for a further review of custody.*

When is there a case for review? The Full Court referred to the decision of Watson, Murray and Lusink JJ. in *In the Marriage of Hayman* (1976) 2 *Fam.L.R.* 11,558. In that case their Honours, referring to multiple applications for custody within Australia, held that the Family Court would not consider an application for a change of custody unless it was established that there had been a change of circumstances since the last hearing. It indicated that the same principle should apply where a foreign court had already determined the issue on the merits. As Evatt CJ. and Ellis J. stated:

Where the earlier custody order is made by an overseas court of appropriate jurisdiction and that court has recently considered the issues in full and has made a custody order applying the rule that a child's welfare or interests are the paramount consideration, the Australian Court should be reluctant to act inconsistently with that order unless the exceptions set out in s. 68(4) are met. In determining appropriate jurisdiction, regard should be paid not only to the status of the court, but also to the provisions of s. 39(4) which define the custody jurisdiction of the Family Court.

The questions which arise, therefore, are:

1 *Was the foreign court a court of appropriate jurisdiction?*

There are two aspects to this: the status of the foreign court and the circumstances in which it exercised jurisdiction.

As regards the status of the foreign court, Evatt CJ. and Ellis J. in their joint judgment do not define what is required, but in *C.* v. *C.* (1973) 1 NZLR 129, Speight J. considered it relevant that the custody order in issue had been made by the Supreme Court of British Columbia, a court equal in status to the Supreme Court of New Zealand. If that analogy were followed, it would mean that the Family Court of Australia would require the foreign court to be at least of the level of a superior court.

Watson J. took a less formalistic approach. He was concerned more with the composition and method of the foreign tribunal. He asked:

Secondly, what is the nature of the tribunal which made the order? Is it a court which specialises in family law matters? Are its judicial officers professional or lay? Was the order arrived at by a judicial process or by some other means, e.g. *a panel or a board either solely or partially comprised of non-lawyers? It is perhaps not so much the status of the foreign tribunal but its composition and methods which is the more relevant consideration.*

It must be assumed that the questions posited by His Honour are merely examples of the type of question which the court should ask. His Honour's remarks should not be interpreted as requiring that in order to gain recognition the foreign order should be made by a tribunal composed of professional judges sitting in a court which specialises in family law matters. This, it is summitted, would be too rigid an approach, since in many countries matters of custody are determined by trained personnel who are not necessarily professional judges or even lawyers. It is more a question of the seriousness, impartiality and expertise of the foreign tribunal.

So far as jurisdiction is concerned, Evatt CJ. and Ellis J. referred to section 39(4) which defines the jurisdiction of the Australian courts in custody matters, as a guide. This gives jurisdiction in custody matters if either party to the marriage is an Australian citizen, if either party to the marriage is

present in Australia, or if the child to which the proceedings relate is present in Australia. As can be seen, the jurisdictional requirements are extremely wide and would, if applied in *Travers* v. *Holley* (1953) P. 246, fashion, only exclude the most unlikely situation of a foreign court entertaining a custody dispute between absent parents concerning a child resident outside its jurisdiction. As the House of Lords in *Indyka* v. *Indyka* (1969) 1 AC 33, indicated, there are dangers in applying the reverse mirror image of jurisdiction to recognition. More fruitful, it is submitted, is to ask, as did Watson J., whether the adjudication took place after a hearing in which both parties took an active part.

2 *Were the issues canvassed in full?*

As the decision in *In the Marriage of Khamis* indicates, a decision on an *ex parte* application does not warrant recognition. Again, Watson J. extends this consideration by stating:

Thirdly, what was the nature of the hearing which led to the making of the order? Were both parents present? Were the conflicting claims fully examined? Did the court have the assistance of family reports from trained observers such as psychologists or social workers, etc?

No doubt His Honour was not stating conditions *sine qua non*, but considerations which, if fulfilled, would strengthen the claim to recognition. The main question is whether the parties were each represented and their claims were fully considered by the court.

3 *Did the foreign court apply the rule that the child's welfare was the paramount consideration?*

As Watson J. indicates, there are some foreign courts which still give automatic rights of preference to the father, or which are solely swayed by religious, ethnic or cultural considerations. In such a case the order of the foreign court can have little significance in this country. On the other hand, it is submitted, there is no need for the forum to review the actual reasoning of the foreign court. In *C.* v. *C.* (1973) 1 NZLR 129, Speight J. accepted the British Columbian order, despite the absence of elaborate reasons for its decision, once he was satisfied that Canadian courts followed 'the best interest of the child' rule.

If the foreign court and its order fulfil these three requirements of jurisdiction, a full hearing and proper application of the principle that the interests of the child are paramount, what then is the status of such an order in Australia?

Evatt CJ. and Ellis J. suggest that such an order should have the status of an order registered under section 68, that is to say, the Australian court should not make an order with respect to the custody or access of such child (and by inference confirm and enforce the overseas order as it stands) unless the applicant seeking a different order satisfies the court in the terms of section 68(4) that the welfare of the child is likely to be adversely affected, or there has been a change in the circumstances of the child.

For an example of how those principles would operate in practice, we now have the decision of McGovern J. in *In the Marriage of P. and B. (formerly P.)* (1978) 4 *Fam.L.N.* No 31. This case concerned a child which has been the subject of a custody order made in New Zealand in 1974 awarding custody to the mother. The father had taken the child to Australia at the end of 1977, ostensibly for a holiday, but had refused to return it to the mother in New Zealand. He thereupon applied to the Family Court of Australia for an order for custody.

Although the New Zealand order was not registered under section 68, McGovern J. held that he should proceed on the principles laid down in that section. The issue, as he saw it, which he had to resolve was, therefore, the preliminary question of whether the child should be returned to New Zealand, thereby giving effect to the New Zealand order and leaving the father to apply to the courts there for any variation in the order, or whether he should assume jurisdiction to hear the merits of the case.

He came to the conclusion that the Australian court should 'act in the interest of comity', *i.e.* give effect to the overseas order 'provided it is satisfied the child will come to no harm by being sent back to the foreign jurisdiction, the welfare of the child being the paramount consideration, and that the foreign jurisdiction is the *forum conveniens*'.

It had been argued for the father that the child had, since his arrival in Australia, become attached to the father and hostile to the mother and that consequently it would be contrary to the interests of the child to return him to his mother. His Honour pointed out, quite rightly, that this state of affairs had been the result of the separation created by the father's action and would grow worse the longer it was allowed to continue. His Honour could not decide without full investigation whether the child's attachment to his father had become so strong that it would cause him real harm to be parted from his father. However, on the evidence so far before him the probabilities were against that situation occurring. He was also satisfied that, having regard to the fact that New Zealand had been the matrimonial residence of the parties and had been until late 1977 the residence of all the parties and was still the residence of the mother and the boy's sister, it clearly was the most convenient forum to resolve any custody disputes. He, therefore, ordered that the child be returned to New Zealand within a week.

This decision indicates that the onus on the person who seeks to retain a child in Australia in breach of an overseas custody order otherwise entitled to recognition, will be quite heavy. He or she must be able to show a real likelihood of harm befalling the child if the order for return to the original custody is made. To that extent His Honour accepted the arguments of Professor Brigitte M. Bodenheimer in 'The International Kidnapping of Children: The United States Approach' (1977) 11 *Family Law Quarterly* 83-100, to which he referred in his judgment.

Is such an approach consistent with the opinion of the Privy Council in *McKee* v. *McKee*? Watson J. discusses briefly the interesting question of what the status of the Privy Council opinion is in federal courts since the High Court's decision in *Viro* v. *R.* (1978) 18 ALR 257. It may, perhaps, be a bit too bold to suggest that in the absence of a conflicting decision of the High Court, the Family Court is now free to ignore *McKee* v. *McKee*, especially since the opinion in *McKee* was followed by the High Court in *Kades* v. *Kades* (1961) 35 ALJR 251. However, it is submitted that the approach outlined above is not in conflict with *McKee* v. *McKee*. Their Lordships in that case acknowledged (at 364) that in some cases the forum could refuse to consider the question of custody *de novo* and order the immediate return of the child, where the foreign order was of a recent date and there was no new circumstance to be considered. What the Full Court has done is to flesh out the very broad framework created by the Privy Council in defining more closely the circumstances in which an Australian court should give effect to the foreign order without a re-investigation of the merits. Such a possibility the Privy Council never denied.

Enforcement of Australian orders abroad

In *Khamis* there was a short discussion by Watson J. of the effect of an Australian order abroad. This, needless to say, depends on the law of the foreign country involved. Section 69 makes provision for the transmission of Australian custody orders to an overseas country which has made provision for the enforcement of overseas custody orders along the lines of section 68. To this date, no overseas country, not even New Zealand and Papua New Guinea, the beneficiaries of section 68, have made such provision, although the New Zealand Domestic Proceedings Act 1968 in section

32(3) does authorise the Governor-General to make regulations for the enforcement of overseas custody orders in that country.
As the Report on International Child Abduction prepared by Mr C.A. Dyer for the Hague Conference on Private International Law in August 1978, illustrates, international conventions on the recognition and enforcement of custody orders are virtually non-existent. The Conventions on Guardianship of 1902 and 1961 deal only incidentally with custody and are in any event confined in their operation to countries in the continent of Europe. Apart from this, there exist only regional and bilateral arrangements. Australia is not a party to any.
In *Khamis* the father was seeking access to the children outside Australia. Since the attitude of courts outside Australia to an Australian order was uncertain, and the father's behaviour gave rise to suspicion that he might not return the children, the application was refused. As Watson J. pointed out:

The problem is not presently capable of solution. In some cases the return of a child to Australia may be enhanced by providing substantial security against default. In other cases, it may be possible to have the Australian order registered as an order in the appropriate court of the foreign country. Difficulties can arise where that country requires the presence of the child to found jurisdiction.
In my opinion, practitioners who seek orders on behalf of a parent who wishes to take a child overseas should carefully explore the methods (if any) by which the child's appropriate return to Australia can be assured: concrete proposals should be presented to the court.

To prevent a child being taken out of the country, the court can take some precautionary steps. In *Khamis* it ordered the deposit in court of the passports of the children and the father as well as his airline tickets. If a parent has taken the children, or failed to return them, and there is reason to believe that he or she may take the children abroad, the court may issue a warrant for his arrest. In addition, the court may issue a warrant under section 64(9) and (10) authorising the Commonwealth, State or Territorial police to stop and search any vehicle, vessel or aircraft and take possession of the child and deliver it to the parent having custody. This was done in *In the Marriage of M.* Unreported, 13 October 1978, by Watson J. where a father had failed to return children after weekend access and had arranged to send a telegram from Rome to give the impression that he and the children had arrived in Italy. However, not all abducting parents telegraph their intentions so clearly in advance. The abduction of a child in defiance of a court order, constitutes of course contempt which can be punished under section 108 of the Family Law Act. In *In the Marriage of M.* Watson J. imposed a penalty of imprisonment of 10 months on the abducting father.
Another provision which can be invoked is found in section 62 of the Migration Act 1958 which makes it an offence to take a child which is the subject of a custody or access order or of pending proceedings for such an order from Australia without the consent of the other party involved in the order or proceedings. A parent who fears that a child may become the victim of an abduction attempt may also serve a statutory declaration containing details of a custody order or of pending proceedings for such an order, on a carrier under section 63 of the Migration Act 1958 by delivering it, or sending it by registered post, to his principal place of business in Australia, whereupon the carrier is forbidden to transport the child from Australia without the written consent of the person serving the statutory declaration or the authority of a court order. In addition, the request can be made to the Department of Foreign Affairs' Passport Office to have the child's name included on a passport stop list: as to the procedure, see *Information Bulletin* No 31, October 1978.
Where the abduction is successful, the court is not thereby deprived of jurisdiction. Under section 39(4) it can exercise jurisdiction in respect of a child outside the jurisdiction. However, it should as a matter of practice not do so unless there is some expectation that the moral authority of the Australian court will be recognised by the court of the country in which the child is currently residing: *In Marriage of Ding* (1976) 1 *Fam.L.R.* 11,231; *In the Marriage of Woo* (1976) 2 *Fam.L.N.* No 9. The question then really becomes one of seeking enforcement of the Australian order in a foreign court. It may be assumed that the courts in New Zealand and the United Kingdom will observe principles very similar to those adopted by the Family Court of Australia. In some parts of the United States the principles of the Uniform Child Custody Jurisdiction Act described in Professor Bodenheimer's article may induce the court to apply similar principles to the orders of non-United States courts. The same may apply in Canada where the Extra-Provincial Custody Orders Enforcement Act has been adopted in all provinces except Ontario and Quebec. But in many other countries where traditional legal and religious systems still prevail, the claim particularly of an abducting father to a son or of a parent who wishes to keep the child in the country of his or her nationality will be more or less automatically recognised against those of an Australian parent. The only alternative then is a counter-kidnap, which is hardly beneficial to the welfare of the children. The need for international co-operation in this area is obvious.

Note by the Permanent Bureau

Copies of the Family Law Act 1975 *and the* Family Law Regulations, *as well as a copy of sections 61-63 of the* Migration Act 1958, *were attached as an annex to the original Australian reply submitted to the Permanent Bureau.*

Legislative texts, documents and law review articles, annexed to the Replies of Member States to the Questionnaire have not been included with the collected texts of the Replies, Preliminary Document No 2, *because of their length. The Permanent Bureau of the Conference retains copies in its files.*

Belgique / Belgium

Remarque préliminaire

Il faudrait éviter de mettre les cinq types de situation sur le même plan. En effet, la plus fréquente est la situation B suivie de la situation A.
L'expérience révèle que les situations C et D sont relativement rares. De plus, la situation E n'est qu'un cas d'application de la situation B.

Informations de caractère sociologique

Question 1
Oui. L'accroissement est important.

Question 2
Différents facteurs interviennent: en premier lieu les mariages mixtes et leur dissolution; ensuite l'extension du chômage qui incite certains travailleurs étrangers à rentrer dans leur pays et, enfin, l'insuffisance et l'inefficacité du contrôle aux frontières.

Question 3

Le Département des Affaires Etrangères possède des statistiques partielles quant au nombre de cas pour lesquels son intervention est sollicitée (voir annexe *infra*).

Question 4

Ces travaux s'ils existent ne sont pas connus.

Conventions

Question 5

La Belgique n'a pas conclu de conventions sur la loi applicable en matière de garde d'enfants. En revanche, elle a conclu des conventions sur la reconnaissance et l'exécution des décisions en matière civile et commerciale.
Deux Conventions, la Convention franco-belge du 8 juillet 1899 et la Convention belgo-néerlandaise du 28 mars 1925 contiennent, en outre, des règles de compétence directe.
Les autres Conventions sont: la Convention conclue le 2 mai 1934 entre la Belgique et la Grande Bretagne, la Convention entre la Belgique et la République fédérale d'Allemagne du 30 juin 1958, la Convention entre la Belgique et la Suisse du 29 avril 1959, la Convention entre la Belgique et l'Autriche du 16 juin 1959, la Convention entre la Belgique et l'Italie du 6 avril 1962.

Question 6

L'utilité de ces Conventions est très relative en raison de la réserve de l'ordre public qu'elles contiennent toutes.

Question 7

Oui, mais ces traités sont sans efficacité en l'occurrence.

Question 8

La Belgique a conclu des arrangements sur le rapatriement des mineurs avec
– les Pays-Bas, le 21 juillet 1913 (arrangement modifié le 3 avril 1933),
– la France, le 17 juillet 1925,
– le Grand-Duché de Luxembourg, le 31 mai 1933,
– l'Italie, le 7 février 1934.
Ces arrangements prévoient le rapatriement, par voie administrative à l'intervention des parquets, lorsque le droit de garde n'est pas contesté et que le rapatriement est jugé conforme à l'intérêt de l'enfant.

Législation et jurisprudence

Question 9

Il résulte des dispositions du Code civil (articles 3 et 15), du Code judiciaire (articles 628, 635 et suivants) et de la loi du 8 avril 1965 sur la protection de la jeunesse, qu'en pratique les juridictions belges peuvent être compétentes dès que le litige présente un lien avec la Belgique.
Voir également, ci-dessus, la réponse à la question 5.

Question 10

Non en droit civil.

Question 11

Deux principes essentiels dominent la matière. L'un fait de l'intérêt du mineur la considération primordiale dont s'inspirent, et de plus en plus, la loi et la jurisprudence: on serait même tenté de dire qu'elle est actuellement la seule. L'autre (qui peut apparaître comme une conséquence ou un corollaire du premier principe) est que les parents se trouvent placés sur un pied de stricte égalité, sans aucune prééminence légale ou doctrinale de l'un sur l'autre.

a Au cours du mariage des parents l'autorité sur la personne des enfants mineurs (la minorité s'étend jusqu'à vingt et un ans; l'émancipation est toutefois possible à partir de quinze ans) est exercée par le père ou la mère, sauf le droit de l'autre époux de se pourvoir devant le Tribunal de la Jeunesse uniquement dans l'intérêt de l'enfant (C.C., article 373). D'autre part, si l'un des époux manque gravement à ses devoirs, le juge de paix peut ordonner, à la demande de l'autre, les mesures urgentes et provisoires relatives à la personne et aux biens des époux et des enfants (Civ. 223).
De ces textes légaux il résulte principalement que lorsque les parents vivent ensemble ils exercent ensemble l'autorité parentale, sauf dissentiment ou contestation sur laquelle le Tribunal de la Jeunesse ou le juge de paix statue. Lorsque les parents sont séparés de fait (c'est-à-dire sans qu'il y ait d'instance en divorce ou en séparation de corps) l'autorité est exercée par celui des deux qui a en fait la garde de l'enfant, sauf recours de l'autre au Tribunal de la Jeunesse ou au juge de paix.
En cas d'instance en divorce ou en séparation de corps pour cause déterminée les parents peuvent, soit convenir entre eux de la garde des enfants (Code judiciaire, article 1258), soit faire trancher par le président du tribunal de première instance, siégeant en référé, leurs litiges à ce sujet (Code judiciaire, article 1279).
En cas d'instance en divorce ou en séparation de corps par consentement mutuel, il appartient aux époux de désigner de commun accord, par convention notariée, donc authentique, celui d'entre eux ou la tierce personne à qui sera confiée la garde des enfants durant l'instance, et après celle-ci (Code judiciaire, article 1288, 1°).

b Après divorce ou séparation de corps pour cause déterminée, les mesures résultant de l'accord des époux ou ordonnées par le Président du tribunal pour le temps de l'instance restent en vigueur de plein droit (Civ. 302). A défaut de tel accord ou de telle ordonnance, la garde est dévolue à celui des parents qui a obtenu le divorce aux torts de l'autre (Civ. 302). Si le divorce a été autorisé aux torts de tous deux, le tribunal peut accorder la garde à l'un ou à l'autre. Il en va de même lorsque le divorce a été autorisé pour séparation prolongée des époux (Civ. 232), donc sans torts constatés de part ni d'autre. Et les mesures résultant de ces règles sont toujours modifiables ultérieurement par le Tribunal de la Jeunesse, dans l'intérêt des enfants (Civ. 302).
Après divorce ou séparation de corps par consentement mutuel, l'attribution de la garde reste réglée par la convention authentique et notariée préalable à l'instance.

c Après le décès d'un des parents la garde appartient à l'autre. Si les deux parents sont décédés, le tuteur exerce la garde sous la surveillance du subrogé tuteur et le contrôle du conseil de famille.

d *Enfant naturel* – Si sa filiation est établie à l'égard des ses deux auteurs (par reconnaissance volontaire ou par action judiciaire) le système quant à la garde est, *mutatis mutandis*, le même que pour l'enfant légitime.
Si sa filiation n'est établie qu'à l'égard d'un seul auteur, le régime de la tutelle s'applique comme en cas de décès d'un parent légitime. En principe l'auteur a la garde même s'il n'est pas tuteur.

Enfant adoptif – La garde de l'enfant légitimé par adoption, ou adopté par deux époux, est exercée comme le serait celle d'un enfant légitime. En cas d'adoption par une seule personne la garde est exercée par cette personne.

Enfant dont les parents ou un des parents sont déchus de l'autorité parentale – Les droits dont le parent est déchu sont exercés par une personne désignée à cet effet par le Tribunal

de la Jeunesse. Si un seul des parents a encouru la déchéance, le tribunal désigne l'autre parent lorsque l'intérêt du mineur ne s'y oppose pas.

Question 12

Non.

Question 13

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Question 14

L'âge est un élément dont il est tenu compte, toujours dans l'intérêt de l'enfant. Ainsi les enfants en bas âge sont le plus souvent confiés à la mère. En ce qui concerne les adolescents il existe une certaine tendance à confier les fils plutôt aux pères et les filles aux mères; toutefois, lorsqu'il y a plusieurs enfants, les tribunaux s'efforcent à ne pas les séparer.

Question 15

A partir de l'adolescence l'enfant peut être entendu en vue de faire connaître son opinion. Il est interpellé presque toujours par un travailleur social ou un psychologue qui s'efforce de déterminer ses motivations. Le juge n'est pas tenu par le choix de l'enfant toujours influençable. C'est le critère de l'intérêt de l'enfant qui guide le tribunal.

Question 16

Les autorités administratives ne sont pas compétentes en la matière. Les autorités judiciaires peuvent imposer pareilles obligations, mais le font rarement. Ces mesures sont d'ailleurs peu efficaces si le parent qui n'a pas la garde est un étranger.

Question 17

En principe la loi applicable à ces conflits est la loi nationale de l'enfant. Mais l'importance primordiale accordée par les tribunaux à l'intérêt de l'enfant les conduit à s'inspirer toujours de cet intérêt nonobstant toute disposition différente d'une loi étrangère et donc en pratique à négliger cette loi en faveur de la *lex fori*.

Question 18

Non.

Droit de visite

Question 19

Oui. Ce droit n'est que rarement refusé et seulement si tel est l'intérêt de l'enfant. Le droit de visite peut également être accordé à d'autres personnes que les père et mère, tels les grands-parents.

Question 20

Il n'est pas rare que le droit de visite s'exerce à l'étranger, par exemple si le titulaire de ce droit y réside, et dans ce cas sous forme de séjours de plus ou moins longue durée, plutôt que de visites proprement dites. D'autre part les vacances des enfants sont généralement partagées par moitié entre les deux parents. Celles d'été ayant une durée de deux mois, et l'habitude de beaucoup de Belges étant de passer les leurs à l'étranger, il est fréquent qu'à cette occasion des enfants soient emmenés hors du pays par le titulaire du droit de visite. A cela les tribunaux, compétents pour régler ce droit, ne mettent obstacle que s'il leur est signalé un danger sérieux d'enlèvement.

Question 21

Cette question n'est pas réglée par la loi mais, dans chaque cas, par les tribunaux. Ceux-ci subordonnent parfois, dans l'intérêt de l'enfant, à certaines conditions, le droit du parent qui n'a pas la garde de rencontrer régulièrement son enfant.

Question 22

Oui. Les circonstances dans lesquelles l'enfant est enlevé lors de l'exercice du droit de visite peuvent être très différentes.

Question 23

Ce pourrait être le cas mais, en fait, ce n'est pas établi et, de toute façon, les cas de refus du droit de visite sont rares.

Solutions actuelles non conventionnelles

Question 24

Les moyens qui peuvent être utilisés pour éviter des enlèvements (contrôle aux frontières, dépôt du passeport, dépôt d'une caution) sont d'une efficacité relative.

Solutions conventionnelles possibles

Question 25

a Oui. Il y a lieu d'écarter en tout cas l'examen du fond de la décision dans le pays requis et de prévoir l'exécution automatique de la décision, sans exequatur, lorsque l'enfant a sa résidence habituelle dans l'Etat dont émane la décision et que les père et mère et l'enfant ont la seule nationalité de cet Etat.

b Non.

c Oui. Il y a lieu de mettre au point des procédés permettant d'aboutir rapidement par exemple en prévoyant des rapports directs entre les autorités concernées.

d Il suffirait d'éliminer les compétences exorbitantes.

e Non.

f Non.

g Oui, dans le sens de la Convention de New York sur le recouvrement des aliments à l'étranger ou du projet de Convention de Strasbourg.

A notre avis, si la demande de rapatriement intervient dans un bref délai après l'enlèvement, il faudrait prendre toutes mesures nécessaires pour que l'enfant soit renvoyé dans le pays d'où il a été enlevé,

a s'il a été enlevé au mépris d'une décision judiciaire intervenue dans ce pays;

b si cette décision n'a pas été rendue par une juridiction dont la compétence est exorbitante.

On pourrait combiner ce système avec la création d'autorités centrales.

Question 26

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ANNEXE

	avant '73	73	74	75	76	77	78	79	total
ALGÉRIE			2	1	4				7
ALLEMAGNE						1	1		2
ANGLETERRE						1			1
CANADA					1		1		2
DANEMARK						1			1
ESPAGNE		1		4	3	2	1		11
ETATS-UNIS	1			1	1				3
FRANCE					1	4	2	1	8
HONGRIE					1				1
ISRAËL						1			1
ITALIE						2			2
JORDANIE				1					1
LIBAN							1		1
LIBYE	1								1
MAROC				3	4	4	1		12
NOUVELLE-ZÉLANDE				1					1
PORTUGAL	1(66)						1		2
RÉP. CENTRAFRICAINE					1				1
SUISSE				1			1		2
TUNISIE	1(72)		2		2	4	1	1	11
U.R.S.S.					1				1
VENEZUELA							1		1
YOUGOSLAVIE							1		1
ZAÏRE					1	2	1		4
	4	1	4	12	20	22	13	2	78

Le tableau n'est pas exhaustif. Il mentionne uniquement les cas dans lesquels l'intervention du Ministère des Affaires Etrangères a été demandée à la suite d'enlèvements d'enfants de Belgique vers l'étranger.

Canada

Sociological information

Question 1

Statistics are unavailable on the number of abductions of children by parents that have occurred in the last five years either between Canadian provinces, from a Canadian province to another country, or from another country to a Canadian province. However, during recent years there has been an increase in the number of reported judicial decisions involving interprovincial or international custody disputes and there has also been an increase in the number of cases brought to the attention of the Secretary of State for External Affairs, Government of Canada, in which assistance has been sought in the locating and return of children taken by a parent from Canada to another country. Therefore, it is believed that there has been an increase in the frequency of occurrence of child abductions by parents

during the past five years although the increased reporting may merely represent the increased publicity that has been given to the problem in Canada and a resulting increase in the number of left-behind parents seeking judicial and governmental assistance.

Question 2

The reasons are speculative and several are set out in the Report (*supra*, pp. 18-19), namely:

a the availability of modern, rapid transportation;

b the decreasing impediments to border crossings;

c the increasing number of intermarriages between persons from different 'international families'; and

d frustration with the slowness, expense and inefficiency of legal custody proceedings.

To this list could be added the following items which illustrate the overall lack of effectiveness of the current system:

e the lack of recognition and enforceability of foreign custody orders at common law, particularly among Federal States;

f the fact that an abducting parent has a good chance of obtaining a custody award in his (her) favour; and

g the lack of effective criminal or civil sanctions imposed on abducting parents. Under the existing laws of Canada, child snatching by a parent is rarely punished.

Question 3

There are no national statistics or data available on the number of abduction cases made known to the courts or administrative authorities in Canada. Such data also do not appear to be collected by any of the provincial governments.

Question 4

There does not appear to have been any research studies done in Canada during the past five years specifically on the causes or effects of child abductions by parents, although there have been several legal articles discussing how the custody jurisdiction laws in Canada and elsewhere cause, or at least facilitate, the problem of child abduction. [*E.g.* Davies, C., 'Interprovincial Custody', (1978) 56 *Can. B. Rev.* 17; Hughes, M.E., 'Child Abduction: Inter-Provincial and International Custody Disputes', (1978) *Summer Programme on Family Law* (Toronto) D-1.]

Treaties

Question 5

No. Canada is not a party to any multinational or bilateral treaties which deal with jurisdiction or with the applicable law in child custody cases, or with recognition and enforcement abroad of custody decisions.

Question 6

Not applicable.

Question 7

Yes. Canada is a signatory to the Universal Declaration of Human Rights, adopted and proclaimed by the General Assembly of the United Nations on December 10, 1948. In addition, Canada has been bound by the following Covenants and Protocol since August 19, 1976:

a the International Covenant on Economic, Social and Cultural Rights;

b the International Covenant on Civil and Political Rights; and

c the Optional Protocol to the International Covenant on Civil and Political Rights.

However the relevancy of these Covenants to the issue of child abduction is debatable.

Question 8

Canada is not a party to any treaty or administrative agreement containing provisions which are designed particularly to prevent or deal with child abduction.
[However, it should be noted that a France-Quebec Entente on Judicial Assistance in Civil, Commercial and Administrative Matters was signed on September 9, 1977 and contains provisions on the recognition and enforcement of judicial decisions concerning the status and capacity of natural persons, and in particular, decisions relating to child custody and maintenance orders. These provisions are set out in sections VI and VII of the Entente. These provisions are not as yet in effect in Quebec as the required enacting legislation has not been passed.]

Legislation and case law

Question 9

In Canada, the power to make laws with respect to the custody of infants is divided between the Parliament of Canada and the provincial legislatures. This power is to be found in head (26) of section 91 of the British North America Act, which gives Parliament exclusive legislative competence over 'Marriage and Divorce', and head (13) of section 92 which lists 'Property and Civil Rights in the Province' as an exclusive subject of provincial legislation. In order to avoid conflicts between federal and provincial legislation, Parliament has legislated with respect to custody only where it arises as corollary relief in divorce proceedings.
As the bases upon which a court may assume custody jurisdiction differ between the federal Divorce Act and the relevant provincial legislation, the base used by the court for assuming custody jurisdiction will depend partly on the way in which the case comes before the court.

a In divorce proceedings

The Divorce Act 1968 applies to all provinces and by sections 10 and 11, confers upon the appropriate court designated for each province jurisdiction to make orders with respect to the custody, care and upbringing of the 'children of the marriage' sought to be dissolved. There are, however, some limitations on the power of the courts to award custody under the Act. These limitations are:

(*i*) An award may be made only in relation to 'children of the marriage', which is defined as meaning 'each child of a husband and wife who at the material time is *a*) under the age of 16 years, or *b*) 16 years of age or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw himself from their charge or to provide himself with necessaries of life'.

(*ii*) A decree of divorce must be granted (although an interim custody order may be made pending the hearing of the divorce petition). This then requires that the jurisdictional requirements of section 5 of the Divorce Act be complied with. These requirements are that the petition for divorce is presented by a person domiciled in Canada and that either the petitioner or the respondent has been ordinarily resident in that province for a period of at least one year immediately preceding the presentation of the petition and has actually resided in that province for at least ten months of that period.

In summary, it appears that if the requirements of section 5 are satisfied and a decree of divorce is granted, the divorce court *may* make an order for the custody of the 'children of the marriage' *wherever the children might be.* It has thus been held that a court, upon granting a decree *nisi* of divorce, has the power to decide the issue of custody under section 11 of the Divorce Act whether or not the children of the marriage are within the province (or even presumably within the country), and whether or not their custody has been previously adjudicated upon by that or some other court pursuant to provincial legislation or the royal prerogative as *parens patriae.*

b In non-divorce proceedings

There are a number of bases upon which a court may assume custody jurisdiction in a non-divorce proceeding. The primary basis of jurisdiction appears to be ordinary residence of the child within the province, and such residence is not dependent upon the child being physically present within the province. The term 'ordinary residence' was defined by Lord Denning M.R. in *Re P. (G.E.)* (An Infant), (1965) Ch. 568 at pp. 585-586 as follows:

The Court of Chancery has jurisdiction to make an order for the custody, education and maintenance of an alien child who is ordinarily resident in this country, even though the child is for the time being absent from this country or taken out of it. But then we are faced with the question, what is the ordinary residence of a child of tender years who cannot decide for himself where to live, let us say the age of 16? So long as the father and mother are living together in the matrimonial home, *the child's ordinary residence is the home — and it is still his ordinary residence, even while he is away at boarding school. It is his base, from whence he goes out and to which he returns. When father and mother are at variance and living* separate and apart *and by arrangement the child resides* in the house of one of them — *then that home is his ordinary residence, even though the other parent has access and the child goes to see him from time to time. I do not see that a child's ordinary residence, so found, can be changed by kidnapping him and taking him from his home, even if one of his parents is the kidnapper. Quite generally, I do not think a child's ordinary residence can be changed by one parent without the consent of the other. It will not be changed until the parent who is left at home, childless, acquiesces in the change, or delays so long in bringing proceedings that he or she must be taken to acquiesce. Six months' delay would, I should have thought, go far to show acquiescence. Even three months might in some circumstances. But not less.*

This dictum has been cited with approval in a number of Canadian cases.

The courts of the province where the child is physically present, also have jurisdiction to make a custody order, even though the child may have been clandestinely brought into the province to evade an unfavourable custody decree rendered elsewhere or even though the child is present in the province merely as a visitor. Mere presence of the child within the province is usually enough to ground the jurisdiction of the court, notwithstanding that the child is neither resident nor domiciled within the province, on the basis that the State has a responsibility and vital interest in the welfare of the children within the borders of the State — the so-called *parens patriae* doctrine.

It is only in exceptional circumstances that a Canadian court will make a custody order in a non-divorce proceeding in respect of a child that is neither ordinarily resident nor present within the province concerned. If the child is outside the province, a court may assume custody jurisdiction if the parent or person exercising actual control over the child is within the province as that person could be ordered to return the child to the province or be liable for contempt proceedings. Also, even if neither the child nor the person exercising control over the child are within the province, a number of courts have held that a court could assume jurisdiction in exceptional circumstances such as where the child is domiciled in the province, where the child has a real and substantial connection with the province, or where the child was removed from the province after legal proceedings were commenced or threatened, with the object of getting the child beyond the jurisdiction of the court.

In summary, the following bases for assuming custody jurisdiction in non-divorce proceeding have been utilized at one time or another by Canadian courts:

(*i*) the ordinary residence of the child within the province;
(*ii*) the physical presence of the child within the province;
(*iii*) the physical presence of the parent or person exercising actual control over the child within the province;
(*iv*) the child, although physically outside the province, is domiciled in the province;
(*v*) the child, although physically outside the province, has a real and substantial connection with the province;
(*vi*) the child has been removed from the province after legal proceedings were commenced or threatened with the object of getting the child beyond the jurisdiction of the court.

Question 10

It should be noted that Canada is a Federal State in which each province is considered a 'foreign jurisdiction' and the rules for the recognition and enforcement of the orders of sister provinces are those of private international law unless a statute provides otherwise.

a Judicial practices

A number of Canadian courts have become alarmed by the increased incidents of parents resorting to the self-help remedy of abduction of the child rather than relying upon the local courts, where the greater amount of relevant evidence relating to the child's needs and circumstances is usually available, to determine the matter of custody or to determine the need for a variation of an existing custody order. In an attempt to curb child abductions and avoid the confusion of conflicting custody orders, some Canadian courts have begun ro refuse to exercise their jurisdiction to hear a custody application made by an abducting parent, even though the child is physically present within the geographic confines of that area over which the court can effectively exercise control, unless the court is the convenient forum to hear the custody dispute. They have begun to order the child returned to the jurisdiction from where he was taken or where the child is ordinarily resident, or into the custody of the parent from whom he was abducted, on whatever conditions the court deems suitable.

The two major factors weighed by the courts in determining whether to exercise their custody jurisdiction appear to be 1) the welfare of the child and 2) the fair and proper administration of justice. It is believed that the welfare of the child is generally best served if the custody dispute is heard in the province or country where the best evidence relating to the child is available. The court only examines the merits of the case to the extent that it is necessary to satisfy the court that the child will not suffer serious harm by being returned, which is substantially different from the court examining whether in the light of all the evidence, the custody arrangement is the one that it would have ordered as being in the best interests of the child.

The consideration of the fair and proper administration of justice is particularly relevant when a child is brought into a province other than that of his ordinary residence in order to evade process about to issue or contrary to the terms of a custody order. In such a situation, it appears that unless the child has been within the new province for a considerable period of time or harm to the child is anticipated if the child is ordered returned, there is a good chance that the child will be ordered returned as the courts have recognised that the

abducting parent may gain an unfair advantage from his wrongdoing if the case is delayed for a full enquiry into the merits of the case as the child may begin to acquire roots in the new jurisdiction that it then might be in the best interests of the child not to sever. The courts do not appear to be weighing heavily whether the child was abducted from a sister Canadian province or from a non-Canadian jurisdiction.

Although the Canadian courts do sometimes decline to exercise their custody jurisdiction and make peremptory orders for the return of a child to a jurisdiction from where he has been abducted for the reasons stated above, there is no certainty as to when they will do this, and practices appear to vary from province to province and from court to court within a province. As a result, there has been strong encouragement in Canada for the enactment of legislation that would restrict a judge's right to re-open a foreign custody order and exercise his discretion to determine what he perceives on a re-examination of the merits to be in the child's best interests.

b Statutory provisions

The 'Extra-Provincial Custody Orders Enforcement Act' was recommended for enactment in all Canadian provinces by the Uniform Law Conference of Canada in 1974. The Act is aimed at deterring the 'civil kidnapping' of children by restricting Canadian courts from exercising their broad custody jurisdiction in specified circumstances. To date the Legislatures of seven provinces have enacted this legislation, namely Alberta, British Columbia, Manitoba, Newfoundland, New Brunswick, Prince Edward Island and Saskatchewan, and an eighth province, Nova Scotia, has enacted a variation of it.

The Uniform Act requires a court of a province that enacts the legislation to enforce, on application, a custody order made in another province, State or country unless the court is satisfied that the child did not have a real and substantial connection with the State that made the order at the time the order was made. The Act gives a court in the enforcing province the power to vary, on application, the custody order of another province, State or country if it is satisfied either *a*) that the child, at the time the application for variation is made, does not have a real and substantial connection with the jurisdiction in which the custody order was made or last enforced, *and* that either the child does have a real and substantial connection with the enforcing province or all the parties affected by the custody order are resident in the enforcing province, or *b*) that the child would suffer serious harm if the custody order were to be enforced. The legislation does not define what constitutes a 'real and substantial connection'.

Several provisions should be carefully noted:

1 The definition of 'custody order' includes a non-Canadian order as the legislation of all enacting provinces, except Nova Scotia, defines 'extra-provincial tribunal' as a court or tribunal outside the enacting province with authority to grant custody of a child. There is no reciprocity requirement for recognition and enforcement, except in Nova Scotia, as the drafters' primary concern was for the welfare of the child and they could not see how the welfare of a particular child who was the subject of a custody order being considered by a court in a Canadian province could be related to the question of whether or not the law of the jurisdiction from which the child came provided for reciprocal enforcement of custody orders. Furthermore, the Act's provisions do not enquire as to the basis on which custody was awarded in the foreign jurisdiction and presumably render unnecessary an examination of the law that the foreign court chose to apply to the substantive custody issue before it.

2 The definition is broad enough to include a custody order granted after the child has been removed from the jurisdiction provided that the child had a real and substantial connection with the province, State or country making the order at the time the custody order was made. This might arise, for example, where the child is ordinarily resident in jurisdiction A but is kidnapped by one parent and taken to jurisdiction B. If a child's ordinary residence cannot be changed by one parent without the consent or acquiescence of the other parent to the change, a custody order made by jurisdiction A should be entitled to mandatory recognition and enforcement under the Act unless the variation powers are applicable.

3 The definition 'custody order' includes access or visitation provisions contained in a custody order although it is questionable whether one could apply, except in New Brunswick, to enforce an access order made by a foreign court that was not tied to a custody order.

4 The Act is based on the presumption that the extra-provincial tribunal had jurisdiction to grant the custody order. This presumption may be rebutted by proof that the child did not have a real and substantial connection with the extra-provincial tribunal that made the custody order.

5 The serious harm test that is used to justify the non-enforcement of a foreign custody order is different from a best interests test. The court should only be examining the merits of the case to the extent that it is necessary to satisfy itself that the child will not suffer serious harm by remaining in or being restored to the custody of the person named in a custody order, which is substantially different from the court determining whether, in light of all the evidence, including any change of circumstances since the granting of the order, the custody arrangement is the one that the court would have ordered as being in the best interests of the child. It should also be noted that there are no provisions in the legislation establishing minimal enforcement procedures and there are no administrative procedures provided for enforcement. As a result, it appears that an individual desiring to invoke the provisions of the Extra-Provincial Custody Orders Enforcement legislation would need to incur the expense of retaining counsel, commencing an application and perhaps travelling to the jurisdiction himself to enforce the order.

Question 11

Common law provinces:

In relation to the civil law of Quebec, attached are articles 60-81 of the Report on the Quebec Civil Code*, prepared by the Civil Code Revision Office, which contains the recommendations of the Office on the recognition and enforcement of custody decisions, *inter alia*. These recommendations are now under study by the Quebec Department of Justice.

a 1 When parents living together

Under the laws of the common law provinces the husband and wife living together are joint guardians of their children with equal powers, rights and duties in respect thereto. A similar situation prevails in Quebec under articles 242-245*j* of Title 8 of the Civil Code*. A parent in such a situation is apparently not entitled to court ordered custody to solve

* See *infra*, p. 80, *Note by the Permanent Bureau.*

differences with the other parent regarding the child's upbringing and education.

2 When parents living apart with custody agreement

Most provinces provide that where the parents are not living together, they may provide by a written separation agreement who is to have custody, but the courts have consistently refused to enforce any such custodial agreements that have come to their attention that are not considered by the court to provide the custodial arrangement that is in the best interests of the child.

3 Principles applied by the courts under provincial legislation for determining custody when parents living apart and are unable to resolve custody by agreement

The statutory provisions of the common law provinces with respect to the factors that the courts shall take into consideration in determining a custody dispute are not identical and they must all be read subject to the interpretation that they have received by the courts in the individual province concerned. The most common statutory provision requires the court to take into consideration three factors, namely the welfare of the infants, the conduct of the parents and the wishes of the parents. Yet, the courts have consistently interpreted such statutory provisions as meaning that the welfare of the child is the paramount, although not the exclusive, consideration to which all others must yield in determining custody, even though the statute does not specifically say so. However, in one province at least the courts have interpreted such a statutory provision as maintaining the common law preference in favour of the father. In Nova Scotia it has been held in a number of cases that the court has a discretion in custody matters and that the two guiding principles are

1) that the father has the right to the custody of the children, unless

2) the paramount welfare of the child dictates that they should not be with the father.

On the other hand, some provinces, such as Newfoundland, specifically provide that the court shall regard the welfare of the child as the *first and paramount* consideration, notwithstanding that from any other point of view the claim of the mother or the father may be superior.

Saskatchewan's legislation, due to a recent amendment, provides that in making a custody order the court shall have regard *only* for the welfare of the child and, for that purpose, the court shall consider the physical, psychological, social and economic needs of the infant and that no presumption shall exist as between parents that one parent should be preferred over the other on account of his or her status as a father or mother.

b 1 *Legal separation*: A decree of judicial separation is available in most, but not all, Canadian common law provinces. Where the remedy is available, custody is determined by the principles set out above in question 11*a* 3.

2 *Divorce*: Custody as ancillary relief in divorce proceedings is determined by federal law. The *Divorce Act,* 1968, which applied to all provinces, directs a court in determining custody to have regard to 'the conduct of the parties and the condition, means and other circumstances of each of them'. There is no mention in the *Divorce Act*, 1968, of the welfare of the child as being even one of the factors which should be taken into consideration upon making an award of custody. Notwithstanding this fact, the courts have refused to accept the argument that the common law rule of a father's prior claim to custody, all else being relatively equal, should prevail and have insisted that the primary or paramount consideration is the welfare of the child even though the statute fails to say this.

Generally, in the common law provinces in the case of the death of either of the parents, the surviving parent becomes the guardian of their children and exercises all the powers theretofore exercised by the parents jointly. Some provinces allow either the father or mother to appoint by deed or will any person to act in his or her place as guardian of an infant child after his or her death and if this is done, this guardian shall exercise all such powers jointly with the surviving parent. However, the court is not bound by the parent's appointment of a testamentary guardian and such guardians are removable by the court generally for the same reasons for which trustees are removable.

Question 12

When parents living apart in the absence of a custody agreement or court order regarding custody

The common law right of the father to the custody of his children in the absence of a court order to the contrary has been abrogated by legislation in most of the common law provinces. The most common provision now is that, unless otherwise ordered by the court, the father and mother of an infant are joint guardians and are equally entitled to the custody, control and education of the infant. This type of legislation does not provide any guidance upon the issue of who has the right to the care and control of the child in the period between the break-up of the matrimonial home and the judicial determination of custody if the parties cannot agree upon a custodial arrangement.

In British Columbia, the legislation attempts to stabilize the custody of children between the break-up of the matrimonial home and the judicial determination of custody without expressing a statutory preference for any particular sex, by providing that the parent who has *de facto* custody is entitled to custody pending adjudication by the court.

Question 13

Yes. The courts of the common law provinces have considered themselves empowered to override the rights to custody granted by the respective provincial statutes to either the mother or the father if, under all the circumstances, it is convinced that it is in the best interests of the child to do so.

Question 14

The age of the child is an important criterion in determining the custodial arrangement that is in the best interests of the child. When the welfare and happiness of an infant would be equally served by awarding custody to either of the parents, the courts have often applied the 'tender years doctrine' which is considered not a rule of law, but a rule of common sense. Under this doctrine, the mother, other things being equal, is entitled to the custody and care of a child during what is called the period of nurture, namely until the child attains about seven years of age. There are many cases in which the tender years doctrine has not been applied because the court was of the opinion that the welfare of the child would not be equally served by awarding custody to the mother as it would be by awarding custody to the father.

Question 15

The influence that a child's opinions have on the award of custody or rights of access depends on the jurisdiction and on the judge. With older children, particularly those over 14 years, most judges realize that it would be difficult to enforce a custody order, short of incarcerating the child, if the order was against the strongly expressed wishes of the child. With respect to younger children, particularly children under 14 years of age, the law and practice varies. In some jurisdictions the child's preference must be taken into con-

sideration while in others the issue of whether the child's preference should be taken into account at all, and if it is to be taken into account, the weight which should be attributed to it, are within the discretion of the judge. Saskatchewan's legislation, for example, provides that in determining the welfare of the child the court shall take into account, among other special items, 'the preference of the infant, to the extent the court considers appropriate, having regard to the age and maturity of the infant'. Some courts have taken the position that little, if any, weight should ever be given to a child's preference.

Question 16

There does not appear to be any explicit statutory power in this regard, but a number of Canadian courts have inserted clauses into their custody orders, where it was deemed appropriate, prohibiting the removal of the child from the jurisdiction (even if the threatened movement is only from one province to another) without the prior authorisation or consent of the court, and these clauses have been upheld on appeal. Such a clause may be inserted if it is felt that frequent access is highly desirable in the interests of the child and that the access parent will find it difficult to exercise a right of access if the child is absent from the jurisdiction for prolonged periods, or that the custodial parent may move for the purpose of defeating the access rights of the other parent.

It should also be noted in this regard that, in determining the custody issue itself, Canadian courts consider the future plans of each parent with respect to accommodating, caring for and educating the child and one important item in the future plans is the location where the applicants for custody propose to reside. Special attention is often paid by the court if the location where one of the applicants proposes to reside is beyond the jurisdiction of the court as an order in favour of such an applicant results not only in the court losing jurisdiction over the child, but it may also affect the exercise of any right of access which might be granted to the non-custodial parent. Nevertheless, it is a general rule that any right of access must be subordinated to the best interests of the child on the issue of custody and thus, custody has been awarded to a parent whose immediate plan was to move permanently from Canada.

Question 17

It appears that if a Canadian court has jurisdiction to make an order for custody of an abducted child and it decides to exercise its custody jurisdiction, the court will apply the respective provincial jurisprudence concerning matters of custody in determining the custody issue on the merits – *i.e.* the domestic *lex fori*. This should mean that the courts will be guided by the best interests of the child irrespective of the provisions of any foreign law.

Question 18

While it is not specifically a question of choice of law, because the domestic *lex fori* is applied, it is relevant to note that generally Canadian courts will not recognise or enforce a foreign law or judgment that is contrary to the forum's public policy. Presumably then, Canadian courts will not apply the mandatory enforcement provisions of the Extra-Provincial Custody Orders Enforcement legislation, described in question 10, where such enforcement of a foreign custody order would be contrary to public policy. Examples might be where the foreign proceedings have resulted in a denial of natural justice, in the view of the enforcing court, such as where reasonable notice and an opportunity to be heard were not given to all affected persons; or where the decree was obtained by fraud; or perhaps where the foreign court has changed the custody of a child solely to discipline or punish a parent for child snatching or for denying visitation rights previously granted by the court. It is also possible that Canadian courts might refuse to enforce a foreign custody order where the custody laws of a particular country give either the father or the mother custody as of right. However, as the Act's provisions do not enquire as to the basis on which custody was awarded and presumably render unnecessary an examination of the law that the foreign court chose to apply to the substantive custody issue before it, it is unclear at the present time whether Canadian courts will look behind the foreign custody order if the jurisdictional test set by the legislation is complied with and the court is not satisfied that serious harm will result to the child if the custody order is enforced.

Visitation and access

Question 19

Yes. A parent who has been denied custody is usually granted access unless the court apprehends that the child's upbringing may be endangered in some manner by allowing access. The philosophy behind this principle is that it is desirable that every child should have the opportunity of knowing and developing psychological ties with both of his or her parents. In determining whether access will be granted, and the terms upon which access will be granted, the paramount consideration is the welfare and happiness of the child involved.

Question 20

Yes, unless the court orders otherwise. Canadian courts have granted a right of access to a parent living outside Canada, against the wishes of the custodial parent, even where such an order meant that the child would be moved out of the jurisdiction. On the other hand, some Canadian courts have included clauses in their custody orders prohibiting the removal of the child from the jurisdiction of the court by either or both the custodial parent and the access parent without prior authorisation or consent of the court. They have also required as a condition of granting access that the access parent's passport be amended to exclude the child to prevent the access parent from taking a child abroad, or that the access parent's passport be deposited with the court or with the custodial parent's lawyer. (This of course may not prevent an access parent who has dual nationality from obtaining a passport for himself and the child from the embassy or consulate of his State in Ottawa.)

In cases where the court has allowed the access parent to take the child out of the jurisdiction, the court has sometimes required the access parent as a preliminary condition to enter into a recognizance or bond whereby he accepts the jurisdiction of the court and undertakes to comply with its orders to ensure that the child will be returned to the jurisdiction following the visitation period. In other cases, the court has ordered the access parent to obtain, at his or her expense, a consent order in the appropriate court where the access parent is residing embodying the custody and access provisions of the court order. Part of the court order may be a clause to the effect that in the event that the access parent fails to return the children after the expiry of the visitation period, the access parent has, in writing, irrevocably consented to an order for immediate deportation of the children being made forthwith by the State or country in which the children are, and the access parent further waives and forever releases the custodial parent from any right of appeal from such deportation order as the access parent might otherwise have.

Question 21

Neither federal nor provincial legislation specifies that the child has a right of regular access to a parent who does not have custody. However, as previously stated in question 19, access will seldom be refused, if the non-custodial parent wishes access, unless a danger to the child is apprehended.

Question 22

The exercise of access or visitation rights probably contributes to child abductions only in the sense that it provides an opportunity to the access parent that he or she may not otherwise have. It also may contribute in the sense that extended visitation rights, such as one month in the summer, often emphasize to the access parent what he or she is missing in interaction with the child on a regular basis and leads to 'overholding' of the child beyond the legal visitation period.

Question 23

Denial of access or visitation may contribute to abductions by generating severe frustration in the non-custodial parent. It has also been argued in Canada that, although the parents in most common law provinces stand an equal chance in law of obtaining custody in a contested action if both are fit, there is a built in bias in favour of mothers, particularly if the children are young and female. The failure to have custody laws under which both parents perceive that they stand in practice an equal chance of obtaining court ordered custody may contribute to the self-help remedy of child abduction. It appears that many Canadian males do in fact believe that they do not stand an equal chance of obtaining custody in contested proceedings, particularly if the young child is female, and that they must be satisfied with *de facto* custody even if they have to abduct the child and remain in hiding to obtain it.

Existing non-treaty remedies

Question 24

a Criminal law

As noted in the brief on 'The International Abduction of Children by a Parent' of the Canadian Department of Justice, referred to in the Report (*supra* p. 45), it is a criminal offence in Canada for anyone, with intent to deprive a parent or guardian or any other person who has lawful care or charge of a child under the age of 14 years of the possession of that child, unlawfully to take, entice away, detain, receive or harbour the child. However, the section does not apply to a person who, claiming in good faith a right to possession of a child, obtains possession of the child. As both parents generally under the law of most common law provinces (although maybe not in practice) have equal rights to the custody of their children until a court decree orders otherwise, there does not appear to have ever been a criminal conviction of a parent in Canada for abduction of his (her) child except in cases where there was an order of a court of competent jurisdiction granting custody to the other parent prior to the abduction of the child. Even in cases where there is such an existing custody order, it is difficult to motivate police and prosecutors to lay charges and judges and juries to convict because of a widespread belief in Canada that the criminal law is an inappropriate method of resolving what are essentially domestic disputes of a civil nature.

If the abducting parent leaves the country with the child, the fact that the abduction of the child may be a criminal offence in Canada does not ensure either the extradition of the fugitive parent on a charge of kidnapping or the return of the abducted child. For successful extradition of an abducting parent there must be an extradition treaty in existence that lists abduction or kidnapping as an extraditable offence and the abduction of a child by a parent must be a criminal offence by the laws of both of the contracting States, which is often not the case. Furthermore, extradition of the abducting parent does not guarantee the return of the abducted child as the child is the victim, not the perpetrator of the offence, and the child may be cared for and retained by the extended family of the abducting parent in the foreign jurisdiction. The only effective way to secure the return of the child legally would be through a civil custody action instituted in the country to which the child was taken. It should be noted that the Minister of Justice of Canada has introduced in the House of Commons amendments to the Criminal Code of Canada aimed at, among other things, strengthening the provisions of the Criminal Code on the abduction of a child by a parent. The main thrust of the amendment is to make it a criminal offence for a parent to abduct a child, notwithstanding the absence of a custody order of a Canadian court of competent jurisdiction.

b Passport regulations

In Canada, passports are issued pursuant to the Royal Prerogative by the Secretary of State for External Affairs. A passport may be issued to a child, or if the child is under 16 years, its name may be included on the passport of one of the parents. Under normal circumstances both parents have an equal right to apply for passports on behalf of their children. The policies and procedures which apply to children's passports have been designed to determine that the parent applying does so with the implied knowledge and consent of the other parent, or that the parent applying has been awarded sole custody of the child by a court order or pursuant to a separation agreement and there is no legal impediment to the removal of the child from Canada.

Possible treaty remedies

Question 25

The initial view taken by Canada of the various provisions that might figure in an international convention to prevent or deal with child abduction is as follows.

a Provisions facilitating and expediting the enforcement of custody decisions among countries

1 Such provisions may eliminate the considerable delays that presently occur in legal proceedings in the place to which the abducted child has been taken. This is essential, in that these delays may give rise to a change in circumstances that necessitates a new custodial arrangement. Canada would therefore favour such an approach, which might proceed on the following basis. The court of the place where the child is not habitually resident should only examine the merits of the case to the extent that it must satisfy itself that the child is not habitually resident there, and that there is no risk of serious harm to the child, if it is restored to the person from whom or the place from which it was abducted. It may be, however, that certain precautions would be required before such a recognition and enforcement mechanism could be applied in concrete cases. One example might be that the original court took its decision only after notice and an effective opportunity to be heard was given to all parties concerned. Canada has not come to any decided view on this facet of the question.

2 If these provisions have as their object the specification of minimum custody order enforcement procedures for every participating State, Canada would have serious reservations. At the present time in Canada, notwithstanding a good deal of uniformity in the law relating to the enforcement of extra-provincial custody orders, the actual practice of enforcement varies too greatly from province to province, depending upon differing enforcement agencies,

procedures and remedies, to enable the relevant Canadian legislation to go to the lengths of prescribing uniform enforcement modalities. Certainly, a court is unlikely to be given greater enforcement powers in respect of foreign orders than it has in respect of local orders, and the person seeking to enforce a foreign custody order would have to rely on the local standard of and procedures for enforcing a local custody order. Canada appreciates that specification of enforcement procedures may have a certain surface appeal, but considers that there would be agreement only on procedures that constitute the very lowest common denominator among participating States. It would therefore be preferable to leave the parties to their local remedies, which may be entirely satisfactory with the possible elaboration of procedures for administrative assistance, as indicated in the response to paragraph *g* hereunder.

b Provisions creating an international tribunal to resolve conflicting custody decisions from different countries

Such a provision is thought to be impracticable. First, what law or perspective would the neutral judges from different countries sitting in the tribunal apply to resolve the conflict when each party before it has the legal authority of a different country supporting its position? The interests or welfare of the child may appear very different from the perspective of different countries with different jurisdictional and legal standards and cultures. How are these neutral judges to appreciate the merits of cases involving the interests of the parents whose nationality, residence and culture differs from those of the presiding judges? Secondly, this would be an extremely costly remedy for the parties involved. Finally, the critical factor that works against such a proposal is the inevitable delay that would ensue which would equally inevitably give rise to an arguable change of circumstances of the child. Canada would not support such an approach.

c Provisions expediting the return of the child who has been improperly or arbitrarily removed from custody in another country

Canada would support consideration of such a mechanism provided that such provisions do not entail the automatic turnover of the child in every abduction case. Three conditions should be included:

1 the existence of a custody order and the removal of the child in breach thereof;
2 the restoration of custody should be ordered by a court, rather than some administrative authority; and
3 the court, before ordering the return of the child, must satisfy itself that the child will not suffer serious harm if it is restored to the person from whom or jurisdiction from which it was improperly or arbitrarily removed.

The serious harm test proposed is as noted above (see paragraph 5 in the answer to question 10*b*), different from a best interests test. Courts should be discouraged from invoking jurisdiction which they may clearly possess, in cases of this sort, particularly where consideration of alleged 'serious harm' may lead the court to apply, in reality, the best interests test to determine custody anew.
Canada reconizes the serious difficulties that exist in cases where there is no custody order but the abduction violates a private, contractual agreement or a *de facto* arrangement. The problem of restoration of custody in such cases has not yet been fully resolved in Canada. One possible solution is to require courts to decline jurisdiction to entertain custody proceedings in such instances unless the child is habitually resident in their jurisdiction or unless the child would not have a closer connection with another jurisdiction.

d Provisions defining more narrowly the custody jurisdiction of courts

1 Canada would support this, in principle. There is agreement with the English and Scottish Law Commissioners that 'concurrency of jurisdiction is better prevented than cured'. Therefore, jurisdiction as well as recognition and enforcement must be considered. The present bases of custody jurisdiction, particularly the basis of the physical presence of the child, are too wide in the sense that they confer jurisdiction in cases where almost all the child's significant, long-term relationships are with a different place and the best evidence relating to the child's needs and welfare therefore lies elsewhere. Although the courts will sometimes decline to exercise their custody jurisdiction in such cases and will make a peremptory order for the return of the child to the jurisdiction from where the child was abducted, there is no certainty as to when they will do this, and this uncertainty may be a factor in encouraging a parent to resort to abduction.

2 State of the child's habitual residence

The jurisdiction-selecting or jurisdiction-defining rule must be one that points to the forum with which the child has an appropriate long-term connection and where the best evidence in relation to that child's needs is likely to be available. In most cases, the child's needs are more satisfactorily determined by the courts of the State where the child is habitually resident.
Care would need to be taken to ensure that the selected basis of this proposed delimited jurisdiction was not so narrow and inflexible that it impedes access to the forum which is the most appropriate one to make a decision relating to the best interests and welfare of the child. This might be accomplished by defining habitual residence in terms of a time period and providing that in computing the period of habitual residence no account is to be taken of a period of residence brought about by an unlawful act. It might further be provided that if the child is wrongfully taken from or retained out of his habitual residence, the court of his habitual residence nonetheless retains full custody jurisdiction for a specified period, such as six months, thereafter. Canada has not yet reached any final position on this issue, however, apart from the following premise. Although kidnapping should be discouraged by ensuring that the kidnapper gains no tactical or legal advantage from his act, it is necessary to ensure that the child is adequately protected. Any provisions more narrowly defining the custody jurisdiction would need to contain adequate, but restricted provisions to enable the State where the child is physically present to make a custody order in an emergency, such as the serious harm provisions discussed earlier.

3 Primacy of custody orders made in matrimonial proceedings

Although Canada would favour the State where the child is habitually resident be given pre-eminent, if not exclusive, jurisdiction over determination of the child's custody, Canada would favour a reservation by which the State where a petition for divorce or annulment of a marriage was pending might retain jurisdiction for determination of custody issues arising in the context of that proceeding, at least for a specified period of time.

e Provisions giving the courts the power to decline jurisdiction for reasons of misconduct by a parent

Although Canada would support consideration of this 'clean hands' approach, it will be difficult to find international agrement on the specific situations whereby the parent who has acted improperly may be denied his day in court because the definitions of improper removal, evasion and/or fraud vary greatly between countries. Furthermore, it might be preferable for the court to stay the proceedings, rather than decline jurisdiction, until it is known that the court that should determine the custody issue will in fact exercise its custody jurisdiction.

Furthermore, any such 'clean hands' provision would need to be subject to the narrow provisions previously proposed in answer to question 25*c* and *d*, above. The court where the child is physically present must have the authority to make an order in an emergency, that is, where serious harm to the child would be likely if the child were automatically returned to the jurisdiction from which or the custodian from whom it was abducted.
It might also be preferable to provide the court with further ancillary powers in these situations. A convention might specify that where the court has stayed or declined jurisdiction to make or to vary a custody order, it may nevertheless make an order –

1 referring to the issue of custody or variation of a custody order to the jurisdiction where the child is habitually resident; and

2 directing the return of the child to the jurisdiction where he or she is habitually resident and, if the court sees fit, ordering that the transportation costs for the child and his or her guardian be paid by the abducting parent.

f Provisions granting to the courts the discretion to apply the doctrine of forum non conveniens

Canada would support such provisions. At the present time, a Canadian court faced with a conflict of law situation in a custody matter decides first whether or not it has jurisdiction to deal with the dispute with which it is confronted, and secondly, if this question is affirmatively answered, whether or not the court will proceed with a determination of the issue. Numerous Canadian courts have declined to exercise their custody jurisdiction, when such jurisdiction is based upon the physical presence of the child within the jurisdiction of the court, because the child is not ordinarily resident in the province and the best evidence in relation to the child's welfare therefore lies elsewhere.

g Provisions strengthening administrative co-operation

Canada would be interested in considering a number of possible forms of administrative co-operation, although the law in Canada has not yet been settled on these matters.

1 Central Authority

The first feature could be a provision requiring each Contracting State to designate a Central Authority, or more than one Central Authority, if necessary, in federal States. It would have specified functions aimed at discouraging the abduction of children by reducing the delay that commonly occurs between the abduction and subsequent legal action.

2 Information function

Such a designated Central Authority should have, as a minimum, rights and responsibilities with regard to locating the missing child and furnishing information to the Central Authority of other Contracting States, upon request, concerning the location and legal situation of the child. This information function should apply whether or not there was a custody order in existence at the time of the abduction or at the time of the request. The information function could also be extended to impose duties regarding the obtaining and channelling, upon request, of social reports on the child and the environment in which the child is residing, having regard to the child's welfare.

3 Recognition and enforcement function

In Canada proceedings to locate the child and to secure the recognition and enforcement of the original custody decision are usually conducted directly by the interested party seeking to have the original decision enforced through his own lawyer and his own efforts. Canada would nonetheless take some interest in supplementing this, perhaps on the basis of proposals similar to those in the Draft Council of Europe Convention on recognition and enforcement of decisions relating to the custody of children which appear to make the Central Authorities in the State of origin and the State addressed the effective medium through which custody orders are communicated and enforced.

4 Preventive function

Canada views the imposition of guarantees such as the holding of a parent's passport, the posting of cash bonds, the giving of sworn undertakings to return the child at an agreed upon time and/or consent orders as a pre-condition of allowing the visitation of a child outside the jurisdiction, as conditions properly imposed by a court in a court order allowing access, other than conditions to be imposed by the Central Authorities designated for each State.
Furthermore, a centralized data centre to provide, on request, information on outstanding custody orders, pending divorce or custody suits, visitation rights, etc., is not feasible at the present time in Canada where jurisdiction to make a custody order is present in a number of different types of actions, some based on provincial and some based on federal law, even if the privacy objection could be offset by the benefits to be derived from such a data bank.
In summary, Canada favours improvements in all methods discussed in question 25 except for method *b*, that of the creation of an international tribunal to resolve conflicting custody decisions from different States.

Note by the Permanent Bureau

Copies of the Entente entre le Québec et la France sur l'entraide judiciaire en matière civile, commerciale et administrative, *articles 60-81 of the* Report on the Quebec Civil Code, *articles 242-245j of Title 8 of the Civil Code*, The Extra-Provincial Custody Orders Enforcement Act, *and an article by Christine Davies,* 'Interprovincial Custody', *16* Canadian Bar Review *17 (1978), were attached as an annex to the original Canadian Reply submitted to the Permanent Bureau.*

Legislative texts, documents and law review articles, annexed to the Replies of Member States to the Questionnaire have not been included with the collected texts of the Replies, Preliminary Document No 2, *because of their length. The Permanent Bureau of the Conference retains copies in its files.*

Danemark/Denmark

Sociological information

Question 1

There is no statistical information available on the subject. Presumably, a small increase has taken place within the last 5 years.

Question 2

The reasons are very complex and difficult to point out, but those mentioned in the Report (*supra*, pp. 18-21), are important.

Question 3

Exact statistics on the number of cases made known to the courts or administrative authorities are not available. However, in 1977 the Ministry of the Interior made an inquiry into the subject.
Due to the lack of statistics the inquiry does not contain exact information on all cases made known to the administration on child abduction, but presumably most cases are reported. From the inquiry it appears, that within the last 5

years there have been 32 cases involving 40 children. In all these cases the parents had different nationalities. Moreover, 5 cases were found, where both parents were Danish nationals. In 16 cases of 'mixed marriages' (involving 22 children) the deprived parent succeeded in getting back the child to Denmark – in 12 cases with the consent of the authorities in the country to which the child was abducted.

Question 4

As far as we know no such research studies have been published in Denmark.

Treaties

Question 5

Denmark is a Party to the Nordic Convention of 6 February 1931 containing certain provisions of private international law on marriage, adoption and guardianship. Denmark is also a Party to the Nordic Convention of 11 October 1977 on Recognition and Enforcement of Nordic Decisions on Private Law Claims.
According to the 1977 Convention judgments and administrative decisions rendered in Finland, Iceland, Norway and Sweden on custody or on the right of visitation are enforceable in Denmark, if the judgment or the administrative decision is enforceable in the country of origin. The 1931 Convention contains *inter alia* rules on jurisdiction in 'inter-nordic' custody cases derogating from the general national provisions.
The Conventions must be seen in the context of a long-time and broad co-operation between the Nordic countries in the legal field, which has led to a high degree of a uniform family law. Moreover, the close links between the countries imply a common approach to the interpretation of the criterion 'the best interest of the child'.

Question 6

Yes, see the reply to question 20.

Question 7

Denmark is a Party to the United Nations Universal Declaration of Human Rights and to the European Convention on the Protection of Human Rights and Fundamental Freedoms, as well as to the U.N. International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights.

Question 8

No.

Legislation and case law

Question 9

An action before a Danish court can be brought against the other parent, if

a the defendant has his domicile in Denmark,

b the plaintiff has his domicile here and either has lived here during the last two years or previously has had his domicile here,

c the plaintiff is a Danish national and it is proved that, because of his nationality, he has no access to the courts in the country of his domicile,

d both parents are Danish nationals and the defendant does not protest against the action being brought before a Danish court, or

e divorce is sought on the grounds of a decision on a legal separation rendered in Denmark within the last five years.

Question 10

No.

Question 11

a During the marriage both parents have part in the legal custody.

b After a legal separation or divorce the custody is assigned to one of the parents. In the absence of an agreement between the parents, the decision is taken solely on the grounds of what is considered to be the best interest of the child.

c If one of the parents to a child born in wedlock dies, the custody remains with the surviving parent. If the parent having the custody to a child born out of wedlock dies, the custody is assigned to the surviving parent, unless such assignment is considered to be against the best interest of the child.

d As regards children born out of wedlock the mother has the custody *ex lege.*

However, the custody may be transferred to the father, if such transfer is considered necessary in the best interest of the child. In taking such decision special regard is taken to the father's previous connection with the child. The provision is in particular aimed at situations where the parents for a longer period have lived together as an unmarried couple.

Question 12

No.

Question 13

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Question 14

The legislation has no specific reference to the age of the child. However, in practice, it will often be considered to be in the best interest of very small children, *i.e.* under 2 years, that the custody is assigned to the mother.

Question 15

The child is asked and its opinion is taken into consideration, when it is assumed that it can express its sincere opinion without being influenced by one of the parents. This age is generally believed to be about 12 years, but naturally it depends on the maturity of the child. In practice, rights of visitation are denied, if a child of about 12 years informs the authorities that it is against such visitation.

Question 16

No authority has the power to order the custodian to keep the child in Denmark or to take any other measures serving the same purpose.

Question 17

Danish law is applicable.

Question 18

No.

Visitation and access

Question 19

As regards children born in wedlock, there is a right *ex lege* to have access to the child. The right may be repealed due to the best interest of the child.
If the child is born out of wedlock, the father may be granted a right of access if it is compatible with the interest of the child and special circumstances, in particular the father's previous connection with the child, speak in favour of a right of access. As a general rule, the father according to administrative practice is granted such right if he has lived together with the child for about one year or more.

Question 20

The right of access may generally be effectuated in the other *Nordic* countries, because the return of the child is guaranteed even if the parent not having the custody abducts the child (*cf.* the reply to question 5).
Access, which is to be effectuated in *other* foreign countries, is generally denied, if the custodian does not agree, because the return of the child is not guaranteed.

Question 21

The legislation is based on a right of access for the parent. However, in connection with a future legislative amendment it will be considered to stress, that the main purpose is the right of the child to maintain the contact with the parent not having the custody.

Questions 22 and 23

Both questions may probably be answered in the affirmative for the reasons indicated in the Report (*supra*, pp. 41-43).

Existing non-treaty remedies

Question 24

In case of right of visitation for a parent who is a foreign national and/or habitually resident abroad, some kind of safeguards are generally taken to prevent the parent from abducting the child, unless the parent has a link with Denmark, which is so strong that the risk of abduction may be regarded as non-existent. If there is just a vague risk, the right of access may be conditioned upon the handing over of the parent's passport to, for instance, the police during the period of visitation. If the risk of abduction is more substantial, it may be required that a third party be present during the visitation. Right of access is repealed or denied if there is an actual danger of abduction.
Abduction is a penal offense, and the police and frontier control authorities will assist in the attempt to prevent an abduction to be successful.
In the example mentioned under A in the Explanatory Note to the Questionnaire, there is a possibility of immediate transfer of the custody to the deprived parent, thus making the abduction a penal offense. The decision is normally taken by the Ministry of Justice. It is a provisional measure in order to secure that a subsequent Danish judgment on custody is not rendered illusory by the abduction. Such administrative decision will be taken only if Danish courts are considered to have jurisdiction in a subsequent custody case (*cf.* reply to question 9). The actual risk of abduction and the probability that the deprived parent will subsequently be awarded the custody are also taken into consideration.

Possible treaty remedies

Question 25

a It should be considered to conclude a convention facilitating the enforcement of decisions. From a Danish point of view, it will probably be necessary that the courts in the State addressed – possibly by way of a reservation clause – be given a possibility of deciding whether the return of the child is in the child's best interests.

b For constitutional reasons we can hardly accept an international tribunal competent to make binding decisions. Furthermore, the arguments put forward in the Report (*supra*, p. 47) against such tribunal appear relevant.

c The question is closely connected with *a* and we refer to the reply to that question. The possibility of accepting the suggestion in the Report (*supra*, p. 48) of an '*almost* automatic, and above all, speedy turnover of the child' depends on the further clarification of 'almost'.

d and *e* We are rather sceptical towards solutions along these lines, partly because of the traditional divergencies between the supporters of 'domicile' and 'nationality', partly because it seems doubtful whether one, as a matter of principle, ought to prevent a party from access to the courts, if the general jurisdictional conditions are satisfied.

f We support the arguments put forward in the Report (*supra*, pp. 49-50) against granting to the courts the discretion to apply the doctrine of *forum non conveniens.*

g We have a positive attitude towards a strengthening of administrative co-operation, but at present it is difficult to say how far such co-operation can be carried. It seems doubtful whether we shall be able to support all the measures suggested in the Report (*supra*, pp. 50-51).

Question 26

No.

Espagne/Spain

Informations de caractère sociologique

Question 1

Oui. En outre, cet accroissement n'est pas seulement quantitatif, mais aussi qualitatif, dans la mesure où il a été accompagné d'une claire prise de conscience par l'opinion publique des problèmes que ces affaires suscitent.

Question 2

Bien qu'il soit toujours difficile de donner une explication d'un phénomène complexe, en ce qui concerne les ressortissants espagnols on peut, peut-être, l'expliquer du fait de l'augmentation considérable des mariages mixtes, à la suite, tout particulièrement, de l'intense émigration de nos ressortissants dans d'autres pays européens et du grand nombre de touristes qui, chaque année, visitent l'Espagne.

Question 3

La seule statistique dont nous disposions à ce jour revêt un caractère partiel et se réfère uniquement aux cas dont a eu connaissance le Ministère des Affaires Etrangères. On y énumère huit cas ayant des caractéristiques très distinctes,

tant en ce qui concerne la position assumée par le père espagnol (sujet actif ou passif de l'enlèvement de son enfant) que le moment auquel s'est produit le déplacement du mineur.
En effet, bien que dans la majorité des situations il s'agisse de ménages en voie de séparation ou de divorce, il existe également des cas d'enlèvement d'enfants effectués avant que ne soit prise une décision judiciaire et des cas d'enlèvement d'enfants naturels, c'est-à-dire, en l'absence d'une relation légalement constituée entre les parents.

Question 4

Non.

Conventions

Question 5

L'Espagne est Partie à la Convention du 12 juin 1902 «pour régler la tutelle des mineurs». Etant donné qu'il s'agit d'une Convention élaborée par la Conférence de La Haye, on considère que les Etats signataires et le contenu de ses dispositions sont connus. (*Cf.* Rapport établi par C.A. Dyer, *supra*, p. 29-30).
Dans le cadre des relations bilatérales, le Gouvernement espagnol a souscrit à diverses conventions concernant la reconnaissance et l'exécution de décisions en matière civile et commerciale. Ces Conventions sont les suivantes: Convention hispano-suisse du 12 novembre 1896; Convention hispano-colombienne du 30 mai 1908; Convention hispano-tchécoslovaque du 26 novembre 1927; Convention hispano-française du 28 mai 1969 et Convention hispano-italienne du 27 mai 1973. Toutes ces Conventions peuvent s'appliquer, de façon expresse ou implicite, aux décisions sur la garde des mineurs: dans des circonstances déterminées, on peut appliquer l'article 5 de la Convention hispano-française et l'article 15 de la Convention hispano-italienne qui prévoient, en ce qui concerne l'état et la capacité des personnes, un certain contrôle de la compétence législative. En effet, l'article 5 mentionné plus haut établit que l'on ne pourra pas refuser la reconnaissance du seul fait que le tribunal d'origine a appliqué une loi différente de celle qui correspondait selon les règles du droit international privé de l'Etat requis, à l'exception de ce qui se réfère à l'état et à la capacité des personnes. Même dans ces cas, la reconnaissance ne sera pas refusée lorsque l'application de la loi correspondant selon ces règles aurait le même résultat.
Sur un autre plan, l'Espagne est également Partie à la Convention de Vienne sur les relations consulaires, dont l'article 5, alinéa *h*, définit parmi les fonctions consulaires, indépendamment du fait qu'elles soient exercées par des «représentations consulaires» ou par des «missions diplomatiques», celle de veiller dans les limites imposées par les lois et règlements de l'Etat récepteur, sur les intérêts des mineurs . . . qui sont des ressortissants de l'Etat qui envoie, tout particulièrement lorsqu'une tutelle est requise à leur égard. En outre, en droit espagnol, le Règlement de la Carrière consulaire du 27 avril 1900, admet, de manière générale, la tutelle consulaire, lorsqu'il établit que les consuls ont la faculté «d'instruire les dossiers dans les cas concernant la désignation de tuteurs et la nomination à une tutelle». Mise à part cette possibilité reconnue de façon expresse dans divers traités consulaires, souscrits par l'Espagne avant et après la promulgation du Code civil, elle figure également en termes généraux dans la Convention de La Haye de 1902 (article 2); sur la base de cette Convention et de celle de Vienne déjà mentionnée, le droit espagnol reconnaît l'exercice par les consuls étrangers en Espagne de ladite fonction consulaire en matière de tutelle, en ce qui concerne des mineurs détenant la nationalité de l'Etat qui les envoie.

Question 6

Non. De par leur nature même, les Conventions mentionnées dans la réponse antérieure ne se révèlent pas utiles pour prévenir ou atténuer les problèmes que posent les enlèvements d'enfants.

Question 7

L'Espagne, en tant que Membre des Nations Unies, est liée par la Déclaration Universelle des Droits de l'Homme du 10 décembre 1948. De même, elle est Partie au Pacte international sur les Droits civils et politiques (conclu au sein des Nations Unies le 16 décembre 1966) et elle a signé et elle espère ratifier prochainement, la Convention européenne pour la sauvegarde des droits de l'homme et des libertés fondamentales, conclue dans le cadre du Conseil de l'Europe le 4 novembre 1950; *cf.* Rapport établi par Adair Dyer, *supra*, p. 32-34).

Question 8

Non.

Législation et jurisprudence

Question 9

Etant donné l'imprécision relative et le caractère incomplet des normes espagnoles en ce qui concerne la compétence judiciaire internationale de nos tribunaux, il est nécessaire de recourir à l'interprétation jurisprudentielle.
Conformément à celle-ci, les tribunaux espagnols se déclareront vraisemblablement compétents:

a lorsque l'une des parties au litige détient la nationalité espagnole ou qu'il s'agit de la nationalité du mineur dont la garde fait l'objet du débat;

b du fait du domicile, lorsque le défendeur ou le mineur (dans le cas d'un domicile par dépendance) réside sur le territoire espagnol (article 63, paragraphes 1, 17 18 et 19 de la loi de procédure civile, en relation avec l'article 70 de la même loi);

c du seul fait de la présence du mineur sur le territoire espagnol, chaque fois qu'il s'agira de prendre des mesures de protection et éducatives ou des mesures urgentes et provisoires (article 33 du Décret royal sur l'extranéité du 17 novembre 1852).

Question 10

Non.

Observations préliminaires aux questions 11 à 23

Le droit espagnol interne en la matière est soumis à un processus de révision. Il est possible, par conséquent, que lors de la Conférence de 1980 les réponses apportées à ce questionnaire ne reflètent plus le droit positif espagnol.

Question 11

a Au cours du mariage, la puissance paternelle revient au père et, à défaut de celui-ci, à la mère.

b Dans les cas de nullité ou de séparation, le tribunal dispose d'un pouvoir discrétionnaire concernant la garde des enfants (articles 70 et 73 du Code civil). S'il ne prend pas de dispositions à cet égard on mettra en oeuvre une série de règles figurant aux articles mentionnés qui attribuent la garde des enfants au père ou à la mère, compte tenu de l'âge, du sexe et de la bonne foi ou de la culpabilité du ou des conjoints. En cas de nullité du mariage, si aucune décision

n'est prise en la matière, les parents peuvent décider, d'un commun accord, ce qu'ils estiment approprié en ce qui concerne la garde des enfants (article 71 du Code civil).

c En cas de décès du père, la puissance paternelle incombe automatiquement à la mère.

d En cas de décès des parents ou dans le cas où ceux-ci auront été privés de la puissance paternelle, on institue la tutelle, sous la surveillance du protuteur et du conseil de famille, avec intervention de l'autorité judiciaire (livre I, titres IX et X du Code civil).

En second lieu, s'il s'agit d'enfants naturels connus ou d'enfants adoptifs, ceux-ci sont placés sous la puissance paternelle du père ou de la mère qui les reconnaît ou les adopte (article 154 du Code civil).
Ces dispositions peuvent être prises sans préjudice des mesures de protection de l'enfance que peuvent adopter les organes de tutelle des mineurs, en marge de l'existence de la puissance paternelle ou d'une tutelle organisée.
Dans le projet de révision du Code civil qui a déjà été remis au Parlement, on se fonde sur le principe de la coparticipation égale du père et de la mère dans l'exercice de la puissance paternelle, quel que soit le type de filiation.

Question 12

Aussi longtemps qu'une décision judiciaire n'aura pas été prise concernant la garde des enfants, la législation espagnole maintient le principe de la puissance paternelle en faveur du père. Voir, cependant à cet effet, les indications mentionnées en réponse à la question 11.

Question 13

Oui, aussi bien dans les cas où la décision fait partie d'un procès de séparation ou d'annulation du mariage (selon les indications fournies en réponse à la question 11 *b*), que dans ceux où le mariage n'est pas dissous à la suite d'une sentence pénale ou civile (articles 169 à 171 du Code civil). D'autre part, les tribunaux des mineurs peuvent également décider la suspension de l'exercice de la puissance paternelle par son titulaire (article 9, paragraphe 3, A et article 13 de la loi qui les régit, texte revisé du 11 juin 1948). Une loi sur le divorce est en voie d'élaboration en Espagne et traitera de ses répercussions sur les enfants.

Question 14

Oui, le Code civil établit que, dans les cas de nullité ou de séparation des parents, la mère aura la garde des enfants, garçons et filles, de moins de 7 ans. Le tribunal dispose de pouvoirs discrétionnaires quant à l'application de cette disposition.

Question 15

Dans le droit en vigueur actuellement, il n'est pas établi expressément que l'enfant mineur est entendu en vue de prendre les décisions judiciaires attribuant la garde ou les visites. Toutefois, les principes de notre droit recommandent que le mineur soit entendu, comme c'est le cas pour d'autres décisions judiciaires qui l'affectent directement (adoption, émancipation, aliénation de ses biens).
Le projet de révision détermine que le mineur sera entendu avant que le juge ne prenne une décision concernant la personne avec laquelle il devra vivre en cas de désaccord entre les parents ou concernant l'exercice ou le degré de la puissance paternelle lorsqu'il existera des circonstances spéciales. Le projet prévoit que le mineur lui-même peut, contre la volonté de celui qui exerce la puissance paternelle, demander au juge de prendre une décision lui permettant d'être lié à l'autre parent.

Question 16

Si l'un des parents exerce seul la puissance paternelle; il peut, en principe, déterminer librement le lieu de résidence de l'enfant.
Dans les cas de nullité ou de séparation des parents, les tribunaux peuvent imposer des restrictions au droit de garde.

Question 17

Article 9, paragraphe 4 du Code civil: *Les relations père-enfant seront régies par la loi nationale du père et, à défaut de celui-ci, ou au cas où l'on aurait seulement reconnu ou déclaré la maternité par celle de la mère.*

Article 9, paragraphe 6, du Code civil: *la tutelle et les autres institutions de protection de l'incapable seront régies par la loi nationale de celui-ci. Toutefois, les mesures provisoires ou urgentes en matière de protection seront régies par la loi du lieu de sa résidence habituelle.*
Les formalités visant à la constitution de la tutelle et des autres institutions de protection dans lesquelles interviennent les autorités judiciaires ou administratives espagnoles seront menées à bien, dans tous les cas, selon la loi espagnole.
On appliquera la loi espagnole pour prendre les mesures de protection et éducatives concernant les mineurs ou les incapables abandonnés se trouvant sur le territoire espagnol.

Question 18

La nouvelle Constitution espagnole prévoit, à l'article 14 l'interdiction de toute discrimination pour des raisons de sexe. Ce principe inspire la révision en cours du Code civil concernant les questions auxquelles se refère ce questionnaire.

Droit de visite

Question 19

Il s'agit d'un droit que déterminent les tribunaux, en fonction de leur pouvoir discrétionnaire, aussi bien pendant la durée du procès de nullité ou de séparation des conjoints (article 68, paragraphe 3 du Code civil) qu'en ce qui concerne la sentence définitive mettant fin au litige.

Question 20

Rien ne s'y oppose en droit espagnol. Toutefois, les juges peuvent imposer des conditions concernant le lieu où s'exercera le droit de visite.

Question 21

Non. Le projet prévoit que ce droit dépend de la décision du juge.

Questions 22 et 23

Sans nier que le droit de visite, ou son interdiction puissent avoir une influence en la matière, il est difficile d'en tirer des conclusions claires étant donné l'expérience limitée de l'Espagne à cet égard. Au contraire, la diversité de situations dans lesquelles se produisent les enlèvements d'enfants semble indiquer qu'il ne s'agit pas d'un facteur déterminant.

Solutions actuelles non conventionnelles

Question 24

Non.

Solutions conventionnelles possibles

Question 25

De l'avis du Gouvernement espagnol, une forte réduction du nombre de tribunaux compétents pour connaître de chaque cas concret devrait être l'objectif fondamental des efforts de la Conférence de La Haye. C'est pourquoi, la consécration de la compétence exclusive des tribunaux du lieu de résidence habituelle du ménage jusqu'à sa dissolution de fait ou de droit pourrait se combiner à la notion de la résidence habituelle du mineur dans les cas d'enfants nés hors du mariage. Les avantages d'une telle approche sont évidents; si le parent qui enlève l'enfant de son milieu habituel sait qu'aucune décision prise dans un autre pays ne lui accordera la garde, l'une des principales raisons qui conduisent à de telles situations aura disparu (solution préconisée à la lettre *d*).

Or, pour que ces tribunaux continuent d'être les mieux placés pour statuer sur la garde du mineur, il convient d'accélérer la restitution de celui-ci avant que son intégration à un nouveau milieu change substantiellement les données du problème (solution préconisée à la lettre *c*); à cet effet, une collaboration administrative efficace peut se révéler être absolument décisive (solution préconisée à la lettre *g*).

Ce système, dans son ensemble, devrait être complété par la reconnaissance, dans n'importe quel pays, des décisions prises par le tribunal compétent (solution préconisée à la lettre *a*).

Une protection internationale spéciale du droit de visite dans des conditions minimales contribuerait à recueillir les résultats proposés. Tout enlèvement pendant l'exercice de ce droit devrait être réprimé par tous et le mineur restitué immédiatement.

Question 26

Au cas où il serait impossible d'établir la compétence internationale des tribunaux d'un seul pays, il faudrait instituer une coopération judiciaire aussi directe que possible, afin d'éviter des solutions contradictoires et de permettre que soient prises des décisions qui tiendront véritablement compte de l'intérêt suprême du mineur intéressé.

Etats-Unis/United States

This report in reply to the Questionnaire and Report prepared by Mr Adair Dyer, First Secretary of the Permanent Bureau, will follow the order and numbering of the questions contained in the Hague document, which will be referred to as the Dyer Report.

Sociological information

Question 1

There is no question that parental abductions (in the broad sense outlined in the Dyer Report *supra*, p. 9) have become more numerous in the United States in recent years.

Question 2

One obvious reason is the steep rise in the divorce rate[1], potentially subjecting correspondingly larger numbers of children ot custody disputes which frequently lead to abductions. Another reason is the growing combativeness between divorcing fathers and mothers. This is probably due in part to the growth of organized interest groups concerned with child custody matters, and in another part to the decline of the 'tender years' preference for mothers in custody cases within the last few years[2]. The latter development, which was welcomed by equal rights advocates of both sexes, deprived the courts of the one legal rule that was definite and certain, leaving them to deal as best they can with the vague 'best interests of the child' principle[3]. The resulting unpredictability of custody decisions has led to more custody litigation and less agreement on the future of the children, as each party now sees a chance to win in court. Hotly contested custody trials in turn escalate the hostility between the parents, breed more litigation and more hostility, until the point is reached when the acrominy is translated into unilateral action outside the law.

The increased unpredictability of custody decisions also causes 'self-help' measures at an early stage of the marital rift before there is a custody decree, in order to gain possession of the children and remove them from the scene of a possible unfavourable judgment.

Further, it is reported that child abductions by unmarried fathers are no longer uncommon[4] since the United States Supreme Court in 1972 recognized far-reaching parental rights of fathers of illegitimate children[5].

Question 3

No statistics or other data on the number of abductions by parents are available in the United States. Published estimates of parental abductions (interstate and international) range from 25,000 to 100,000 cases per year[6].

A sampling of recent cases shows child removals to or from England[7], France[8], Switzerland[9], Australia[10], and Yugoslavia[11].

In states where child abductions by parents are prosecuted under the criminal law, some numbers are beginning to emerge. In California, prosecutors' offices have been collecting this information since 1977. It was reported, for example, that 150 prosecutions were pending in Orange County, California, in July of 1978[12]. Among 45 cases listed by the district attorney of Los Angeles County in August, 1977, there were a number of abductions to Canada, Argentina, Mexico, Barbados, Costa Rica, and Iran, and others to 'parts unknown'[13].

[1] From 1965 to 1975 the number of divorces in the United States jumped from below 500,000 to more than 1 million. In 1975 there were 1.12 children per divorce. *U.S. Bureau of the Census, Department of Commerce, Statistical Abstract of the United States* 74, 77 (1977). U.S. Census Bureau demographers estimated in 1978 that about 38% of first marriages of women in their late twenties are likely to end in divorce, and that of those who remarry, about 44% may divorce a second time. *The Wall Street Journal*, June 27, 1978, at p. 48.

[2] See e.g. Foster & Freed, 'Life with Father', *Family Law Quarterly*, Vol. XI, at p. 332 (Winter 1978).

[3] See Krause, *Family Law in a Nutshell*, at pp. 252-253 (1977); Mnookin, 'Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy', *Law and Contemporary Problems*, Vol. 39, at pp. 233-237 (Summer 1975).

[4] Telephone interview of Attorney Tamara Dahn, San Francisco Neighborhood Legal Assistance Foundation, Fall 1977.

[5] *Stanley* v. *Illinois*, 405 U.S. 645, 92 S.Ct. 1208 (1972). See also *Uniform Parentage Act*, prepared by the National Conference of Commissioners on Uniform State Laws in 1973, *Uniform Laws Annotated*, Vol. 9, Supp. 1974-1976 (1977).

[6] See *Congressional Record*, Jan. 4, 1977, Vol. 123, p. H54 (remarks by Member of United States Congress J. Moss); Oakland Tribune, Jan. 30, 1977, *Parade Magazine*, at p. 4.

[7] *In re Shalit*, N.Y. Supr. Ct., Nov. 1, 1977, *Family Law Reporter*, Vol. 4 at p. 2035 (children abducted from England to United States by non-custodial mother were returned to father in England).

[8] *Baissac* v. *Baissac*. (Three children, 7, 8, and 11 years old, removed from France to Illinois prior to litigation. Proceedings pending in France and Illinois.) (Information received from attorney in Illinois.)

[9] *Morgan* v. *Morgan*, Superior Court of Santa Clara County, California, No P.28817 (1975). (Father sought custody of child who was visiting him in California. Court returned child to mother who had custody under Swiss decree.) (Information received from L. Stotter, San Francisco, attorney for mother.)

[10] *Miller* v. *Superior Court of Los Angeles County*, L.A. No 30816 – Cal. 3d. (Mother, who had custody of two children, 11 and 12 years old, for 9 years, under Australian decree, moved to California. Australian court changed custody to father. Pending before Supreme Court of California, 1978.)

[11] *Kajtazi* v. *Kajtazi*, U.S. District Court, New York, August 1978, *Family Law Reporter*, Vol. 4, at p. 2703. (Non-custodial father abducted 3-year-old son to Yugoslavia. Large amount of damage payments for abduction and false imprisonment imposed on father and his relatives in New York.)

[12] *Family Law Reporter*, Vol. 4, at p. 2624 (1978).

[13] Van De Kamp, District Attorney of Los Angeles County, 'Child Stealing Report', Exhibit 'H', (August, 1977). According to this Report, the statistics do not include cases handled civilly by the courts where the district attorney assists in locating an absent parent and child pursuant to California Civil Code section 4604.

Question 4

As far as could be determined, no research studies of the causes and effects of abductions of children by parents have been published in the United States. There are some recent studies on the effects of divorce on children of various ages[14], but the kidnapping problem is not specifically addressed.

Numerous case histories, from which some conclusions can be drawn, are found in the files of members of the United States Congress, state legislators, public prosecutors, private attorneys, and professors of family law. In addition, some books[15] and articles in popular magazines and newspapers[16] give vivid accounts of actual occurrences, including the build-up of hostilities leading to the abductions, the activities of 'professional' child snatchers, effects on the children and adults involved.

A small book, entitled 'Legal Kidnapping', by Anna Demeter[17] is of particular interest. Written by a woman physician, it offers general insights into the causes and consequences of parental abductions which go beyond the account of the author's personal ordeal and that of her two youngest children. It points out some of the deeper causes of an abduction, reaching back to many years of a troubled marriage and to the abducting husband's own childhood experience of being kidnapped by his father. It describes the physical and mental condition of two boys, 2 and 6 years old, after 4 months of hiding and moving from state to state: their growth, but loss of weight, their need to be fed and held like infants, and their crying out in fear in the nights. The author's search for the children reflects problems common to domestic and international cases: the inability to enlist the help of governmental agencies; the shielding of the abductor by relatives; the need to employ expensive private detectives; the fear of violence upon discovery of the fugitive; and ultimately the recurring anxiety that the kidnapping may be repeated[18].

Treaties

Questions 5-8

The United States is not a party to any multilateral or bilateral treaty in the area of private law which deals with jurisdiction, recognition, enforcement, or the applicable law, in international child custody cases. Nor is the United States a party to a human rights treaty or an administrative agreement which has a bearing on problems of child abduction. Some criminal extradition treaties, however, may cover child stealing by parents[19].

The United States is a Party to the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters and the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. Both Conventions have relevance in child abduction cases because they provide for a Central Authority to promote international judicial assistance (see Dyer Report, *supra*, pp. 28, 50-51).

Legislation and case law

Question 9

In the United States, the law of child custody, including jurisdiction, is governed, not by Federal law, but by the law of the individual states. When there is a prior custody order, the Full Faith and Credit Clause of the United States Constitution may come into play in interstate cases to a limited and somewhat uncertain extent[20]; and a prior custody order which violates the Due Process Clause of the United States Constitution may not be entitled to recognition[21].

The legal prerequisites for child custody jurisdiction are not uniform throughout the United States. A distinction must be made between three groups of states: (*a*) states which have enacted the Uniform Child Custody Jurisdiction Act (hereafter referred to as UCCJA, Uniform Act, or Act); (*b*) states which follow some of the policies of the Uniform Act by virtue of judicial law; and (*c*) states which adhere to older, traditional principles.

a States with the Uniform Child Custody Jurisdiction Act

This Act was prepared by the National Conference of Commissioners on Uniform State Laws in 1968 with the approval of the American Bar Association and was recommended for enactment in all the states of the Union. As of 1978, the legislatures of the following 28 states have adopted the Uniform Act: Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Louisiana, Maryland, Michigan, Minnesota, Missouri, Montana, New York, North Dakota, Ohio, Oregon, Rhode Island, Pennsylvania, South Dakota, Wisconsin and Wyoming.

Although further enactments in 1979 and subsequent years are anticipated[22], it must be emphasized that the Uniform Act is not presently in effect in the 22 remaining states, the District of Columbia, Puerto Rico, and United States territories and possessions.

Under the Uniform Act (sections 3 and 14) a distinction must be made between initial jurisdiction and modification jurisdiction. The child's home state (ordinarily 6 months' residence of the child with a parent), or a state with strong contacts with the child and a parent, has initial custody jurisdiction (sections 2 and 3). Mere presence of the child and a parent in the state does not confer jurisdiction, except in emergencies to protect the child in case of maltreatment or abandonment. If the child has been removed from the home state, that state's jurisdiction continues for 6 months after the child's departure in order to give the parent who is left behind the opportunity to litigate custody in the state of his or her residence (section 3).

[14] *E.g.* Wallerstein and Kelly, 'The Effects of Parental Divorce: Experiences of the Preschool Child', *Journal of American Academy of Child Psychiatry*, Vol. 14, No 4, pp. 600-616 (Autumn 1975); Wallerstein and Kelly, 'The Effects of Parental Divorce: Experiences of the Child in Early Latency', *American Journal of Orthopsychiatry*, Vol. 46, No 1, pp. 20-32 (1976); Wallerstein and Kelly, 'The Effects of Parental Divorce: The Adolescent Experience', in *The Child and His Family*, Vol. 3, Anthony and Koupernik, editors (New York 1974).

[15] *E.g.* Noble and Noble, *The Custody Trap* (New York 1975); Demeter, *Legal Kidnapping* (Boston 1977).

[16] *E.g.* 'Have You Seen This Child?', *Ladies Home Journal*, November 1974, p. 26; Molinoff, 'Divorced Parents Who Kidnap Their Own Children', *Parade Magazine*, Oct. 16, 1977, p. 10; Smith, 'After All the Anguish, They Still Fight: Parents Tell of Children Abducted by Ex-Spouses', *Los Angeles Times*, April 11, 1977, Part IV, p. 1; Smith, 'In Search of Jolie: A Paper Chase', *Los Angeles Times*, April 20, 1976, p. 1; 'Kidnapping: A Family Affair', *Newsweek*, Oct. 18, 1976, at p. 24 (father and child were killed in father's kidnapping attempt); Huey, 'To Man Whose Job is Child Snatching, End Justifies Means', *Wall Street Journal*, March 24, 1976, at p. 1; Newman, 'Professional 'Kidnapper' Helps Win Custody Wars', *San José Sunday Mercury News*, April 25, 1976, p. 1.

[17] See note 15, *supra*.

[18] Similar problems were encountered by a mother during a year-long fruitless search for her 3-year-old son in Europe. See Affidavit of Ann Morgan attached to pleadings in *Morgan* v. *Vance*, U.S. District Court, Northern District of California, Febr. 10, 1978, *Family Law Reporter*, Vol. 4, at p. 2252.

[19] In view of the fact that the projected Hague Convention deals exclusively with private international law (see Dyer Report *supra*, p. 43), extradition treaties have not been examined. It should be mentioned, however, that the House of Delegates of the American Bar Association in a Resolution passed in August, 1978, called for the inclusion in extradition treaties of provisions declaring 'the removal of a child from a custodial parent, in violation of an existing court decree' to another country to constitute an extraditable act.

[20] To the extent that the original forum may modify its own custody order, a subsequent forum may likewise change the original custody decree, even assuming that the mandate of full faith and credit (that is, recognition of sister state judgments) of Article IV of the United States Constitution applies to child custody decrees. The Supreme Court of the United States has never gone further to declare that the Full Faith and Credit Clause applies – or does not apply – to custody judgments. See New York ex rel. *Halvey* v. *Halvey*, 330 U.S. 610 (1947); *Kovacs* v. *Brewer*, 356 U.S. 604 (1958). This uncertainty was a major reason for the drafting of the Uniform Child Custody Jurisdiction Act. See Commissioners' Prefatory Note, *Uniform Laws Annotated, Master Edition*, Vol. 9, at pp. 99-101 (1973).

[21] For example, if proper notice and an opportunity to be heard was not given to an affected person. See *Armstrong* v. *Manxo*, 380 U.S. 545 (1965), *Cf. May* v. *Anderson* 345 U.S. 528 (1953).

[22] See National Conference of Commissioners on Uniform State Laws, *Uniform Law Memo*, Fall 1978, p. 1.

Modification jurisdiction is severely restricted. Once a custody decree has been rendered in a state with jurisdiction, that state has exclusive continuing jurisdiction, even if another state has become the child's home state. Other states must respect the continuing jurisdiction of the prior state. They are not permitted to modify the prior decree, unless the state of continuing jurisdiction has declined to exercise its jurisdiction or all persons involved (normally both parents and the child) have moved from the state (section 14 and Commissioners' Note). This prohibition of custody modifications by other states is one of the key provisions of the Uniform Act. It prevents conflicting custody decrees, denies court access to child abductors, and requires anyone seeking a change of custody to address the appropriate court in the state of continuing jurisdiction[23]. Again, temporary emergency measures are authorized in a state where the child is present, subject to further disposition by the state with continuing jurisdiction[24].

Once the continuing jurisdiction of a state has terminated (by declining jurisdiction or the departure of all persons concerned), another state may assume modification jurisdiction, provided that all the prerequisites for initial jurisdiction are met (section 14 and Commissioners' Note).

Recognition and enforcement of custody decrees of other states and countries

It should be added although the question is not specifically asked, that the UCCJA requires enacting states to recognize and enforce the custody decrees of other states if the prior court had jurisdiction under laws or factual circumstances meeting the jurisdictional standards of the Uniform Act. These standards include constitutional due process requirements of reasonable notice and an opportunity to be heard (sections 12, 13 and 15). Visitation rights under a custody decree are required to be enforced like primary custody rights (sections 2(2), 15, and Commissioners' Note).

Upon the filing of a certified copy of a custody decree with the appropriate court in another state, the decree has the same effect and is enforced in like manner as a custody decree rendered by the state where the decree is filed (section 15).

Finally, and most importantly in the context of the work of the Hague Conference, the general policies of the Uniform Act extend to the international area. The recognition and enforcement provisions in particular are directly applicable to custody decrees rendered by the appropriate authorities of other nations, if the constitutional requirements of reasonable notice and opportunity to be heard have been met (section 23). On the basis of this provision, a New York court, for example, recently returned two children to England to their father, who had custody under an English decree, after the mother had abducted the children to the United States[25].

The Uniform Act does not contain a reciprocity requirement. (See Commissioners' Prefatory Note.)

b States following some policies of the Uniform Act

Courts in a number of states which have not (or not yet) adopted the UCCJA, apply some of the Act's principles as a matter of judicial policy[26]. States in this category cannot be identified with sufficient certainty to enumerate them because there continue to be fluctuations of judicial opinion in this group. But it can be stated that there is an ascertainable trend in the United States, influenced by increasing enactments of the UCCJA, to avoid the reopening and relitigation of custody decisions of other states[27].

c States adhering to traditional principles

Some states continue to follow the doctrine that mere presence of the child in the state suffices as a basis for custody jurisdiction. These states not only assume initial jurisdiction when the child is in the state, but may also modify the custody decree of another state, even upon petition of an abducting parent[28]. Such 'haven states' may well be sought out by child abductors who find the doors of courts in other states closed to them. Some of the states in this category apply the 'clean hands' rule, however, which precludes an abductor from access to a court to gain or change custody[29]. Again, during these times of ferment and of change in the law, it is impossible to identify positively and with any degree of certainty the states which fall into this third category.

Because of the persistence of the older approach in some states, proposed Federal legislation under consideration by the United States Congress would impose a federal duty upon all states to recognize and enforce, and refrain from modifying, the custody decrees of other states under jurisdictional prerequisites identical with the jurisdictional bases of the Uniform Act[30].

Approaches of Uniform Act to five typical fact situations

Considering the five types of situations addressed by the Questionnaire (Dyer Report *supra*, p. 9) the Uniform Act would deal with these situations as follows.

A *Pre-decree removal of child*: The home state has jurisdiction to determine custody for at least 6 months[31] after the child's removal. The resulting decree is enforceable in UCCJA states, regardless of whether the Uniform Act has been adopted by the home state.

B *Post-decree abduction by non-custodial parent*: The custody decree is enforceable in all UCCJA states and will not be modified in these states, if the state of the decree had jurisdiction under the principles of the Act.

C *Retention of child in another state beyond legal visitation period*: Again, the custody decree of a state meeting the jurisdictional prerequisites of the Act is enforceable in the visited state and that state will not take jurisdiction to change custody.

D *Conflicting second custody decree obtained by abductor in another state*: If state 1 had jurisdiction under statutory provisions or factual circumstances meeting the jurisdic-

[23] See *e.g.* Custody of Glass, 537 P.2d 1092, at p. 1094 (Colorado Court of Appeals, 1975): '. . . by virtue of [section 14 (*a*) of the Uniform Act] the Colorado Court may not modify the existing California custody decree, and James's petition for custody . . . should have been addressed to the Superior Court of Mendocino County, California.'

[24] See *e.g. Fry* v. *Ball*, 544 P.2d 402 (Supreme Court of Colorado 1975).

[25] *In re Shalit, supra*, note 7.

[26] See *e.g. Nehra* v. *Uhlar*, 401 N.Y.S. 2d 168 (New York Court of Appeals 1977) (The Uniform Act went into effect in New York one year later); *O'Malley* v. *O'Malley*, 338 A.2d 149 (Maine 1975); *Hedrick* v. *Hedrick*, Oklahoma Supreme Court, Nov. 11, 1978, *Family Law Reporter*, Vol. 4, at p. 2076.

[27] See Reference to the Act's 'spreading influence' in *Family Law Reporter*, Vol. 4, at p. 1129 (1978).

[28] For the theoretical bases of this view, see New York ex rel. *Halvey* v. *Halvey, supra*, note 20, and *Sampsell* v. *Superior Court*, 32 Cal. 2d 763, 197 P.2d 739 (Supreme Court of California, 1948). Among recent decisions following this view, see *e.g. Rzeszotarski* v. *Rzeszotarski*, 296 A.2d 431 (District of Columbia Court of Appeals 1972) (father obtained custody of 7-year-old boy notwithstanding a conflicting prior decree of a Polish court and despite the fact that the son's visit was secured by deception); State ex rel. *Domico* v. *Domico*, 172 S.E. 2d 805 (West Virginia Supreme Court of Appeals 1970) (pre-divorce abduction of children from Germany); *Gil* v. *Servizio*, Massachusetts Supreme Judicial Court May 9, 1978, *Family Law Reporter*, Vol. 4, at p. 2505 (jurisdiction assumed although mother had taken children from custodial father in Michigan). See also *Spence* v. *Durham*, 198 S.E. 2d 537 (Supreme Court of North Carolina 1973).

[29] See *e.g. Forsyth* v. *Forsyth*, 546 P.2d 117 (Washington Court of Appeals 1976). On the clean hands doctrine, see Ehrenzweig, 'Interstate Recognition of Custody Decrees', *Michigan Law Review*, Vol. 51, p. 345 (1953).

[30] See S.1437, 95th Congress, 2d session, pp. 346-348, as passed by the United States Senate in 1978. The bill was not passed by the House of Representatives. Preparations are currently under way for the reintroduction of the full faith and credit provisions and other child custody provisions of S.1437 in the next session of the Congress.

[31] Jurisdiction may continue somewhat longer under the strong contacts standard of section 3 of the Uniform Act.

tional requirements of the Act, UCCJA states will recognize and enforce state 1's custody decree (section 13). The conflicting second decree of state 2 will be denied recognition by UCCJA states whenever state 1 had exclusive continuing jurisdiction and state 2 consequently was without jurisdiction to modify state 1's decree (section 14).
Practically speaking, as long as the abductor remains in state 2 with the child, the original custodial parent has no effective legal recourse. A Federal law requiring that full faith and credit be given by each state to the custody decrees of other states would solve the problem. As has been noted, the Congress of the United States is presently considering such a law[32]. Federal legislation along these lines while directly applicable only between the states of the Union, may have some influence on increasing comity recognitions of custody decrees of other countries by non-UCCJA states.
It must be emphasized that as long as there is no Federal legislation, the approaches of non-UCCJA states to the above fact situations are far less certain or predictable. As has been mentioned, an abductor from another state or another country may still find refuge in some 'haven states'.

E *Exit prohibition imposed on custodial parent*: Some courts do not permit the parent who has custody to leave the state with the children. The restriction has the purpose of preserving the jurisdiction of the state in the custody matter and of safeguarding the visitation rights of the other parent. As has been mentioned before, the Uniform Act preserves the continuing jurisdiction of the court in question by requiring other states to respect it. Moreover, the Act requires other states to enforce the visitation rights of the custody decree, with adjustments, if necessary to fit the changed geographical situation[33]. Moving prohibitions, assuming they are legal[34] in a world 'as mobile and nomadic as ours'[35], would therefore no longer serve an important need, once legal provisions similar to the Uniform Act are in force.

Concealment

There is a sixth problem which is becoming all too common – the taking and concealment of a child by a parent before or after a custody decree. Until it is known to which state and locality a child has been taken, the Uniform Act's recognition and enforcement provisions cannot begin to operate. This problem requires additional measures, such as governmental locating services, and court orders directing court personnel or other officials to take the child from the fugitive parent. The child would be returned to the custodial parent, or, if there is no custody order, could be placed with the other parent pending a determination of custody in the proper court. The co-operation of governmental agencies in other states would, of course, be imperative.
California has recently enacted a parent locator law providing for state detection services to find abducting parents. The same law charges district attorneys (the prosecuting attorneys of California counties) with the responsibility of locating absent parents and children with the help of the state locator service[36]. The Federal legislation which is under consideration by the United States Congress would make Federal locating services to find abductors available to the states[37].

Question 10

The Uniform Act incorporates the 'clean hands' principle and the inconvenient forum principle (see Dyer Report, *supra*, p. 49). Both principles are applied in non-UCCJA states to varying extents[38].

a Clean hands rule

Section 8 (*a*) of the Uniform Act permits a court to decline the exercise of jurisdiction if there is no prior custody decree and the petitioner has 'wrongfully taken the child from another state'[39]. This provision is of limited practical importance. Ordinarily the parent who is left behind in the home state will initiate custody proceedings in that state (section 3(*a*)(1)). If proceedings are pending in the home state or a custody decree has been entered in that state, a second state does not have jurisdiction to hear the petitioner or modify the out-of-state decree (sections 6(*a*) and 14). Only if the other parent has delayed proceedings at home for more than 6 months and the forum state has become the home state, would there be an occasion for the application of this section 8(*a*).
Section 8 (*b*) requires a court to decline jurisdiction 'unless required in the interest of the child', if the petitioner has abducted the child from the parent who has custody under a court decree or has retained the child after visitation. This provision also is not often applied because the non-modification rule of section 14 keeps the abductor out of a court in another state.
However, when the continuing jurisdiction of the state of the custody decree has ended, for example, because both parents and the child have taken up residence elsewhere, this provision comes into operation to deny court access to an abductor, if appropriate. Although the section is couched in mandatory language, it is clear from the 'best interests of the child' exception that there will be occasions when a second state may assume jurisdiction. This would be true, for example, if the second state is the only one that can meet the jurisdictional requirements of section 3[40].
The clean hands section as well as other provisions of the Uniform Act provide for the imposition of travel expenses, attorneys' fees and other expenses on the abducting parent when the other parent is obliged to litigate or enforce a custody decree in a distant forum (sections 7(*g*), 8(*c*), 15(*b*)). A recent California amendment has added a notification requirement whenever a petitioner is turned away from a court under the clean hands rule or the non-modification rule of section 14. Upon declining or denying jurisdiction, the court must notify the other parent and the prosecuting attorney of the state with jurisdiction, and in a proper case must return the child to the other parent[41].

b Application of doctrine of forum non conveniens

Under the Uniform Act a court may decline to exercise

[32] See note 30, *supra*.
[33] See Bodenheimer, 'Progress Under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody, and Excessive Modifications', *California Law Review*, Vol. 65, at pp. 997-998 (1977).
[34] A New York court recently questioned the power of courts to enjoin the custodial parent's removal of children to another country 'in today's society with its sophisticated concepts of due process.' *Y. v. Y.*, 403 N.Y.S. 2d at 857 (Family Court, New York City, 1978). See also pp. 90-91 *infra*.
[35] Justice Jackson of the United States Supreme Court spoke of 'a society as mobile and nomadic as ours' in 1948. *Estin v. Estin*, 334 U.S. 541, at p. 553.
[36] Chapter 1399, California Laws 1976, codified in California Welfare & Institutions Code, section 11478, 11478.5, and California Civil Code, sections 4604, 4605. The same law made California's criminal child abduction law more stringent. See California Penal Code, sections 278, 278.5. See note 13, *supra*. Information on experience with the civil locating functions of the district attorneys is not yet available.
[37] See S. 1437, *supra*, note 30, at pp. 360-361.
[38] See *e.g. Forsyth v. Forsyth supra*, note 29.
[39] Wrongful taking under this provision covers the removal of a child from the other parent without consent even though both parents have equal custody rights until there is a court decree. See *Rosefield v. Rosefield*, 221 Cal. App. 2d 431, 34 Cal. Rptr. 479 (1963) where the Court stated: 'If one parent makes away with the offspring . . . and leaves the other parent . . . bereft of the means of enjoying any of the privileges of parenthood, it is folly to say that the decamping parent is merely exercising his 'equal right' to . . . custody'. The father's removal of the child from the mother was held to be 'an invasion of the mother's legal right'. This provision does not require 'fraudulent intent' or 'fraudulent removal', see Dyer Report *supra*, pp. 27-49.
[40] The child may have no contact with the state to which the custodial parent has moved. It has been proposed that jurisdiction should follow the residence of the custodial parent wherever that parent moves. See Hudak, 'Seize, Run, and Sue: The Ignominy of Interstate Child Custody Litigation in American Courts', *Missouri Law Review*, Vol. 39, at pp. 547-548 (1974). This idea has not been adopted by the Uniform Act because it creates problems with respect to visitation rights.
[41] Chapter 1399, California Laws 1976, amending California Civil Code section 5157 (Uniform Act, section 8).

jurisdiction if it finds that another state is a more appropriate forum in the interest of the child (section 7). Among the factors to be taken into consideration in making a finding of inconvenient forum are the following: (1) another state is or recently was the child's home state; (2) another state has a closer connection with the child and his family; (3) substantial evidence concerning the child's care and personal relationships are more readily available in another state; (4) the parties have agreed on another forum which is no less appropriate; and (5) the exercise of jurisdiction by the court would contravene the general objectives of the Act.

The general objectives of the Act are listed in section 1. Major objectives there enumerated are the deterrence of abductions and other unilateral removals of children undertaken to obtain custody awards; and the discouragement of continuing controversies over child custody in the interest of greater stability of home environment and secure family relationships for the child.

The inconvenient forum rule could thus be invoked to deny a hearing to an abductor. In this respect the rule overlaps with the clean hands rule which might well have been made a part of the *forum non conveniens* provision (see Dyer Report, *supra*, pp. 49-50).

The inconvenient forum rule is of great practical significance. Courts have already found the rule to be particularly useful when the child, who has lived with the custodial parent in another state for several years, returns to the state of continuing jurisdiction for a visit. There is a risk that the non-custodial parent, taking advantage of the continuing jurisdiction of the court, may then attempt to obtain custody with motives no dissimilar to those of an abductor. Courts in Oregon and California have realized that their resumption of jurisdiction under the circumstances might lead to an overemphasis of the evidence presented by the parent who remained a local resident and could be detrimental to the child whose ties with the new state are much closer. They have declined to reassume jurisdiction in such cases[42].

Exchange of information and co-operation among courts of several states

The inconvenient forum provision and other provisions of the Uniform Act stress the need for direct communication, mutual assistance, and exchange of information among courts of several jurisdictions concerned with the same child (*e.g.* sections 1, 6, 7, 16, 19, 20). As far as can be determined, this important objective of the Uniform Act has not yet begun to be carried out. One case under the Uniform Act has been discovered in which co-operation between courts was achieved, albeit in a roundabout, indirect manner[43].

The framers of the Uniform Act had envisaged that national or regional judicial conferences would develop the necessary mechanisms for court-to-court contact (see Commissioners' Prefatory Note). However, in a legal system where court action is normally initiated by the attorneys for either side[44], the co-operation provisions of the Uniform Act represent a legislative innovation that may take time to become accepted and implemented. It is conceivable that the appointment of an attorney for the child[45] may be of some help in coordinating the efforts of two or more states concerned with the same child.

Question 11

a During the marriage mother and father have joint custody of their children in the United States.

b Upon divorce or legal separation, custody is normally awarded to either parent according to the best interests of the child. A minority of states still give preference to the mother when the child is 'of tender age' but the trend is toward the elimination of this discriminatory rule[46]. In recent years some couples have obtained joint custody upon termination of the marriage. Since this custodial arrangement requires an extraordinary degree of co-operation between former spouses, courts may accept joint custody agreements worked out by the parties, but generally refuse to impose this type of custody over the objection of one parent[47]. If one of the joint custodians moves to another state or another country with the child without redetermination of custody prior to departure, the legal situation is exactly the same as if no custody decision had ever been made[48].

Attempts are being made to give the 'best interests principle' some concrete content. The Uniform Marriage and Divorce Act lists some of the factors that should be considered in the process of custody decision-making. These factors include the wishes of the parents; the wishes of the child; the relationship of the child with his parents, siblings, and other relevant persons; the child's adjustment to home, school, and community; and the mental and physical health of all persons involved. Significantly, 'conduct of a proposed custodian that does not affect his relationship to the child' is not to be considered by the court (section 402). A considerable number of states which have recently revised their divorce laws have adopted these or similar guidelines or have elaborated on them[49].

Modification of custody

Courts in most states do not modify a custodial arrangement, unless circumstances have changed or facts have come to light which were unknown to the court at the time of the initial decree[50]. Since there has been a tendency to move children too readily from one parent to the other, the Uniform Marriage and Divorce Act proposes a more stringent rule: upon a petition for a change of custody, the court is to continue the child in the custody of his present custodian, unless the petitioner can prove (1) that the child's present environment is dangerous to the child's physical, mental, moral, or emotional health, and (2) that 'the harm likely to

[42] See *Moore* v. *Moore*, 546 P.2d 1104 (Oregon Court of Appeals 1976); *Schlumpf* v. *Schlumpf*, 79 Cal. App. 3d 892, 145 Cal. Rptr. 190 (1978); *Clark* v. *Superior Court*, 73 Cal. App. 3d 300, 140 Cal. Rptr. 709 (1977). Arizona reached the same conclusion before the Uniform Act was passed in that state: *Graton* v. *Graton* 537 P.2d 31 (1975), declared that since the children now resided with the custodial mother in New Hampshire, where the father picked them up every summer for a visit in Arizona, courts in Arizona should under no circumstances exercise their continuing jurisdiction to hear the father's petition for a change of custody. 'To do so would condone kidnapping', the Court said and would hamper 'the free and unbridled exercise of visitation rights from a sister state'. New Hampshire would be the proper forum, if the father wishes to petition for a change of custody, the court held.

[43] *Fry* v. *Ball*, 544 P.2d 402 (Colorado 1975). In this case the Supreme Court of Colorado offered to co-operate with the California court which had continuing jurisdiction. Since the child involved was in some danger, the Court permitted the grandmother in Colorado to retain the child for 50 days under condition that she seek a modification of the prior decree in California. The grandmother in fact applied for a change of custody in California, submitting the decision of the Supreme Court of Colorado. As a result, California declined further exercise of its jurisdiction in favour of Colorado. See Bodenheimer, *supra* note 33, at pp. 990-992. It should be added that long before the advent of the Uniform Act, judicial co-operation on the international level, between New Jersey and France, was envisaged by a New Jersey court. See *Levicky* v. *Levicky*, 140 A.2d 534 (N.J. Super. 1958). In this case the father had taken the couple's 4-year-old son from France to the United States prior to a French judgment of divorce granting the mother custody. The mother's action for the return of the boy 5 years after his removal resulted in a negotiated agreement providing for a one-year visit in France as an interim solution. The New Jersey court incorporated this agreement into its order, which was to become effective upon modification by the French court in question of its earlier order to conform to the parties' agreement.

[44] See R.B. Schlesinger, *Comparative Law*, at pp. 301-302 (3d ed. 1970).

[45] Twenty-four jurisdictions in the United States have statutory provisions relating to separate legal representation of the child in custody disputes. See Note, 'Lawyering for the Child: Principles of Representation in Custody and Visitation Disputes Arising from Divorce', *Yale Law Journal*, Vol. 87, at p. 1127 (1978).

[46] See Foster & Freed, *supra* note 2.

[47] See *e.g. Braiman* v. *Braiman*, 407 N.Y.S. 2d 449, 378 N.E. 2d 1019 (New York Court of Appeals 1978); *Dodd* v. *Dodd*, 403 N.Y.S. 2d 401 (Sup. Ct., New York County 1978). See generally, Foster & Freed, 'Joint Custody: A Viable Alternative?', *New York Law Journal*, Nov. 9, 1978, at p. 1, Nov. 24, 1978, at p. 1, and December, 1978.

[48] See Bodenheimer, *supra* note 33, at pp. 1011-1012.

[49] See Foster & Freed, 'Divorce in the Fifty States', *Family Law Reporter*, Vol. 4, at p. 4039 (August, 1978).

[50] See *e.g.* Clark, *The Law of Domestic Relations in the United States*, at p. 600 (1968).

be caused by a change' is 'outweighed by the advantage of a change to the child' (section 409)[51].
Some states have adopted this provision[52] and in other states there is an increasing judicial reluctance to permit custody modifications without powerful proof of the child's need for a change[53].

c Upon the death of one of the parents during an existing marriage, the other parent continues as the sole custodian of the child. If the custodial parent dies after divorce, the non-custodial parent, as a rule, obtains custody of the child. There are some exceptions to this rule. For example, if the custodial parent had remarried and the child had lived with that parent and a stepparent for a considerable period of time in a stable home environment, a court may award custody to the stepparent, if it would be detrimental to the child to move him to the surviving parent[54].

d When there is a dispute over custody between a parent and a non-parent, as in the case of the stepparent just referred to, or between a long-term foster parent and a parent, the rule is that the parent has primary custodial rights. In some states parental rights are absolute, unless the parent is proved unfit, but in the majority of states today a foster parent may, depending on the particular circumstances, receive custody if the child had little or no contact with the parent and is living in a wholesome and stable environment[55].
If the parents are dead, or there is no parent able or willing to care for the child, a guardian may be appointed or the juvenile court may place the child in a foster home. In a dispute between non-parents, some courts may give preference to relatives, but courts generally decide according to the best interests of the child[56].

Questions 12 and 13

United States law does not assign custody to the parent of either sex by operation of law.

Question 14

In awarding custody upon divorce, some courts will take the age of the child into consideration as one factor among others, or not at all. Other courts continue to feel that a very young child should ordinarily live with the mother. Except in the minority of states where the 'tender years' rule is still alive, there are no definite rules with respect to the age of the child.

Question 15

In most states the child's wishes as to custody are considered by the court, if the child is old enough to form an intelligent opinion. In a few states the preference of a 14-year-old must be followed; in the other states the child's wishes are given progressively greater weight as the child grows older and more mature. Few judges nowadays will disregard the wishes of a teenager as to custody and visitation[57].
Instances in which outright abductions have been instigated or encouraged by the child have not, as far as could be determined, come to public attention in the United States (see Dyer Report *supra*, p. 21). But children do at times refuse to return to the custodial parent after a visit and thereby encourage their retention by the non-custodial parent in violation of a custody decree. Also, it is not unheard of for a child simply to run away, using any mode of transportation, including air travel, to live with the other parent. In such cases the custodial parent may accept the change as a *fait accompli*, particularly if the child is old enough to make some decisions for himself.

Question 16

a Court orders

Courts in the United States assume that they have inherent power to order the custodial parent to keep the child within the state or the country (see p. 88, *supra*). Some states have specific statutory provisions granting this power to the courts[58]. The exercise of the power is within the sound discretion of the courts: some courts readily issue restraining orders to prohibit moving with the child while others use such restraints more sparingly. Once a moving restriction has been issued, the court generally reserves the power to permit a change of residence, if good reasons are advanced to justify the move.
Permission to move to another state or another country is frequently granted and perhaps just as frequently withheld[59]. When permission is given, visiting plans are usually adjusted to fit the new situation, often including the allocation of transportation expenses and the posting of bond to guarantee compliance with visiting requirements[60]. When the original custody decree contains no moving restrictions, some courts treat the addition of exit restraints at a subsequent time as a modification of the original decree, hence place the burden on the non-custodial parent to show detriment to the child if the move takes place[61].
Since it is impossible to predict with any degree of certainty when moving will be prohibited or permission to leave granted, the apprehension of a restraining order causes many custodial parents to move in secret and without agreement on changed visitation schedules. Judging from many known instances in reported cases in which moving restrictions have been disregarded, it must be concluded that judicial moving restrictions are often not effective to keep the child within a particular state or country. On the contrary, such restraints may fan the flames of conflict and cause more abductions and counterabductions than they prevent[62].
Whether punitive measures to discipline the parent who disobeys a moving restriction lead to increased compliance,

[51] The rule does not apply if the custodian agrees to the modification, or the child has been integrated into the family of the petitioner with consent of the custodian. The consent requirement was added in order to 'avoid encouraging ... kidnapping'. Commissioners' Note to section 409.
[52] For example, Colorado, Washington, and Montana. In the interstate context this means that even a non-UCCJA state may not modify custody decrees of these states, unless the stringent prerequisites of section 409 are met. See *supra* note 20.
[53] For example, in Oregon, Alaska, and New Hampshire. See *Warren* v. *Warren*, 528 P.2d 1088 (Oregon Court of Appeals 1974); *Horton* v. *Horton*, 519 P.2d 1131 (Alaska Supreme Court 1974); *Forde* v. *Sommers*, 373 A.2d 358 (New Hampshire Supreme Court 1977).
[54] See Clark, *supra* note 50, at 594-595.
[55] See *e.g.* California Civil Code, section 4600; *In re B.G.*, 11 Cal. 3d 679, 114 Cal. Rptr. 444 (California Supreme Court 1974); *Bennett* v. *Jeffreys*, 387 N.Y.S. 2d 821, 356 N.E. 2d 277 (New York Court of Appeals 1976).
[56] See Clark, *supra* note 50, at p. 596 *et seq.*
[57] See Clark, *supra* note 50, at p. 596 *et seq.*
[58] For example, Wisconson and Minnesota.
[59] In recent international cases custodial mothers were permitted to move to Norway and to Scotland whereas a mother who had custody was prohibited from moving to Australia with the child. See *Bergstrom* v. *Bergstrom*, Supreme Court of North Dakota, Oct. 16, 1978, *Family Law Reporter*, Vol. 5, at p. 1001 (custodial mother's move to Norway, with 7-year-old child, permitted by District of Columbia Court, not to be disturbed by North Dakota under Uniform Act); *Bolenbaugh* v. *Bolenbaugh*, 237 N.W. 2d 12 (Supreme Court of South Dakota 1975) (mother, who intended to return to her native Scotland with 5-year-old daughter, received custody 'without restriction as to her place of residence ... within or without the State ... or the United States of America'); *O'Shea* v. *Brennan*, 387 N.Y.S. 2d 212 (Sup. Ct., Queens County, New York 1976) (joint custody changed to father because of mother's impending move to Australia with second husband).
[60] See *e.g. Sweet* v. *Rose*, 269 N.Y.S. 530 (Supr. Court, Appellate Division, New York 1966) (father's custody of 4 children to be retained notwithstanding his move to Wyoming, subject to summer and Christmas visits in New York and the posting of reasonable security to assure compliance with mother's visitation rights).
[61] See *e.g. In re Lower*. Iowa Supreme Court, Sept. 20, 1978, *Family Law Reporter*, Vol. 5, at p. 2005; *Spencer* v. *Spencer*, 270 N.E. 2d 72 (Illinois Appellate Court 1971).
[62] See Bodenheimer, 'Equal Rights, Visitation, and the Right to Move', *Family Advocate* (published by American Bar Association, Family Law Section), Summer 1978, pp. 19-21.

is difficult to tell. Some courts will punish the custodial parent by modifying the original custody decree so as to transfer custody to the other parent[63]. In the past, courts of other states have refused to recognize and enforce punitive changes because they disrupt the child's life with the custodial parent[64]. While the Uniform Act does not expressly except punitive modifications from its recognition and enforcement requirements, the Commissioners' comments make it clear that no change in the prior law was intended[65]. Courts in Oregon have already so interpreted the Uniform Act[66]. Nevertheless, it is conceivable that some courts will enforce all custody orders of other states and countries under the Uniform Act, including punitive modifications. Thus the passage of the Uniform Act may encourage increased use of punitive decrees with the expectation that they will be enforced and in turn deter custodial parents from disregarding a moving restraint, submitting to confinement within one state or country until the child becomes of age.

The question whether the court exit prohibitions themselves are compatible with the freedom to move guaranteed under the United States Constitution has not been decided by the United States Supreme Court. While continued contact of the child and the non-custodial parent is an important state objective, the question is whether there is a right to visits in a particular locality which overrides conflicting interests of the child and the custodial parent[67]. An answer to this question will probably not be forthcoming in the near future.

b Passport regulations

Under Federal regulations issued by the Secretary of State pursuant to statutory authority[68] the passport issuing office will refuse to issue a passport to a minor when there is a controversy concerning the minor's custody and an objection is received from the parent who has custody by court order. The court order must be submitted by the objecting parent (Code of Federal Regulations, Title 22, section 51.27 (*e*)). Little is known about the effectiveness of this regulation to prevent abductions by the non-custodial parent[69].

Question 17

Courts in the United States traditionally apply their own law in child custody cases.

Question 18

Since the courts normally apply their own law, it is unlikely that the question will arise in connection with choice of law. However, in connection with the enforcement of custody decrees of other countries, a problem could arise under the equal protection clause of the United States Constitution (or under the Equal Rights Amendment, if passed) (see Dyer Report *supra*, p. 39). For example, if the custody decree presented for enforcement in the United States automatically gave custody to the father or mother by operation of the national law of the country where issued, courts in the United States might question their right to enforce the judgment on constitutional grounds. Similarly, a custody order entered in another country without giving adequate notice and opportunity to be heard to all parties, would face serious problems under the due process clause of the United States Constitution when an attempt is made to enforce the order in the United States.

Visitation and access

Question 19

Probably without exception, all states of the Union recognize the right of visitation of the parent who does not have custody[70]. Despite the problems involved, including the risk of abductions (see Dyer Report *supra*, pp. 41-43), courts in the United States are highly protective of this right. Exceptions are seldom granted and not without strong evidence that visits are seriously detrimental to the child[71]. The contrary viewpoint described in the Dyer Report (*supra*, p. 41), which would leave visits entirely up to the decision of the custodial parent[72] is not followed by the courts[73].

Question 20

When parents cannot agree, it is up to the courts to decide within their sound discretion whether the child may visit the non-custodial parent in another country. Court permission is sometimes given and sometimes denied. Permission was granted by a California court, for example, to allow two girls, 13 and 11 years of age, to visit their father in South Africa for 6 weeks each summer in the 1960's. The father offered and was required to deposit in escrow shares of stock worth $175,000 as security for the return of the children. In addition, the father filed with the American Consul General at Johannesburg a written consent that the daughters leave South Africa at the end of each summer's visiting period and arranged with an airline for the return trip to the United States each year[74].

The posting of a bond or other security to insure the return of the child is a common prerequisite to the child's visit in another state or another country.

If a child from another country is visiting in the United States, courts in states with the Uniform Act will enforce the right of the custodial parent to have the child returned (UCCJA sections 13, 23).

Question 21

Courts often stress the importance for the child to have contact with both parents, but do not, as a rule, speak of the child's *right* to regular visits with the parent who does not have custody. A child's refusal to visit the non-custodial parent has, however, been respected by some courts[75].

[63] See *e.g. Fritschler* v. *Fritschler*, 208 N.W. 2d 336 (Supreme Court of Wisconsin 1973); *Entwistle* v. *Entwistle*, 402 N.Y.S. 2d 213 (Sup. Court, Appellate Division, New York, 1978).

[64] See Ehrenzweig, 'Interstate Recognition of Custody Decrees', *Michigan Law Review*, Vol. 51, at pp. 370, 373-74 (1953); *Berlin* v. *Berlin*, 21 N.Y. 2d 371, 235 N.E. 2d 109 (Court of Appeals, New York 1967).

[65] See Commissioners' Notes to sections 13 and 14.

[66] See *e.g. Brooks* v. *Brooks*, 530 P.2d 547 (Oregon Court of Appeals 1975).

[67] The Iowa Supreme Court stated in *In re Lower*, note 61, *supra*: 'While there is much to be said for the maintenance of visitation rights by the non-custodial parent [citations], the interests of the custodial parent and the child may be overriding.' See also Krause, *Family Law in a Nutshell*, at pp. 263-64 (1977). Hoffman, 'Restrictions on a Parent's Right to Travel in Child Custody Cases: Possible Constitutional Questions', *Univ. of Calif. Davis Law Review*, Vol. 6 at pp. 181-194 (1973).

[68] United States Code, Title 22, section 211*a*.

[69] Recently a mother was able to have the passport of her 7-year-old son revoked after the boy had been taken abroad by his father. *Morgan* v. *Vance*, United States District Court, Northern District, California, February 10, 1978, *Family Law Reporter*, Vol. 4, at p. 2252. (The decision was based on Code of Federal Regulations, Title 22, section 51.27(*e*) in combination with section 51.70 and 51.71.) The mother has not found the child yet. Telephone conversation with Ann Morgan, October, 1978.

[70] See Clark, *supra* note 50, at 590. See also Uniform Marriage and Divorce Act, section 407.

[71] *Id.*; *Kresnicka* v. *Kresnicka*, 345 N.Y.S. 2d 118 (Sup. Ct., Appellate Division, New York 1973) (visitation not to be denied despite mother's fear that father might take the 8-year-old boy to Czechoslovakia, but father must leave his passport with the mother during visits); *Vilakazi* v. *Maxie*, 357 N.E.2d 763 (Supreme Judicial Court of Massachusetts 1976) (visitation denied to mother after 'captures and recaptures' of 3-year-old daughter which caused physical and emotional suffering to the child).

[72] See Goldstein, Freud & Solnit, *Beyond the Best Interests of the Child*, at p. 38 (1973).

[73] While the book has had considerable influence on custody decisions, courts consider some of its recommendations to be controversial and unacceptable. See *e.g. Veasy* v. *Veasy*, 560 P.2d 382, at footnote 4 (Supreme Court of Alaska 1977). *Cf. Smith* v. *Organization of Foster Families*, 97 S. Ct. 2094, at footnote 52 (Supreme Court of the United States 1977). See also Krause, *Family Law in a Nutshell*, at p. 262 (1977).

[74] *Milne* v. *Goldstein*, 202 Cal. App. 2d 582,20 Cal. Rptr. 903 (1962). See also *Grassi* v. *Grassi* (Sup.Ct., Appellate Division, New York 1972) (father permitted to take children to Italy for a month's visit upon posting a $ 10,000 bond).

[75] *Cf. Cooper* v. *Cooper*, Illinois Supreme Court, Apr. 18, 1978, *Family Law Reporter*, Vol. 4, at p. 2417. *Lester* v. *Lester*, 277 A.2d 503 (Supreme Court of New Hampshire 1971).

Questions 22 and 23

There is no doubt that both the occasion of a visit and the frustration of visitation may contribute to child abductions (see Dyer Report *supra*, pp. 41-43). The exercise of the visiting right which places the child under the immediate physical control of the visiting parent probably creates the greater risk, but denial of visitation has also brought on abductions. Of course, there are many cases in which children are returned year after year after visits without any untoward events, and there are perhaps even more cases in which the non-custodial parent who has been prevented from seeing the child would not think of considering an abduction. The difference seems to lie in the attitude of the parents towards each other, and above all in the degree of hostility engendered during and after the marriage. (See *infra* question 24*a*).

Existing non-treaty remedies

Question 24

a Custody counseling

It has been said that 'the war against child kidnapping must be won, first and foremost, in the minds and hearts of the parents concerned'[76].

In the United States increasing numbers of courts refer divorcing parents to court conciliation departments or other agencies to inform and counsel them as to their ongoing parental roles and responsibilities after the termination of the marriage. In addition, parents who continue to quarrel over visits or custody changes, often for years after divorce, receive similar counseling assistance. It has been the experience of courts which avail themselves of such services that a major accomplishment of good, professional counseling is the defusing of hatred and hostility of the parents towards each other and the direction of their attention towards the interests and needs of their children. Agreement on custody is reached in a considerable number of cases and visitation problems are often settled, or settled for the time being. Parents can return for further consultation as the need arises. This service often reduces or completely eliminates the parents' return to the courts for relitigation of custody or visitation[77]. Naturally, the inclination to abduct does not arise when preventive counseling has been successful.

b Tort action seeking damages for abduction or false imprisonment

A Federal court in New York recently awarded some $180,000 in damages to a mother and her three-year-old son for the abduction and false imprisonment of the boy by his father, who took him to Yugoslavia. Additional damages accrue for each day of withholding the child. The suit was brought against the father and two of his relatives in New York who had aided in the abduction[78]. A tort action of this type may have a deterring effect, particularly when persons who participated in the abduction remain in the country where the kidnapping occurred.

c Criminal prosecutions

A number of states have recently added or strengthened penal laws applicable to child stealing by parents[79] (see Dyer Report *supra*, pp. 43-44). Also, the Federal bill referred to before would make 'criminal restraint of a minor child by a parent' a Federal offense[80]. Prosecutions under the state laws, including extradition requests, have become more numerous within the last year or two[81].

Possible treaty remedies

Question 25

a In view of the fact that 28 of the 50 states of the Union already recognize and enforce the custody decisions of other nations which have a proper jurisdictional basis (under UCCJA section 23), it is quite likely that the United States will favour similar treaty provisions. The current consideration by the United States Congress of a bill to require the enforcement of custody decisions of sister states throughout the nation is a further indication that enforcement of custody decrees on a broader scale is contemplated. The House of Delegates of the American Bar Association in its Resolution of August, 1978 expressed its support for such Federal legislation.

b Reconsideration of the merits of a child custody decision by a higher tribunal would be unfortunate, as the Dyer Report (*supra*, p. 47) convincingly states. However, an international tribunal could authoritatively settle questions of alleged violations of the Convention, including matters of jurisdiction. In the practical application of the UCCJA in the United States the lack of a higher court to review jurisdiction is being felt, as each state decides for itself whether or not it has jurisdiction under the Act.

It is not clear, however, why the creation of a new international tribunal is being considered. It would seem that the existing International Court of Justice, which has had some experience with child custody matters[82], would be an excellent forum to be vested with jurisdiction by the proposed Convention to adjudicate questions of violations of the Convention.

c It would be highly desirable to provide for the prompt return of the child to the country from which the child was removed without a decision on the merits in the country to which the child was taken (see Dyer Report *supra*, pp. 47-48). If a court having proper jurisdiction had awarded custody to the other parent, the child should be returned to that parent. If no custody decree had been rendered before the removal, the child should be returned for adjudication of custody in the proper court of the country from which the child was taken[83]. If the child's whereabouts cannot be immediately determined (despite improved detection procedures, which are also needed), the same principles should apply, as soon as the child is found. Although it may be a hardship for a particular child to be removed from a long-term new environment (see Dyer Report *supra*, pp. 23, 39, 50), abductions coupled with elaborate schemes for concealments would be encouraged and promoted by the law, if steps to return the child were abandoned after prolonged absence of the child[84]. This does not mean that the adjudicating court, considering all the circumstances, would require the child to remain in the country from which he was taken.

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[76] Shapira & Siehr, 'The Jundeff Affair – Comparative Remarks on International Child Kidnapping and Judicial Cooperation', *Netherlands International Law Review*, Vol XXV, Issue 1, at p. 23 (1978).

[77] See e.g. Annual Report, Conciliation Court of Los Angeles County, 1976, at pp. 15-19; Gaddis, 'Divorce Decision Making: Alternatives to Litigation', *Conciliation Courts Review*, Vol. 16, at pp. 43-45 (1978).

[78] *Kajtazi* v. *Kajtazi*, *supra* note 11. See also *Rosefield* v. *Rosefield*, 221 Cal. App. 2d 431, 34 Cal. Rptr. 479 (1963) holding that mother and child may sue in tort for an abduction by the father that occurred before there was a custody decree. See note 39, *supra*.

[79] *E.g.* California, New Jersey, New York, and Oregon.

[80] See S. 1437, 95th Congress, 2d session, pp. 107-108 (1978). See note 30, *supra*.

[81] See notes 12 and 13, *supra*. A conviction for parental child stealing has been reported in Oregon. See *Family Law Reporter*, Vol. 4, at p. 2532 (1978). (The father was arrested in North Carolina where he was preparing to petition for a modification of custody. Under a North Carolina statute, presence of the child is sufficient to confer jurisdiction.)

[82] See the 'Boll' case, referred to in the Dyer Report (*supra*, p. 38).

[83] Removal from a parent with equal custody rights would be sufficient ground for such a provision. See note 39, *supra*.

[84] The New York Court of Appeals, well aware of the problem, decided to return children, who had been abducted by the mother, to the father after a lapse of 4 years. See *Nehra* v. *Uhlar*, 43 N.Y. 2d 242, 401 N.Y.S. 2d 168 (1977).

d It would be highly desirable to designate an exclusive jurisdiction for international child custody cases (see Dyer Report *supra*, p. 49). The most appropriate exclusive jurisdictional criteria would appear to be the following:

1 the child's habitual residence; or

2 the child's former habitual residence
(*i*) if the child has been abducted from his habitual residence with the parent who has custody by court order, or
(*ii*) if the child has been removed from his habitual residence prior to the institution or completion of custody proceedings.

e-f A combination of both provisions would be useful (see Dyer Report *supra*, p. 49). This subject has been discussed in connection with the UCCJA (pp. 88-89 *supra*).

g The reason why various states (and perhaps the Federal Government) in the United States are turning to criminal prosecutions of child abductions, may perhaps be found in the absence of adequate administrative channels for the return of abducted children. There is a definite need for administrative machinery to assure international co-operation.
The use of one single Central Authority, presumably within the Federal Government, to locate children, facilitate their return and carry out the other functions described by the Dyer Report (*supra*, pp. 28, 50-51) may not be completely practicable in a country as vast as the United States. It might be possible that the Departments of Justice (or Offices of the Attorney General) of the various states be directly or indirectly involved in this important aspect of international co-operation in child abduction cases. Passport restrictions are under the jurisdiction of the United States Passport Office in the Department of State.

Question 26

The Dyer Report covers the subject quite exhaustively. At the present time no other possible methods of dealing with child abductions are recommended, except the possible exhortation of participating governments to institute or expand the use of custody counseling facilities to prevent abductions. The need for such preventive services has been well stated by Shapira and Siehr in the Netherlands International Law Review:

International judicial co-operation is but a poor substitute for arduous and efficient efforts by municipal family counsellors, child psychologists, social workers, judges and lawyers to prevent kidnapping, by properly counselling bewildered parents trapped in the unhappy situation of a family dispute. We feel that such a professional preventive assistance on a personal basis and at the pre-kidnapping phase should precede and augment remedial international judicial co-operation at the post-kidnapping stage[85].

Note by the Permanent Bureau

A copy of the Uniform Child Custody Jurisdiction Act *with Commissioners' Notes was attached as an annex to the original American Reply submitted to the Permanent Bureau.*

[85] Shapira & Siehr, *supra* note 76.

Legislative texts, documents and law review articles, annexed to the Replies of Member States to the Questionnaire have not been included with the collected texts of the Replies, Preliminary Document No 2, *because of their length. The Permanent Bureau of the Conference retains copies in its files.*

Finlande/Finland

Sociological information

Question 1

Although no figures are available, it seems probable that the frequency of occurrence of cases of child abduction by parents has increased. However, cases of child abduction to another country do not so far seem to be very frequent.

Question 2

One reason is most probably the fact that the frequency of marriages and of cohabitation without marriage between persons of different nationalities has increased.

Question 3

No.

Question 4

No.

Question 5

Finland is a Party to the Convention between Finland, Denmark, Iceland, Norway and Sweden on Marriage, Adoption and Guardianship of 6 February 1931 (126 LNTS 121, 141-149). This Convention contains provisions on recognition of custody decisions given in another Nordic State but no provisions on enforcement of such decisions.
Moreover, Finland is a Party to the Convention between Finland, Denmark, Iceland, Norway and Sweden on Enforcement of Judgments in Civil and Commercial Matters of 11 October 1977. The uniform Nordic legislation based on this Convention contains provisions on enforcement of custody decisions given in another Nordic country. Iceland has not, however, so far ratified this Convention.

Question 6

Since the uniform legislation mentioned above has been in force for only one year, we do not have experience enough to answer this question.

Question 7

Finland is a Party to the International Covenant on Civil and Political Rights.

Question 8

No.

Legislation and case law

Question 9

This question is quite difficult to answer because of lack of any provisions in the law and a consistent court practice. At

least jurisdiction will be assumed when one parent and the child have their habitual residence in Finland.
Besides this case, it seems to be probable that Finnish courts would assume jurisdiction also in the following cases:

a the defendant has his habitual residence in Finland;

b both parents are Finnish nationals and either of the parties has his habitual residence in Finland.

Question 10

No.

Question 11

The following principles govern the assigning of legal custody in Finnish law:

a During the marriage of the parents both of them are jointly guardians and custodians over the child.

b The guardianship and custody of the child shall be assigned to the parent who is deemed to be more suitable with regard to the welfare of the child.

c If the guardianship and custody before the death of the parent were exercised jointly by both parents, the surviving parent will remain as guardian and custodian. If the custody was granted only to the deceased parent by a court order, the surviving parent who was deprived of custody, does not automatically become custodian. However, the custody of the child can be given to the surviving parent by a court order if this is deemed to be in the interest of the child.

d If the child was born out of wedlock, the mother alone has custody. However, the custody of the child can be given to the father by a court order if the parents agree that he shall have the custody.

Question 12

No. Both parents have in these cases together control over the care and education of the child by operation of law. However, the father alone has the power to represent the child before tribunals and other public authorities (*e.g.* in bringing an action in law courts, in applying for a passport).

Question 13

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Question 14

No.

Question 15

A judgment or other decision concerning the question which one of the parents shall have the custody of the child, or concerning rights of access or visitation may not be enforced if the child objects to it on condition that the child has reached the age of fifteen. This rule shall also apply to a younger child on condition that the child is so mature that attention can be paid to his opinion.
These provisions will in practice be taken *mutatis mutandis* in consideration by the law courts when deciding on the award of custody or rights of access.

Question 16

No.

Question 17

Acording to the present Finnish law the applicable law is the law of the nationality of the child, but the application of this statutory rule has to a certain extent been set aside by recent court practice. Since the best interest of the child is deemed to be a fundamental principle of Finnish law, the courts will apply Finnish law instead of the applicable foreign law if the latter is not considered to comply with this basic requirement (*e.g.* decision of the Supreme Court of Finland, 5 September 1978, *Gonzales* v. *Gonzales*).

Question 18

No.

Visitation and access

Question 19

Yes. Access can only be denied if it would be against the welfare of the child.

Question 20

In principle, yes, if the court has not decided the place where the right to access should be exercised. However, the child cannot obtain a passport without the consent of the parent who is custodian.

Question 21

No. The legislation is based on the principle that the right of access means a claim of the parent who does not have the custody against the parent or other person having the custody.

Question 22

Yes. The exercise of visitation rights may contribute to child abductions in some cases, especially when the parents are of different nationalities and resident in different countries.

Question 23

Yes, in some cases, especially when the emotional ties between the child and the parent deprived of custody are very strong and the parent has been denied the right of access.

Existing non-treaty remedies

Question 24

When a procedure concerning the enforcement of a custody decision is pending before the enforcement authority and there is a risk that the child will be brought out of the country or from one place to another, this authority may decide that the child immediately shall be temporarily placed in a public institution until the decision is given in the enforcement case.

Possible treaty remedies

Question 25

The question of child abduction seems to be so complex that the use of only one of the above-mentioned methods would probably not be sufficient. From our point of view the types of methods mentioned in items *a*, *c*, *d*, *e* and *g* seem to be the most appropriate. However, the use of the type of method mentioned in item *e* might be difficult to carry out because of practical reasons. Also granting to the courts the discretion to apply the doctrine of *forum non conveniens* would probably cause difficulties in civil law countries because of the wide discretion which a rule based on the principle of *forum non conveniens* would give to the national judge. The creation of an international tribunal would hardly be acceptable to several Member States, especially because this method would cause several difficult problems from the point of view of constitutional law.

Observation liminaire

Le Ministère de la Justice français, depuis plusieurs années, se préoccupe des problèmes que pose la protection de la personne des mineurs dans les relations internationales, notamment, lorsque leur résidence habituelle a été déplacée sans droit d'un pays dans un autre. Ces déplacements dont la multiplication constitue un fléau, entraînent fréquemment, en effet, sur le plan humain des conséquences dramatiques en même temps que sur le plan juridique des situations irréversibles.

Un service de parquet central international, le Bureau de l'Entraide judiciaire internationale, a été chargé de suivre les dossiers de déplacement d'enfants pour faciliter, par ses interventions, la reconnaissance et l'exécution des décisions de justice rendues sur la garde en France comme à l'étranger.

La réponse française au questionnaire diffusé par le Bureau Permanent de la Conférence de La Haye de droit international privé a été établie après consultation des cours et tribunaux auxquels avait été adressé préalablement un exemplaire du Rapport.

Les cinq types de situations considérés comme des enlèvements d'enfants décrits dans le questionnaire paraissent bien recouvrir l'ensemble des cas de déplacements d'enfants à l'étranger, tels qu'ils se rencontrent dans la pratique. Toutefois, la question reste posée de savoir si la situation des familles internationales divisées dont tous les membres ressortissent à une seule et exclusive nationalité ne devrait pas mériter un traitement particulier, voire privilégié sur le plan de l'exécution simplifiée des décisions judiciaires.

Informations de caractère sociologique

Question 1

Le Ministère de la Justice a constaté au cours de ces dernières années un accroissement sensible du nombre des cas de déplacements sans droit d'un enfant par l'un de ses parents.

Les statistiques de ce service portent sur les deux dernières années. C'est ainsi qu'au cours de l'année 1977, ce service a été saisi de 75 cas de déplacements internationaux alors que pour l'année 1978, ce nombre s'est élevé à 130.

Il convient de noter que la plupart de ces cas de déplacements se complique d'un refus d'exercice du droit de visite et d'hébergement et que c'est souvent au titre du refus de ce droit que l'action du Ministère de la Justice est sollicitée.

Ce chiffre, toutefois, ne rend pas compte du nombre réel des déplacements d'enfants. En effet, différentes considérations entrent en ligne de compte pour déterminer l'ampleur de ce phénomène, notamment:

1 Dans les zones frontalières, de nombreux cas de déplacements sont réglés à la suite d'une concertation spontanée et directe, de parquet à parquet, ce qui est le cas avec la République fédérale d'Allemagne, l'Italie, le Luxembourg, la Suisse et l'Espagne.

2 Dans les relations entre la France et la Belgique, les déplacements d'enfants par leurs parents sont assimilés par les parquets à des fugues de mineurs et sont réglés de ce fait par concertation des autorités judiciaires locales française et belge sur la base de l'arrangement franco-belge du 17 juillet 1925. Il s'agit là d'une extension purement prétorienne du champ d'application de cette Convention.

3 Un certain nombre de cas de déplacements sont résolus par les avocats eux-mêmes qui sont amenés à jouer un rôle de conciliateur entre les parents dans l'intérêt de l'enfant.

4 Les autorités judiciaires sont avisées fréquemment des cas de déplacements d'enfants à l'occasion de plaintes pour non-représentation d'enfants ou à la suite d'ouverture de procédure en assistance éducative devant le juge des enfants.

A titre purement indicatif, un rapprochement peut donc être fait entre le nombre des cas dont le Ministère de la Justice est saisi et le nombre total des condamnations pour non-représentation d'enfants que fournit le compte général de l'Administration de la Justice criminelle, ceci sans indication du lieu de refuge. Pour les cinq dernières années connues, ces chiffres sont les suivants: en 1972: 648 condamnations; en 1973: 661 condamnations; en 1974: 468 condamnations; en 1975: 886 condamnations; en 1976: 790 condamnations. Le nombre de ces condamnations peut lui-même être rapproché de celui des poursuites pour non-représentation dont la plupart débouchent sur des classements pour opportunité. Leur nombre s'élève à plusieurs milliers par an après sondage.

Question 2

Il résulte de l'expérience acquise par les services du Ministère de la Justice français que la multiplication des cas de déplacements d'enfants a pour cause essentielle l'«absence» actuelle de toute coopération internationale au niveau des structures judiciaires dans le domaine de la garde. Cette absence de coopération constitue un *vide juridique* qui favorise les voies de fait alors qu'une concertation au niveau des institutions judiciaires par le canal, notamment, d'autorités centrales, serait amenée à jouer un rôle dissuasif et préventif en la matière.

Par un singulier paradoxe, alors que le droit de l'enfance tend à s'unifier, dans la plupart des Etats, autour de la notion de l'intérêt supérieur de l'enfant placé sous la surveillance et le contrôle de l'autorité judiciaire, dans les relations internationales l'absence de concertation au niveau des structures judiciaires livre les parties à elles-mêmes et investit d'un véritable *pouvoir discrétionnaire* le parent auquel se trouve confié le mineur à l'occasion du droit de garde ou du droit de visite.

Cette absence de concertation conduit, également les autorités judiciaires à ne pas remplir leur rôle de médiateur ou d'arbitre, selon les cas, dans les conflits qui surgissent au sein de familles internationales dont les parents sont en difficulté ou divisés. Aucune obligation ne leur est imposée en effet, relativement à la prise en considération des éléments internationaux comme des éléments nationaux d'une procédure – au respect de la corrélation, reconnue dans la plupart des législations, et qui doit être maintenue, entre le droit de garde, d'une part, et ses démembrements, d'autre part, comme le droit de visite, le droit d'hébergement transfrontière, le droit de correspondre et de communiquer – au respect de la corrélation qui doit exister entre le droit de garde et les autres attributs de l'autorité parentale comme l'obligation alimentaire – à la mise en oeuvre de garanties pour assurer la bonne exécution des jugements et des accords intervenus entre les parties et pour éviter, ainsi, que la direction unitaire de l'enfant ne devienne une direction arbitraire. Il en résulte que ces autorités ont tendance dans un souci de protection de leurs ressortissants, à donner une interprétation strictement *nationaliste* de l'intérêt de l'enfant.

Cette notion donc de l'intérêt de l'enfant qui apparaissait devoir constituer un facteur de progrès et d'unification du droit conduit au plan international, en l'absence de coopération judiciaire, à un résultat diamétralement opposé et ramène tous les Etats à une même notion strictement individualiste de la protection des mineurs (Colloque belge sur la protection des mineurs dans les relations internationales – Intervention du Doyen Rigaux, le 27 octobre 1978).

Cette tendance se traduit dans les faits, notamment, par la suppression radicale du droit de visite jusqu'à la majorité de l'enfant, par la subordination de ce droit à une accumulation de conditions restrictives et parfois humiliantes, par la

poursuite du recouvrement des aliments sur la base d'accords internationaux alors que tout droit de communiquer avec l'enfant a été supprimé, par une violation généralisée par les parties de leurs engagements les plus solennels et les plus officiels. Par ailleurs, on constate que dans la pratique, au niveau judiciaire, aucune demande de renseignements, aucune mesure d'instruction par voie de commission rogatoire n'est diligentée entre les Etats à propos de procédures relatives à la garde des enfants, au droit de visite ou d'hébergement et à leurs garanties. Qui plus est, sur le plan administratif, les demandes adressées par le Ministère de la Justice français à ses homologues étrangers restent souvent sans réponse ou aboutissent à des fins de non-recevoir fondées généralement sur l'absence de texte ou l'indépendance des tribunaux. Ce qui est le cas, notamment, lorsqu'il s'agit d'effectuer les recherches d'un enfant déplacé à l'étranger en dehors de toute poursuite pénale.

Un nouveau statut de l'enfant tend ainsi à s'élaborer, celui de l'*orphelin juridique* de père ou de mère étranger. Cette nouvelle conception nationaliste de la condition de l'enfant constitue bien évidemment une violation flagrante de l'un de ses droit essentiels.

Cette situation engendre un *climat d'insécurité* dans les relations internationales et contribue à créer des désordres et des voies de fait à répétition tout en nuisant au développement de l'enfant. C'est une constatation d'expérience que les difficultés rencontrées lors de l'exercice du droit de visite ou d'hébergement sont à l'origine le plus souvent des déplacements d'enfants alors que les parties n'avaient pas contesté l'attribution du droit de garde (*Actes du Quatrième Colloque de Droit Européen*, Vienne 1974 – Rapport de synthèse de M. Jacques Foyer). Le plus grand nombre de conflits dont le Ministère de la Justice est saisi actuellement a pour origine l'inconditionnalité du droit de garde alors que les conflits sur la dévolution de la garde et, notamment, sur la loi applicable peuvent être considérés comme tout à fait «marginaux» et même exceptionnels.

A l'appui de cette observation, il convient de signaler qu'il résulte d'une statistique établie par le Ministère de la Justice que les tribunaux français accordent sans distinction de nationalité dans une proportion voisine la garde à la mère qu'elle soit française ou étrangère. Cette proportion est de 83,59% pour les mères françaises et de 76,39% pour les mères étrangères (étude de la Division de la Statistique couvrant les années 1970 à 1975 et portant sur 393.600 ordonnances de non-conciliation – novembre 1978. Voir ci-dessus).

Ce défaut de concertation constaté entre les Etats a pour *origine* à la fois l'absence de convention judiciaire et l'insuffisance ou les lacunes des conventions existantes.

Alors que les différents Etats se sont engagés à notre époque dans la voie d'une intense coopération économique qui se traduit par une extension sans précédent du réseau bilatéral de leurs accords commerciaux, douaniers, fiscaux, d'assistance technique et scientifique, aucune disposition conventionnelle n'est conclue dans le domaine de la protection des personnes à l'exception, grâce à la Conférence de La Haye, du recouvrement des aliments. Ce fait est particulièrement notoire dans le cadre du Marché Commun où la libre circulation des personnes et des biens n'a été suivie jusqu'ici d'aucune disposition dans le domaine du statut personnel à l'exception des obligations alimentaires.

Par ailleurs, les conventions existantes ne permettent pas de combler ce vide juridique. La portée, d'une part, de la Convention de La Haye de 1961 sur la compétence des autorités de la résidence habituelle du mineur et la loi applicable dont il convient de saluer le mérite, se trouve malheureusement limitée par le nombre restreint des Etats qui l'ont ratifiée et par son objet même. D'autre part, l'absence d'Autorités centrales chargées de veiller à son application ou à celle des conventions bilatérales existantes sur la reconnaissance et l'exécution des jugements handicape leur efficacité.

Cette absence de coopération judiciaire entre les Etats est *aggravée* par les changements constatés dans les *conditions de la vie familiale contemporaine*, plus particulièrement en ce qui concerne l'évolution du taux des divorces.

Un des traits les plus marquants de cette évolution est constitué par l'accroissement caractéristique de ce taux dans les pays de l'Europe occidentale depuis l'année 1965. Ce taux est passé en France, en cinq années, d'un divorce pour huit mariages à un divorce pour six mariages. En 1975 ce taux était de un pour cinq dans la plupart des pays européens, et un pour trois au Danemark, de un pour deux ou pour trois en Suède et aux Etats-Unis («Le divorce en France», par la Documentation française – 1978). La même évolution est constatée pour l'accroissement du nombre des séparations de fait dans le cadre des unions libres.

Par voie de conséquence, cette augmentation du nombre des divorces vient affecter les mariages mixtes. Leur taux est en augmentation constante en France. Leur nombre est passé de 15.122 (pour 312.703 mariages) en 1955 à 20.616 (pour 395.000 mariages) en 1975 (VIIe Rapport sur la situation démographique de la France établi par l'Institut national d'Etudes démographiques).

Le rapprochement du taux d'accroissement des mariages mixtes et des divorces souligne, s'il en était besoin, la gravité de l'ampleur du problème de la garde des enfants au plan français comme au plan international.

Questions 3 et 4

En dehors des statistiques précitées émanant du Bureau de l'Entraide judiciaire internationale, il n'apparaît pas exister en France actuellement d'autres sources de renseignements chiffrés sur les déplacements d'enfants à l'étranger.

Il convient de souligner d'une façon générale la carence de renseignements des statistiques judiciaires sur la nationalité des plaideurs. Toutefois, cette lacune doit être comblée dans l'avenir par l'insertion dans le compte général sur l'Administration de la Justice civile d'une rubrique relative à la nationalité des parties.

Au point de vue bibliographique, certaines publications du Service de Coordination de la Recherche du Ministère de la Justice peuvent être citées car elles contiennent des éléments d'information ou de recherche sur les enlèvements d'enfants. Il s'agit des publications suivantes:

1 «Les Etrangers et la Justice Civile», par Annette Jobert (1977), édité par la Documentation française.

2 «Le Divorce en France», par Jacques Commaille (septembre 1978), édité par la Documentation française.

Conventions

Question 5

1 Conventions multilatérales sur la loi applicable, la compétence des autorités et la reconnaissance des décisions.

Il s'agit essentiellement de la Convention de La Haye du 5 octobre 1961 sur la protection des mineurs.

2 Conventions bilatérales sur la reconnaissance et l'exécution des décisions judiciaires.

Ces conventions s'appliquent également aux décisions rendues en matière d'état et de capacité. Ce qui est le cas, notamment, avec l'Algérie, l'Autriche, la Belgique (2 conventions), le Bénin, le Cameroun, le Cambodge, le Congo, l'Espagne, la Haute-Volta, le Gabon, l'Italie, le Laos, Madagascar, le Mali, le Maroc, la Mauritanie, Monaco, le Niger, la Pologne, la République Centrafricaine, la Roumanie, Saint-Marin, le Sénégal, la Suisse, le Tchad, le Togo, la Tunisie, le Vietnam et la Yougoslavie (voir *Recueil pratique de conventions sur l'entraide judiciaire internationale*).

Ces conventions ont pour objet de faciliter la reconnaissance et l'exécution des décisions de justice en évitant leur révision au fond et en limitant le contrôle de l'autorité de l'Etat requis. Les conventions franco-polonaise et franco-yougoslave comportent également des dispositions relatives à la loi applicable aux relations judiciaires entre parents et enfants et à la compétence.

Question 6

Qu'il s'agisse de la Convention de La Haye de 1961 ou des conventions bilatérales, ces conventions se sont révélées utiles pour faciliter le rétablissement de la garde d'un enfant déplacé et son rapatriement dans la mesure où elles instituent des Autorités centrales officielles. Dépassant le champ de leurs attributions, ces autorités ont pris l'initiative de communiquer entre elles pour assurer la reconnaissance volontaire des décisions de justice.
Dans le cadre de la Convention de La Haye de 1961, le Ministère de la Justice est intervenu, à plusieurs reprises, à la demande de l'autorité judiciaire allemande transmise par Interpol, pour intercepter des déplacements d'enfants en direction du Maghreb. Ces interventions avaient pour objet de faire interpeller l'auteur du déplacement au vu de la décision de justice allemande dans le cadre d'une médiation. Ces interventions ont mis fin aux déplacements.

Question 7

A l'occasion des travaux entrepris à l'Organisation des Nations Unies pour l'élaboration d'une convention sur les droits de l'enfant, le Gouvernement français a demandé que soit reconnu le droit pour un enfant appartenant à une famille internationale divisée de conserver ses liens avec ses deux parents par la voie d'une coopération internationale à l'exemple de ce qui a été fait par la Convention de New York de 1956 pour le recouvrement des aliments à l'étranger.

Question 8

Ces conventions et ces ententes ont pour objet d'aménager une véritable coopération judiciaire entre les Etats.
La première en date est constituée par l'arrangement franco-belge du 17 juillet 1925 qui prévoit une coopération au niveau des juridictions elles-mêmes en vue du rapatriement des mineurs qui se sont soustraits à l'autorité parentale. Le succès de cette Convention a fait que d'une façon prétorienne elle est couramment appliquée dans la pratique pour régler les cas de déplacement d'enfants.
A l'occasion du renouvellement de certaines conventions bilatérales, la coopération établie entre les Ministères de la Justice pour l'accomplissement des actes de procédure a été étendue au domaine de la garde: *Dans le cadre des procédures tendant à la protection de la personne des mineurs, les Autorités centrales se prêtent mutuellement entraide pour la recherche et le rapatriement volontaire des mineurs et s'informent des mesures de protection prises par leurs autorités.* Ce qui est le cas, notamment, dans les relations de la France avec le Bénin, le Congo et l'Autriche.
Plus récemment, avec le Québec et le Brésil, non seulement le principe d'une coopération judiciaire organisée autour des Ministères de la Justice a été prévu, mais le contenu de cette coopération a été précisé.
Il a été prévu, notamment, que:

Dans le cadre des procédures relatives à la garde ou tendant à la protection des mineurs, les Autorités centrales:

a *se communiquent mutuellement sur leur demande, tous renseignements concernant les mesures prises sur la garde ou la protection des mineurs, la mise en oeuvre de ces mesures et les conditions d'existence matérielle et morale de ces mineurs;*

b *se prêtent mutuellement entraide pour la recherche sur leur territoire et la remise volontaire des mineurs déplacés lorsque le droit de garde a été simplement méconnu.*
Lorsque le droit de garde est contesté, les Autorités centrales saisissent d'urgence leurs autorités compétentes pour prendre les mesures de protection nécessaires et pour statuer sur la demande de remise dont le mineur fait l'objet. Ces autorités, au moment de statuer, doivent tenir compte de tous les éléments de la cause survenus sur le territoire des deux Etats et prendre en considération les décisions et les mesures déjà prises dans l'intérêt du mineur par les autorités judiciaires françaises et brésiliennes. Elles font procéder à cet effet dans l'autre Etat aux mesures d'instruction et aux actes judiciaires qu'elles estiment nécessaires en donnant commission rogatoire aux autorités judiciaires de cet Etat;

c *coopèrent pour que soit organisé sur le territoire des deux Etats un droit de visite et d'hébergement au profit de celui des parents qui n'a pas la garde, que soit levé tout obstacle juridique de nature à s'y opposer et que soient respectées les conditions posées par leurs autorités respectives pour la mise en oeuvre et le libre exercice de droit de visite ainsi que les engagements pris par les parties à son sujet.*

Ces éléments ont été complétés par des dispositions sur la reconnaissance et l'exécution simplifiée des jugements sur la garde.

Législation et jurisprudence

Question 9

Les tribunaux sont saisis de conflits sur l'attribution de la garde le plus souvent à l'occasion de procédures de divorce ou de séparation de corps et à l'occasion de procédures ayant pour objet le contrôle de l'exercice de l'autorité parentale. Leur compétence dans les litiges présentant des éléments internationaux ressort à la nationalité française des parties (art. 14 et 15 du Code civil) ou est extrapolée du droit interne qui se réfère à la résidence des parties. Dans les affaires de divorce, le tribunal territorialement compétent est le tribunal du lieu où se trouve la résidence de la famille, si les époux ont des résidences distinctes le tribunal du lieu où réside celui des époux avec lequel habitent les enfants mineurs; dans les autres cas, le tribunal du lieu où réside l'époux qui n'a pas pris l'initiative de la demande. En cas de demande conjointe, le tribunal compétent est celui du lieu de l'une ou l'autre résidence, selon le choix des époux (art. 5 du Décret No 75-1124 du 5 décembre 1975).

Question 10

L'incompétence internationale d'un tribunal français peut résulter de l'autorité de la chose jugée dont bénéficient de plein droit en France les jugements étrangers relatifs à l'état et à la capacité des personnes. Cette incompétence peut résulter également, de dispositions conventionnelles sur la reconnaissance et l'exécution des décisions judiciaires (voir *Recueil pratique de conventions internationales sur l'entraide judiciaire internationale* – 1978 La Documentation française).

Question 11

Les critères retenus par la loi française pour la dévolution du droit de garde sont les suivants:

a au cours du mariage des parents:
Dans la famille légitime prise comme hypothèse de référence, l'attribution du droit de garde coïncide généralement avec l'exercice de l'autorité parentale. Pendant le mariage, la garde qui se présente à la fois comme un droit et une obligation, appartient en principe conjointement au père et

à la mère qui l'exercent en commun dans l'intérêt de l'enfant (art. 213, 371 et s. du Code civil).
Ce droit s'exerce sous le contrôle de l'autorité judiciaire qui peut intervenir en cas de mésentente ou de désaccord des parents. Exceptionnellement si l'intérêt de l'enfant l'exige, lorsque celui-ci, notamment, se trouve en danger physique ou moral, les tribunaux peuvent attribuer la garde à un tiers, par exemple à des grands-parents, voire à un établissement d'éducation.

b après le divorce ou la séparation de corps:
Lorsque le lien matrimonial est atteint par l'effet du divorce ou de la séparation de corps, la garde des enfants mineurs, selon leur intérêt, est confiée à l'un ou l'autre des époux par le juge sous réserve d'un droit de visite au profit de celui qui n'a pas la garde (art. 288, art. 373-2).
La loi ne fixe d'autre critère au juge que l'intérêt de l'enfant qu'il apprécie souverainement. Toutefois, le législateur propose trois éléments d'appréciation dont le juge doit tenir compte, à savoir:
1 les accords passés entre époux;
2 les renseignements qui ont été recueillis dans l'enquête et la contre-enquête sociale;
3 les sentiments exprimés par les enfants mineurs lorsque leur audition a paru nécessaire et qu'elle ne comporte pas d'inconvénients pour eux.

Les fautes conjugales des époux ne sont prises en considération pour l'attribution de la garde que dans la mesure où elles révèlent une inadaptation de ceux-ci à élever convenablement l'enfant.
En fait, on constate une tendance chez les tribunaux à confier les enfants de préférence à la mère quelle que soit sa nationalité *d'abord les enfants en bas âge pour des motifs évidents de commodité, plus tard les enfants déjà grands parce qu'un changement de milieu éducatif risquerait de les traumatiser* (Carbonnier, *Droit civil*, t. II, 1977).
La statistique suivante* établie par la Division de la statistique du Ministère de la Justice vient illustrer ce point de vue. Cette statistique qui porte sur un ensemble de 393.600 tentatives de conciliation intervenues de 1970 à 1975 donne sous forme de pourcentage les taux de répartition de la garde en fonction de la nationalité des parents. Ces renseignements ont pu être réunis à l'occasion d'une enquête approfondie sur le divorce.

c après le décès de l'un des parents:
Au décès de l'époux gardien, le transfert de la garde s'opère de plein droit au profit du survivant sans qu'il soit besoin d'une nouvelle décision de justice. Il en est ainsi lors même que, par le jugement de divorce, le survivant aurait été privé de la garde (art. 373-1 et s.).
Ce résultat automatique pouvant être préjudiciable à l'intérêt de l'enfant, deux possibilités sont prévues pour y remédier. Le tribunal peut toujours désigner un tiers comme gardien de l'enfant. Par ailleurs, dans des circonstances exceptionnelles, le tribunal qui statue sur la garde de l'enfant après divorce ou séparation de corps pourra décider, du vivant même des époux, qu'elle ne passera pas au survivant en cas de décès de l'époux gardien. Il pourra, dans ce cas, désigner la personne à laquelle la garde sera provisoirement dévolue.
Le père et la mère étant tous deux décédés, l'autorité parentale disparaît (art. 373-4). Il y a lieu alors à l'ouverture d'une tutelle et la garde est attribuée à un tiers. Certains attributs de l'autorité parentale subsistent cependant, en la personne des ascendants qui conservent, notamment, un droit de visite quand ils ne sont pas dévolutaires du droit de garde.

d dans d'autres cas – situation de l'enfant naturel:
Les cas de déplacement d'un enfant naturel à la suite de la rupture d'une union libre ou d'un compagnonnage se rencontrent fréquemment dans la pratique. Ces cas sont caractérisés, du côté français, par l'absence de décision judiciaire attribuant la garde.
L'attribution du droit de garde sur l'enfant naturel coïncide comme pour l'enfant légitime avec l'exercice de l'autorité parentale. Ce droit appartient de plein droit à celui des père et mère qui volontairement a reconnu l'enfant, la préférence étant accordée à la reconnaissance volontaire sur la reconnaissance judiciaire. Par ailleurs, entre deux parents qui ont volontairement reconnu l'enfant, la préférence est accordée à la mère.
Toutefois, ce droit s'exerce sous le contrôle de l'autorité judiciaire. Le tribunal pourra changer l'attribution de la garde ou décider qu'elle sera exercée conjointement par le père et la mère comme si l'enfant était légitime (art. 374).

Question 12

Le principe selon lequel, dans la famille légitime, le père et la mère ont en commun à l'égard de l'enfant droit et devoir de garde, de surveillance et d'éducation souffre deux catégories d'exceptions.

1 Dans un certain nombre d'hypothèses spécialement déterminées par la loi, l'exercice de l'autorité parentale est dévolu de plein droit à un seul des parents (art. 373).
Ces hypothèses concernent la situation du parent qui est hors d'état de manifester sa volonté, qui a consenti à une délégation de ses droits ou qui a été condamné sous l'un des chefs de l'abandon de famille tant qu'il n'a pas recommencé à assumer ses obligations pendant une durée de six mois au moins.

2 A l'occasion de certains actes déterminés, l'autorité parentale peut être exercée séparément par l'un des parents ce qui est le cas, notamment, pour la mise en oeuvre des mesures d'assistance éducative.

Question 13

Traditionnellement l'autorité judiciaire est investie du pouvoir de contrôler l'exercice de l'autorité parentale et d'en modifier l'attribution.

Questions 14 et 15

Lorsque l'attribution de la garde est effectuée de plein droit, par l'effet de la loi, les dispositions de celle-ci ne comportent pas de référence à l'âge ou à l'opinion de l'enfant.
Lorsque l'attribution de la garde dépend d'une décision de l'autorité judiciaire, cette décision relève de l'appréciation souveraine du juge du fond. Toutefois, le législateur recommande au tribunal de tenir compte comme élément d'appréciation des sentiments personnels des enfants mineurs (art. 290). Leur résistance, en effet, pourrait paralyser l'exécution du jugement.

Question 16

On observe d'une manière générale, en France, dans le cas où les parents sont de nationalité différente que la garde n'est pas limitée au territoire français, même lorsqu'elle est attribuée au parent qui n'est pas de nationalité française. Toutefois, dans certains cas d'espèce, la garde est limitée, cependant, par le juge aux territoires des pays dont ressortissent les deux parents à l'exclusion des pays tiers.

* Voir le tableau *infra*, p. 100.

Lorsque les deux parents sont de nationalité française, on observe une tendance inverse. Récemment, dans une espèce qui concernait des parents de nationalité française, le père résidant au Maroc et la mère demeurant en France, la garde a été confiée au père à charge pour lui de maintenir son enfant chez la nourrice en France à qui il avait été confié.
Le droit de visite en revanche peut être limité au territoire national (voir question 24).

Question 17

Les lignes directrices du système de conflit de lois sont les suivantes:
Le droit de garde, élément essentiel de l'autorité parentale, fait partie intégrante du droit de la famille et relève du statut personnel. La loi applicable est la loi nationale. En cas de différence de nationalité, la loi française donne des solutions particulières dans le cadre de la filiation (art. 311-14) ou du divorce (art. 310).
Toutefois, le droit de garde étant placé sous le contrôle de l'autorité judiciaire, le principe de la compétence de la loi nationale est contrebalancé par celui de la compétence de la loi du for. Ce qui est le cas pour les mesures prises au titre de l'urgence, toujours à titre provisoire et dans le cadre des mesures d'assistance éducative.

Question 18

Dans son acception contemporaine, l'ordre public a une fonction d'éviction de la loi étrangère normalement compétente. La loi étrangère est écartée si elle heurte soit le droit naturel, soit les fondements politiques ou sociaux de la civilisation française (RCDIP 1965 – Jacques Foyer, «Les mesures d'assistance éducative en droit international privé»; Batiffol et Lagarde, «Droit international privé»).

Droit de visite

Questions 19 et 21

En droit français, le droit de visite et le droit d'hébergement se présentent comme des démembrements dans le temps du droit de garde. Ils en sont le *corollaire* nécessaire. Le droit de visite et d'hébergement ne peut être refusé à l'un des parents que pour des motifs graves (art. 288-2).
En effet, le parent gardien ne dispose pas à lui tout seul de la même maîtrise sur l'enfant que celle qu'il avait précédemment en conjonction avec l'autre parent. Il doit nécessairement composer avec les droits que la loi laisse à celui-ci. Ces droits, groupés parfois sous le nom générique de droit de visite (art. 373-2) comportent plusieurs degrés: le droit de correspondance qui est le moindre (art. 371-4, alinéa 2, et 375, alinéa 2) – le droit de visite au sens strict qui est le droit d'aller voir l'enfant chez le gardien et de le faire sortir pour la journée – le droit d'hébergement qui va plus loin permettant de recevoir l'enfant dans sa propre maison pour un temps assez long comme une période de vacances.

Question 20

La loi française ne prévoit aucune restriction à l'exercice à l'étranger du droit de visite (se reporter à la question 24).
Lorsque le droit de visite doit s'exercer à l'étranger, les tribunaux sont amenés à préciser les modalités de son exercice d'une part dans le temps car les périodes de vacances scolaires ne coïncident pas dans les différents pays, notamment entre les pays nordiques et les pays latins d'autre part, en ce qui concerne la prise en charge des frais de voyage et de séjour qui peuvent être fort importants (Etats-Unis).

Questions 22 et 23

Il convient de se reporter aux indications fournies à la question 2 ci-dessus de la présente réponse.

Dans la pratique, on constate que la plupart des cas de déplacement d'enfants sont provoqués par le refus du droit de visite ou par les difficultés rencontrées à l'occasion de son exercice qui peuvent constituer des charges insupportables pour son titulaire.
Par ailleurs, l'absence de coopération judiciaire dans de nombreuses affaires, transforme la relation de visite ou d'hébergement que le parent gardien a souvent autorisée et dont il a fréquemment pris l'initiative dans l'intérêt de l'enfant, en rétention abusive de l'enfant.

Solutions actuelles non conventionnelles

Question 24

Des mesures préventives et des garanties judiciaires ont été imaginées dans la pratique pour limiter et pour parer au risque des déplacements d'enfants.

1 *Mesures préventives*

Les mesures préventives ont pour objet de limiter l'exercice du droit de visite qui normalement doit pouvoir s'exercer à l'étranger. Les plus connues en France sont l'Opposition à sortie du territoire et l'Interdiction de délivrer un passeport. Ces mesures relèvent à la fois de la compétence des autorités judiciaires et des autorités administratives.

a Compétence des autorités judiciaires

L'autorité judiciaire est seule compétente pour fixer les modalités du droit de visite et, notamment, pour en limiter l'exercice au territoire national. Une décision de l'autorité judiciaire est nécessaire sur ce point.
En cette matière, il appartient à l'autorité judiciaire d'apprécier souverainement l'opportunité de prononcer une telle mesure, en fonction du risque de déplacement ou de rétention abusive de l'enfant à l'étranger. Dans la pratique, l'autorité judiciaire française se montre exigeante sur le plan de la preuve, les seules craintes du gardien n'étant pas considérées comme déterminantes. Mais dans ce domaine, les estimations se révèlent difficiles et la preuve ingrate, notamment, pour rapporter les intentions d'un parent qui n'est pas toujours de mauvaise foi au départ. Les tribunaux se satisfont, parfois, d'engagements sur l'honneur passés à la barre du tribunal. Malheureusement, ces engagements n'ont pas toujours été respectés par les parties et leur exécution ne peut être assurée à l'étranger.

b Compétence des autorités administratives

Une fois la décision judiciaire rendue, la mise en oeuvre des mesures préventives relève de la compétence de l'autorité administrative. Cette autorité est saisie par les parties. La durée d'une interdiction de sortie du territoire est de un an. Passé ce délai, elle doit être renouvelée.
L'efficacité de ces mesures est toute relative car elle dépend de nombreuses contingences et, notamment, des modes de transport utilisés pour déplacer l'enfant. En effet, le degré de perméabilité des frontières est variable selon qu'il s'agit de ports, de routes ou d'aérodromes.
Les autorités judiciaires de certains Etats subordonnent dans la pratique l'exercice du droit de visite ou d'hébergement à la réalisation de certaines conditions comme le dépôt d'une caution, le retrait des pièces d'identité et du passeport, la surveillance d'une tierce personne.

2 *Garanties judiciaires*

Lorsqu'il est de l'intérêt du mineur de confier sa garde à un parent étranger, il apparaît souhaitable que des moyens soient mis en oeuvre pour permettre, toujours au nom de ce même intérêt de l'enfant, de préserver les droits du parent qui n'a pas la garde. Ces moyens ressortissent à la production de garanties par les parties ou par leurs représentants.
Des garanties pourraient être plus souvent demandées pour assurer l'exécution des décisions de justice. Dans ce domaine, on ne saurait, en effet, s'en rapporter seulement à

l'existence de bonnes relations diplomatiques avec le pays concerné.
Ces garanties destinées à suppléer l'absence de conventions sur la reconnaissance des décisions, se présentent comme la conséquence nécessaire du renvoi opéré par l'autorité d'un Etat à celle d'un autre Etat pour assurer l'exécution de sa décision.
Ces garanties peuvent être morales ou judiciaires.
Les garanties judiciaires consistent avant toute exécution, dans l'homologation de la décision rendue par les autorités du pays où elle doit recevoir exécution. C'est ainsi qu'une décision française confiant la garde à une mère norvégienne en même temps qu'un droit de visite et d'hébergement au père français, à la demande de la mère et avant toute exécution, a été homologuée par les autorités norvégiennes.
Les garanties morales consistent dans les engagements souscrits par les justiciables ou par leurs représentants. L'affidavit est l'engagement officiel souscrit par un justiciable devant une autorité habilitée du pays où doit être exécutée la décision. De leur côté, les avocats, à l'occasion d'un constat d'accord, peuvent être amenés à jouer dans l'intérêt du mineur un rôle de médiateur et à se porter garants de la bonne exécution de cet engagement. Le Code civil français prévoit que des tiers, parents, ou amis peuvent se porter caution de la bonne exécution de l'engagement pris par l'un des parents (Décret du 5 décembre 1975, art. 13).

Solutions conventionnelles éventuelles

Question 25

En conclusion, le Gouvernement français est disposé en raison de la gravité à la fois des répercussions qu'entraînent sur le plan humain les déplacements d'enfants à l'étranger et des problèmes juridiques qu'ils posent, à conclure une convention qui consacrerait les unes ou les autres des propositions qui sont contenues dans le questionnaire (*a* à *g*).
Toutefois, un ordre de priorité lui paraît devoir être établi entre ces propositions qui serait le suivant:

1 L'organisation d'une coopération entre les autorités judiciaires des différents Etats lui paraît constituer une *priorité absolue*.
A l'exemple de ce qui a été fait par la Convention de New York de 1956 sur le recouvrement des aliments cette coopération peut être envisagée comme purement administrative. L'organisation d'une semblable coopération autour d'Autorités centrales constituerait un *progrès certain*, plus particulièrement en ce qui concerne la recherche des enfants à l'étranger en dehors de poursuites pénales, l'accès aux tribunaux, l'échange de renseignements sur la situation matérielle et morale des enfants et sur les décisions judiciaires déjà rendues, le rétablissement volontaire de la garde et le rapatriement volontaire des enfants.
Il lui apparaît, toutefois, que cette coopération administrative devrait s'accompagner, pour être pleinement efficace, d'une coopération au niveau judiciaire. Cette coopération devrait avoir pour objet de permettre aux Autorités centrales, selon des modalités propres aux différents droits internes, de disposer d'un *droit d'action d'office* auprès de leurs tribunaux pour l'exécution des jugements étrangers rendus dans le domaine de la garde, du droit de visite et d'hébergement. En droit français, le Ministère public dispose déjà d'attributions judiciaires propres pour l'exécution des décisions de justice.

2 Faciliter la reconnaissance et l'exécution simplifiée des décisions (*a - c - d - e - f*).
Dans ce domaine, la Conférence de La Haye a tracé la voie en ce qui concerne le recouvrement des aliments. Cet exemple pourrait être suivi, voire dépassé. Sous certaines conditions relatives, notamment, à l'écoulement du temps, le contrôle de la compétence de la juridiction pourrait être abandonné.

Question 26

Le droit pénal apparaît peu apte à donner une solution satisfaisante aux problèmes que posent les déplacements ou la rétention abusive d'enfants à l'étranger. En effet, des poursuites pénales ne peuvent être exercées avec quelque chance de succès que dans les cas limités où toutes les parties ressortissent à une même et exclusive nationalité. Dans le cas de familles internationales divisées, les poursuites qui sont généralement sans effet à l'étranger en raison de la nationalité de l'auteur du déplacement, le plus souvent ressortissant du pays de refuge, ont pour conséquence grave de paralyser les relations parents-enfants et de cristalliser les conflits. C'est ainsi que dans certaines affaires particulières, la coopération sollicitée du côté français a consisté à faire lever des poursuites pour permettre l'exercice du droit de visite.
La possibilité de généraliser le système appliqué dans les Etats fédéraux qui consiste à souscrire des constats ou des reconnaissances de réciprocité législatives, notamment, pour faciliter l'exécution des jugements étrangers, pourrait constituer une voie pour développer avec certains Etats qui n'ont pas ratifié de convention judiciaire des relations d'entraide et de coopération judiciaire.

nationalité du père	nationalité de la mère	dévolution au père	dévolution à la mère	dévolution à des tiers	partage entre les parents	partage entre les parents et les tiers
père français	mère française	10,41	83,59	1,42	4,16	0,42
père français	mère étrangère	17,80	76,39	1,61	3,94	0,27
père étranger	mère française	10,18	84,95	1,29	3,22	0,36
père étranger	mère étrangère	10,71	83,48	1,22	4,35	0,25
total général		10,46	83,55	1,45	4,12	0,41

Sociological information

Questions 1, 2 and 3

The statistics available do not indicate whether there has been an increase in the frequency of such cases. In the past few years, only two cases have come before the High Court in which abduction was a feature. However, there is no reason to doubt that the factors given in the Report, which it is believed are contributing to the increasing frequency of child abduction (*supra*, pp. 18-19), are generally valid for Ireland.

Question 4

We are not aware that any such studies have been published.

Treaties

Question 5

No.

Question 6

See answer to question 5.

Question 7

Ireland is a Contracting Party to the European Convention on the Protection of Human Rights and Fundamental Freedoms but the provisions of this Convention have little, if any, bearing on the question of abduction of children by one parent.

Question 8

No.

Legislation and case law

Question 9

The following appears to be the position. An Irish court would assume jurisdiction in child custody cases in the following circumstances:

1 where the child is physically present within the jurisdiction;

2 where the child is ordinarily resident, though not domiciled, in the jurisdiction;

3 where the High Court has granted a decree of legal separation (divorce *a mensa et thoro*) the court may declare the parent by reason of whose misconduct the decree is made to be a person unfit to have the custody of any children of the marriage or of any adopted children – section 18(1) of the Guardianship of Infants Act 1964;

4 where a right under the Constitution of a parent or child is claimed before the High Court that, in itself, grounds the jurisdiction of the court even if none of the circumstances mentioned above exists.

On the subject of whether the domicile of the child would ground the jurisdiction of the court, there has been only one known decision of the Irish High Court, namely *J.W.* v. *M.W.* (unreported, 5 July 1978). This decision appears to have based the jurisdiction of the court in that case on the infants' domicile which the court decided was Irish because the father's domicile was Irish. This may not, however, have been decisive since the children were, at the date of the proceedings, within the jurisdiction and this would, in itself, have been sufficient to ground the jurisdiction of the court.

Question 10

It appears that there are at least two common law doctrines which, when applicable, would induce the court to decline to exercise jurisdiction in cases of child abduction. The doctrine of *lis alibi pendens*, under which an Irish court will decline jurisdiction (by staying its own proceedings) where a suit has been commenced by the same party in a foreign jurisdiction, would be relevant, but presumably only where the parent initiating the proceedings in Ireland had also commenced proceedings relating to the same subject-matter in a foreign jurisdiction.
While there has hitherto been no Irish decision on the topic it is likely that the Irish courts would adopt the rule of *forum non conveniens.*

Question 11

The Guardianship of Infants Act 1964 (section 3) provides that in any proceedings before a court where, *inter alia*, the custody, guardianship or upbringing of an infant is in question, 'the court in deciding that question, shall regard the welfare of the infant as the first and paramount consideration'.

Question 12

No. Under the Constitution of Ireland and the Guardianship of Infants Act 1964 the father and mother of an infant are joint guardians and have equal rights. The Act (section 10(2)) provides that a guardian shall, as against every person not being, jointly with him, a guardian, be entitled to the custody of the infant and shall be entitled to take proceedings for the restoration of his custody of the infant against any person who wrongfully takes away or detains the infant and for the recovery, for the benefit of the infant, of damages for any injury to or trespass against the person of the infant. The court has power, on the application of a guardian, to make any such order as it thinks proper on any question affecting the welfare of the infant (section 11 of the Guardianship of Infants Act 1964). The court may give such directions as it thinks proper regarding the custody of the infant and regarding the right of access to the infant of his father or mother. (See also above at question 9 in relation to the power of the court to award custody where a decree of divorce *a mensa et thoro* has been granted.)

Question 13

A court only.

Questions 14 and 15

Before the enactment of the Guardianship of Infants Act 1964 the common law position appears to have been that the court regarded itself as bound to consult and take into consideration the wishes of the child once the child had reached the age of discretion. A boy was regarded as reaching this age at 14 and a girl at 16. (See *In re Frost, Infants* [1947] I. R. 3 at p. 25 – per Sullivan C.J.) Possibly these ages have been reversed. Apart from that, it is doubtful if *Frost* (a decision of the former Supreme Court) would now be followd by the present Supreme Court, especially having regard to recent developments in constitutional law. Section 3 of the 1964 Act provides that the welfare of the infant is to be regarded as 'the first and paramount consideration' in any proceedings concerning, *inter alia*, the custody of the infant. In applications brought by a guardian under section 11 of the

1964 Act (see question 12 above) it is the practice of the court to interview the children.
Moreover, it has been recognised that it would be impracticable to transfer the custody of a mature infant from one parent to the other against the infant's wishes. It is unlikely that, upon reaching such maturity, a court would act against the wishes of the infant. It should also be mentioned that, in section 17 of the Guardianship of Infants Act 1964 (which provides for the power of the court to consult the wishes of the infant in regard to the making of an order), the religion in which the infant is to be brought up is specifically mentioned.

Question 16

The court has power to restrain the parent from removing the infant from the jurisdiction. This power is, it is understood, used in appropriate cases (for example, *D.J.P.* v. *H.P.* (High Court, unreported, 5 Sept. 1977)) but no statistics are available as to the frequency of its use. The only other thing that can be said is that the court may, by its order, bind air and other transport authorities and restrain them from co-operating in the removal of the child.

Questions 17 and 18

As far as can be ascertained, there are no reported Irish cases dealing with the choice of law rules in this area. As a general principle, it appears that if the rights of a child or a parent under the Constitution are in issue, only an Irish court may decide the issue. Indeed, it appears that, having regard to articles 40, 41 and 42 of the Constitution (see below) and section 3 of the Guardianship of Infants Act 1964, which provides that the welfare of the infant is to be 'the first and paramount consideration', choice of law rules are irrelevant in this area. The court would be bound to act in accordance with the mandatory provisions of Irish law.

Visitation and access

Question 19

Yes. Section 11 of the Guardianship of Infants Act 1964 provides, *inter alia*, that the court may make an order under the section giving such directions as it thinks proper regarding the right of access to the infant by his father or mother.

Question 20

The answer to this question appears to be in the affirmative. Since any preliminary conditions that would be imposed would be made by the court, such conditions would vary to meet the needs of the individual case and, consequently, it is not possible to offer any general information that would be of value.

Question 21

No such right is specified in Irish law. However, it may be argued that, because of the special position of the family (article 41 of the Constitution), a child has a constitutional right of regular access to a parent and that this right is amongst the unenumerated rights which the State, by virtue of article 40.3.2° of the Constitution, guarantees to protect. (See *Ryan* v. *A.G.* [1965] I.R. 294.)

Questions 22 and 23

Specific data on individual cases are not available to enable the questions to be answered with certainty.

Existing non-treaty remedies

Question 24

There are no other practices specifically directed to this end: but see the answer to question 16 above in relation to the power of the court to bind air and other transport authorities.

Possible treaty remedies

Question 25

It is difficult to give a precise answer to this question. A firm commitment to any of the specific measures listed cannot be given *in vacuo*. They would need to be considered in the context of the text of a draft convention. Without wishing to comment on the question of which international organisation should elaborate the instrument in question, we favour work on a convention that would aim to embody, with, of course, appropriate safeguards, the features listed at *a, c, d* and *g* and possibly *e* and *f*. We have considerable reservations about including *b*.

Question 26

No.

NOTE

It is important to remember that in Irish law there is a clear distinction between custody and guardianship and that the rights of the natural guardians continue even when such guardians have been deprived by the court of the legal custody of a child. (See further Alan Joseph Shatter's *Family Law* (Dublin 1977), pp. 183-238, and the Supreme Court judgments cited by the author.)

RELEVANT PROVISIONS OF THE CONSTITUTION

Article 40

1 All citizens shall, as human persons, be held equal before the law.
This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function.

. . .

3 1° The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.

2° The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.

. . .

Article 41

1 1° The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.

2° The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.

2 1° In particular, the State recognises that by her life

within the home, woman gives to the State a support without which the common good cannot be achieved.

2° The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home.

3 1° The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack.

2° No law shall be enacted providing for the grant of a dissolution of marriage.

3° No person whose marriage has been dissolved under the civil law of any other State but is a subsisting valid marriage under the law for the time being in force within the jurisdiction of the Government and Parliament established by this Constitution shall be capable of contracting a valid marriage within that jurisdiction during the lifetime of the other party to the marriage so dissolved.

Article 42

1 The State acknowledges that the primary and natural educator of the child is the Family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children.

2 Parents shall be free to provide this education in their homes or in private schools or in schools recognised or established by the State.

3 1° The State shall not oblige parents in violation of their conscience and lawful preference to send their children to schools established by the State, or to any particular type of school designated by the State.

2° The State shall, however, as guardian of the common good, require in view of actual conditions that the children receive a certain minimum education, moral, intellectual and social.

4 The State shall provide for free primary education and shall endeavour to supplement and give reasonable aid to private and corporate educational initiative, and, when the public good requires it, provide other educational facilities or institutions with due regard, however, for the rights of parents, especially in the matter of religious and moral formation.

5 In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State as guardian of the common good, by appropriate means shall endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.

Israël/Israel

Sociological information

Question 1

No data available.

Question 2

In view of reply to question 1 – not applicable.

Question 3

No statistics or data available.

Question 4

No studies available.

Treaties

Question 5

Israel is not a Party to the Convention of October 5, 1961 on the Protection of Infants.

Under the Convention between Israel and the United Kingdom of October 28, 1970 for the Reciprocal Recognition and Enforcement of Judgments, enforcement is granted only to judgments under which a sum of money is payable. Recognition may however be granted under the Convention, *inter alia*, to judgments in proceedings concerning guardianship of infants 'where such recognition is in accordance with the law of the country of the court applied to'.

The Judgments Convention between Israel and Austria, dated June 6, 1966, contains a provision specifically excluding matters concerning personal relations between parents and children.

Israel is not a party to any other bilateral treaty dealing with child custody.

Question 6

The scope of the treaty provisions mentioned in the reply to question 5, as far as they related to custody, are severely limited, and have thus made no significant contribution to the solution of the problem of child abduction.

Question 7

Israel has signed, but has not yet ratified, the International Covenant on Civil and Political Rights.

Israel is not a Party to the European Convention on the Protection of Human Rights.

Question 8

Israel is not a party to any treaty or agreement dealing specifically with child abduction.

Legislation and case law

Question 9

Under the Capacity and Guardianship Law, 1962, section 76 (2), Israel district courts are given jurisdiction to act in child custody cases 'wherever the need to do so arises in Israel'. This statutory provision has been broadly interpreted by the courts to include all cases where the child is physically present in Israel, even if such presence was brought about by unlawful means such as kidnapping in violation of a foreign court order, or fraud.

The Israeli courts even assume jurisdiction in cases where Israeli children are unlawfully removed from the country and are thus not even physically present within the country. Moreover, the Supreme Court of Israel, sitting as a High Court of Justice exercises jurisdiction to grant relief in the nature of *habeas corpus* wherever a child is being held in contravention of a valid Israeli or foreign custody order, and there is no *bona fide* dispute between the parents as to the question of custody.

Question 10

As mentioned in the reply to question 9, jurisdiction of the Israeli courts in child custody matters is exercised on a very wide basis, and there are no specific provisions requiring the courts to decline jurisdiction. However, in appropriate cases,

an Israeli court may possibly apply the *lis alibi pendens* doctrine where parallel custody proceedings are pending in a foreign court, or may even decline jurisdiction on the basis of *forum non conveniens*.

Question 11

Matters of guardianship in Israel, as detailed below, are regulated by statute, namely the Capacity and Guardianship Law 1962, sections 14-67.

a As long as the marriage of the parents subsists, both parents are natural guardians of their minor children, unless one or both have been deprived of guardianship by a court order. Guardianship includes the right to the custody of the children.

b Where parents are divorced or are living apart, they may determine the question of custody by mutual agreement which is subject to approval by the court.

Where no such agreement is reached, or if the agreement is not implemented, custody may be determined by order of the court.

c On the death of one parent, guardianship of minor children, including their custody, vests in the surviving parent. The court may in its discretion appoint a guardian for the minor in such circumstances, in addition to the surviving parent.

d Where both parents have died, the court may appoint a guardian to exercise custody over a minor child. Such appointment may also be made where one or both parents have been declared legally incompetent or incapable of carrying out their duties or have been deprived of their guardianship or if it has been restricted, where one parent is not known, or is not married to the other parent and has not recognised the minor as his or her child.

Question 12

Statute provides that children up to the age of six should normally be with their mother. Apart from this, no preference is granted automatically by law to the parent of one sex or the other. As mentioned above, both parents are, on principle, the natural guardians of their minor children. Mention should also be made of the Women's Equal Rights Law 1951, which provides that men and women have equal status with regard to any legal act, and mother and father alike are the natural guardians of their children.

Question 13

In special circumstances, the court may even refuse to award custody of a child below the age of six to the mother.

Question 14

The statutory provisions of the Capacity and Guardianship Law 1962, as specified above, refer to custody of all minors, *i.e.* every child who has not reached the age of eighteen, without distinguishing different age groups, apart from the provision requiring as a rule a child under six years of age to be with his mother.

Question 15

The statute provides that the court shall consider the views of the child concerned before appointing a guardian, provided he is capable of understanding the matter and that his views are ascertainable.

Question 16

A district court is empowered by statute to take temporary measures which it deems appropriate for protecting the interest of the minor, and this could include ordering a parent who has custody not to allow the child out of the country. The High Court of Justice, moreover, has the power to make such an order and has indeed exercised the power. Such orders are normally complied with. No data are available as to frequency of such cases.

Question 17

A statutory choice of law rule, section 77 of the Capacity and Guardianship Law 1962, provides that the governing law in matters such as custody is the law of the habitual residence of the child concerned, subject to the overriding consideration of the child's welfare, mentioned below.

Question 18

The welfare of the child is an overriding consideration both in purely domestic custody cases and in those involving foreign elements. This was enacted by the Women's Equal Rights Law of 1951, and re-enacted in the Capacity and Guardianship Law, 1962. It is indeed a provision in the nature of external public policy.

Visitation and access

Question 19

Statute provides that where the parents of a minor live separately, any agreement between them as to custody which, as mentioned above, requires court approval, may contain provision as to the rights of the parent not having custody with regard to contact with the child. Where no agreement has been reached on this matter, it may be determined by the court. Moreover, where one of the parents has died, the court has a statutory power to give directions regarding contact between the child and the grandparents (parents of the deceased).

Question 20

Removal of a child from his country of habitual residence for purposes of access or visitation may be permitted under such conditions as are laid down by agreement between the parents or by order of the court.

Question 21

No such inherent right exists, access depending on agreement or court order, as explained above.

Question 22

No details available.

Question 23

No details available.

Existing non-treaty remedies

Question 24

A criminal sanction is provided against child stealing by section 367 of the Penal Law, 1977. This makes it an offence, punishable with up to 7 years' imprisonment, forcibly, fraudulently or by enticement to take or detain a child under 14 years of age, or receive or harbour such a child knowing it to have been so taken, where the intent is to remove the child from lawful custody.

Possible treaty remedies

Question 25

a We are in favour of including provisions for facilitating the enforcement of decisions.

b We do not believe that matters of this nature can be appropriately dealt with by an international tribunal.

c Provisions for expediting the return of the child should be included in a draft convention.

d We are not in favour of any narrowing of the existing jurisdiction of courts as this would tend to reduce the effectiveness of existing remedies against abduction.

e While an application for grant of custody may of course be turned down owing to a parent's misconduct, we do not favour allowing courts to decline jurisdiction *ab initio* on such a ground.

f We are in favour of allowing limited application of the *forum non conveniens* doctrine.

g We regard provisions for strengthening administrative co-operation as highly desirable.

Question 26

As long as there does not exist an actual draft convention, we consider it premature to put forward any additional proposals for dealing with the problem, apart from suggesting that aspects of the problem involving the recognition and enforcement of foreign decisions be dealt with more fully than in the 1961 Convention on the Protection of Infants.

Japon/Japan

Sociological information

Question 1

As we do not have any statistics available for the purpose of knowing the number of all the cases of child abduction, especially of international ones, we are not confident of answering whether the number of such cases has increased or not.

Question 2

Please understand by the foregoing answer.

Question 3

No, they are not. We do not have any statistics or other data from which we are able to know the number of each situation of child abduction cases described in the Explanatory Note.

Question 4

Although written in Japanese and referred to the domestic cases, there are some studies published in Japan.

Treaties

Question 5

No, it is not.

Question 6

Please understand by the foregoing answer.

Question 7

No, it is not.

Question 8

No, it is not.

Legislation and case law

Question 9

Child custody cases can be handled through three procedures in Japan. Firstly, these cases can be handled in connection with divorce cases the parties of which are the parents of the child. The District Court has jurisdiction over these cases (see article 15 of the Law of Procedure in Actions relating to Personal Status). Secondly, these cases can be handled in the Family Court. This procedure is normal. The Law for Determination of Family Affairs classifies these cases into the category of 'measures relating to the legal custody cases of a child' (see article 4, paragraph (1) (B), sub-paragraph (4) of the same Law). Finally, these cases can be handled as the case of protection of personal liberty under the Habeas Corpus Act. The District Court or the High Court has jurisdiction over these cases.

Regarding the jurisdiction of international civil procedure, there are no provisions which expressly stipulate by what bases a Japanese court can assume its jurisdiction over such cases. But, according to judicial precedents or academic arguments, a Japanese court is to assume its jurisdiction over such cases by the following criteria, conforming to provisions which establish domestic jurisdiction over such cases.

1 Where a child custody case is decided in connection with the divorce cases of its parents, a Japanese district court has jurisdiction over the former case if the latter case comes under the court. It is construed that the Japanese District Court has jurisdiction over the international divorce case if it satisfies the conditions of article 1 of the Law of Procedure in Actions relating to Personal Status.

2 Where a child case is in question as taking 'measures relating to the legal custody case of a child', a Japanese family court has, as a general rule, jurisdiction over such case if the child has his domicile in Japan.

3 Regarding the remedy under the Habeas Corpus Act, a Japanese court has jurisdiction over such case only when the child resides in Japan.

(Reference)

The provisions of the procedural laws and rules relating to the child custody case, especially its domestic jurisdiction, are as follows:

LAW OF PROCEDURE IN ACTIONS RELATING TO PERSONAL STATUS

(Law No 13, June 21, 1898)

Article 1 *Actions relating to the invalidity or cancellation of a marriage, to divorce or to the annulment thereof belong to the exclusive jurisdiction of the District Court of the place of common residence of the husband and wife if they have the common residence, the place of residence if the husband or wife has the residence in the jurisdictional area of the District Court in which the husband and wife had their last residence, and the place of ordinary forum of the husband or wife if the husband or wife has no residence in said jurisdictional area and if the husband and wife had had no common residence, or the place of having it at the time of death thereof. Provided*

that this does not apply where a claim for cancellation of a marriage, divorce or annulment thereof is joined with an action relating to adoption.

2 *If the husband or wife has no domicile in Japan, or if his or her domicile in Japan is unknown, his or her ordinary forum is determined by his or her residence; or if he or she has no residence in Japan or his or her residence is unknown, by his or her last domicile.*

3 *If the jurisdictional court is not decided by the provisions of the preceding two paragraphs, the actions of paragraph 1 shall belong to the jurisdiction of the District Court of the place designated by the Supreme Court.*

Article 15 *In respect to an action for the annulment of a marriage or for the divorce which has been brought by either husband or wife, the court may, on application, determine a person to have the custody of children, or cause either of a husband and wife to distribute the property to his or her spouse.*

2 *In the case as mentioned in the foregoing paragraph, the court may order any of the parties delivery of children, payment of money, transfer of goods or such kinds of delivery.*

3 *Judgment pursuant to the provisions of the foregoing two paragraphs must be made in stating the purport thereof in the text of a judgment.*

4 *The provision of the foregoing paragraph shall not prevent the Family Court to alter a person to have the custody of children or to make other proper dispositions concerning the custody of children.*

5 *The provisions of the foregoing three paragraphs shall apply* mutatis mutandis *in cases where the court determines either of a father and mother to have parental right with respect to actions of the annulment of marriage or of the divorce.*

Article 16 *The provisions of Articles 756 to 763 inclusive of the Code of Civil Procedure shall apply* mutatis mutandis *to provisional orders of the court as to the care for the children and to other provisional orders.*

THE LAW FOR DETERMINATION OF FAMILY AFFAIRS

(Law No 152, December 6, 1947)

(Jurisdiction over determination)

Article 9 *The Family Court shall have jurisdiction over the proceedings of determination concerning the following matters:*

. . .

(B)

. . .

4 *Designation of the legal custodian of a child and other measures relating to the legal custody of a child in accordance with the provisions of any of Article 766, Paragraphs (1) and (2) of the Civil Code (including cases where the said provisions are applicable with the necessary modifications under Articles 749, 771 and 788 of the same Code);*

. . .

7 *Designation of the parent to exercise parental power and alteration thereof in accordance with the provisions of any of Article 819, Paragraphs (5) and (6) of the Civil Code;*

THE RULES FOR DETERMINATION OF FAMILY AFFAIRS

(Supreme Court Rule No 15, December 29, 1947)

(Transfer of case)

Article 4 *In the event that an application in respect of a case is filed with a Family Court not having jurisdiction over the case, the Court shall transfer such case to another Family Court having jurisdiction; but if the Court deems it specially necessary for the disposition of the case, it may transfer it to any Family Court other than that having jurisdiction or dispose of it by itself.*

Even where an application in respect of a case is filed with a Family Court having jurisdiction over the case, if the Court deems it suitable for the disposition of the case, the Court may transfer it to any other Family Court.

(Jurisdiction over the proceedings concerning the legal custody of a child)

Article 52 *The proceedings of determination concerning designation of the legal custodian of a child and other measures relating to the legal custody of a child in case of annulment of marriage or divorce, shall be under the jurisdiction of the Family Court for the place of domicile of the child.*

The application for the proceedings mentioned in the preceding paragraph in respect of two or more children may, notwithstanding the provisions of the same paragraph, be made to the Family Court for the place of domicile of one of them.

(Order concerning the legal custody of a child)

Article 53 *In an order of determination designating the legal custodian of a child and specifying other matters necessary for the legal custody of the child, or altering the legal custodian, or ordering suitable measures for the custody of the child, the Family Court may order delivery of the child, payment of money for support or other performances concerning property rights.*

(Jurisdiction over the proceedings concerning appointment of the special representative in an action of denial of legitimacy)

Article 60 *The proceedings of determination concerning appointment of the special representative in an action of denial of legitimacy of a child shall be taken in the Family Court for the place of domicile of the child.*

(Proceedings concerning designation of the parent to exercise the parental power)

Article 70 *The provisions of Article 52 Paragraph (2), Articles 53 to 55 inclusive and Article 60 shall apply with the necessary modifications to the proceedings of determination concerning designation of the parent to exercise the parental power.*

(Proceedings concerning alteration of the parent to exercise the parental power)

Article 72 *The provisions of Article 27 Paragraph (2), Article 52 Paragraph (2), Articles 53, 54, 60 and the preceding Article shall apply with the necessary modifications to the proceedings of determination concerning alteration of the parent to exercise the parental power.*

The parent exercising the parental power may appeal from an order of determination altering the parent having the parental power.

THE HABEAS CORPUS ACT

(Law No 199, July 30, 1948)

Article 2 *A person whose freedom of action is restrained without the proper legal procedure may apply for its recovery in accordance with the provisions of this law.*

Any person may present the preceding application on behalf of the person who is held under such restraint.

Article 4 *The application provided for in Article 2 may be presented in writing or orally to the High Court or District Court which has the jurisdiction over the district where the restrained, the restrainer or the applicant resides.*

Question 10

No, they are not. We have neither special provisions nor practices.

Question 11

We indicate the number of articles of the Civil Code of Japan, item by item.

a Article 818, paragraphs (1) and (3) – The principle is joint exercising of the parental power by father and mother.

b Articles 819 and 766 – In case of the parents' divorce, one of the parents who has been stipulated to have parental power or custody of the child by the court or by the agreement between the parents exercises the power.

c There are no provisions which expressly stipulate the situation, but assignment of legal custody is construed as follows:

1 When one of the parents dies during the marriage, the surviving parent has the parental power.

2 When one of the parents dies after their divorce:

(*i*) in case he or she did not have the parental power, it remains with the surviving parent;
(*ii*) in case he or she had the parental power, guardianship commences. But, in practice, the Family Court is entitled to transfer the parental power from the deceased parent to the surviving parent.

d The Civil Code provides as follows:

1 If one of the parents loses the parental power pursuant to Article 834 or becomes missing (disappearance), the other parent exercises the parental power solely. – Article 818 paragraph (3) proviso.

2 If both of the parents die or lose the parental power, guardianship commences. – Article 838 paragraph (1).

3 If the parents have effected divorce before the birth of their child, the parental power is in principle exercised by the mother. – Article 819 paragraph (3).

4 Regarding an illegitimate child, its mother has the parental power. If it is recognized by its father and if the father has been stipulated to have the parental power by the agreement between father and mother or by the Family Court, the father can exercise the parental power. – Article 819 paragraph (4).

(Reference)

The following are the provisions of the Civil Code of Japan concerned:

THE CIVIL CODE OF JAPAN, BOOKS IV AND V

(Law No 9, June 21, 1898, as completely amended by Law No 22 of 1947)

Article 766 *In case a father and mother effect a divorce by agreement, the person who is to take the custody of their children and other matters necessary for the custody shall be determined by their agreement, and if no agreement is reached or possible, such matters shall be determined by the Family Court.*
The Family Court, if it deems necessary for the benefit of the children, may change the person to take the custody of them or order such other dispositions as may be appropriate for the custody.
The provisions of the preceding two paragraphs shall not cause any change in the rights and duties of father and mother outside the scope of the custody.

Article 818 *A child who has not yet attained majority is subject to the parental power of its father and mother.*
If such child is an adopted one, it is subject to the parental power of its parents by adoption.
When father and mother are in matrimonial relation, they jointly exercise the parental power. But, if either the father or the mother is unable to exercise the parental power, the other parent exercises it.

Article 819 *If father and mother have effected divorce by agreement, they shall determine one of them to have the parental power by agreement.*
In cases of judicial divorces the Court determines a father or mother to have the parental power.
If the father and mother have effected divorce before the birth of a child, the parental power is exercised by the mother. But the father may be determined to have the parental power by agreement between father and mother, after the birth of a child.
The parental power over a child recognized by its father shall be exercised by its father, only if the father has been determined to have the parental power by agreement between father and mother.
If no agreement mentioned in any of paragraphs 1 and 3 and the preceding paragraph is reached or possible, the Family Court may render judgment in place of agreement on application of the father or mother.
If it deems necessary for the benefit of a child, the Family Court may transfer the parental power from one of the parents to the other on application of any relative of the child.

Article 834 *If a father or mother abuses parental power or is guilty of gross misconduct, the Family Court may, on the application of any of the child's relatives or of a public prosecutor, adjudge the forfeiture of the parental power.*

Article 838 *Guardianship commences in any of the following cases:*

1 *if there is no one to exercise parental power over a minor, or if the person who exercises parental power has no right of management;*

2 *if an adjudication of incompetency has been made.*

Question 12

As mentioned above, during the marriage of the parents both of them exercise the parental power jointly pursuant to article 818 of the Civil Code.
After divorce of the parents, which parent has the parental power is determined by agreement between them or by the court pursuant to article 819 of the same Code. Notwithstanding the former provision, the other parent is entitled to take the custody of their child by virtue of article 766 of the Code.

Question 13

Yes, the Family Court may transfer the parental power from one parent to the other parent or may change the person who takes the custody of their children by virtue of article 819 paragraph (6) or article 766 paragraph (2) of the Civil Code after the parents effected divorce.

Question 14

No, the age of the child does not constitute a criterion under questions 11, 12 and 13.
As an additional remark, if a child attains majority (on the completion of full twenty years of age), the parental power or legal custody becomes out of question (see article 818, paragraph (1) of the Civil Code above).

Question 15

If a child in question is fifteen years old or over, the Family Court shall hear his statement before assigning the legal custody or awarding the right of access or visitation pursuant to article 54 of the Rules for Determination of Family Affairs.

(Reference)

(Hearing the statement of a child)

Article 54 *If a child is fifteen years old or over, the Family Court shall hear his statement before rendering an order of determination concerning the designation of his legal custodian and other matters relating to his legal custody.*

Question 16

Regarding the first half part of the question, there are no provisions which expressly stipulate that the Court has such power. Opinions are divided on this question, and the arguments on this point have not been settled yet.
Regarding the latter part, special measures are not taken particularly in Japan.

Question 17

As a general rule, the legal relations between parents and their child, including child custody, are determined by the law of the home country of the father, while in case of the father being non-existent, the relations are determined by the law of the home country of the mother and the guardianship is governed by the law of the home country of the ward in pursuance of articles 20 and 23 of the Law Concerning the Application of Laws in General (*Hōrei*). There is an opinion, however, which argues that the law to be applied to the divorce of the parents (see article 16 of the same Law) can be also applied to the determination of who exercises parental power or who takes the custody of their child in case of the said divorce. Anyway, the doctrine of renvoi is applied to 'home country' mentioned above by virtue of article 29 of the same Law.

(Reference)

LAW CONCERNING THE APPLICATION OF LAWS IN GENERAL (HŌREI)

(Law No 10 June 21, 1898)

Article 16 *Divorce is governed by the law of the home country of the husband at the time of the occurrence of the fact forming its cause. But the Court can make no adjudication of divorce unless the fact forming its cause also constitutes a cause of divorce according to Japanese law.*

Article 20 *The legal relations between parent and child are determined by the law of the home country of the father, or in case of the father being non-existent, by the law of the home country of the mother.*

Article 23 *Guardianship is governed by the law of the home country of the ward.*

The guardianship of an alien domiciled or resident in Japan is governed by Japanese law only when there is no person to undertake the functions of a guardian even though according to the law of his home country there exists a cause for commencement of guardianship or when he has been adjudged incompetent in Japan.

Article 29 *In case the law of the home country of a party is to be followed, if Japanese law is to govern according to the law of such country, the Japanese law shall then govern.*

Question 18

No, there are not.

Visitation and access

Question 19

Although there are no provisions which expressly stipulate 'the right of access to the child', the Family Court is entitled to admit the parent who does not have custody to have access to the child by means of the interpretation of articles 766 and 819 of the Civil Code.

Question 20

It is construed that the child can be taken for a certain period of time to a country other than where he habitually resides if it is necessary.

Question 21

No, it does not.

Questions 22 and 23

The exercise of access or visitation is admitted for the benefit of the child's welfare in practice in Japan. The relationship between child abduction and the exercise of access or visitation has not been discussed so much.

Existing non-treaty remedies

Question 24

No, nothing particular.

Possible treaty remedies

Question 25

a We are in favour of 'facilitating the enforcement of decisions' in principle.

b We cannot take a positive attitude to creating 'an international tribunal'.

c 'Expediting the return of the child' is worthy to be considered in connection with *a*.

d We are in favour of 'defining more narrowly the jurisdiction of courts' basically.

e, f We cannot take a positive attitude to 'giving the courts the power to decline jurisdiction' or granting the courts to apply *forum non conveniens*.

g 'Administrative co-operation' is worthy to be considered. Exchanging opinions (a kind of taking evidence abroad) may be helpful in knowing the circumstances of a parent who resides abroad and may make decisions easier and more accurate in child custody cases.

Question 26

Nothing special.

Luxembourg/Luxemburg

Informations de caractère sociologique

Question 1

Les statistiques ne remontant qu'à 1977, une réponse satisfaisante ne peut être donnée. Toujours est-il que le nombre des enlèvements pour les dix premiers mois de 1978 est supérieur au total de 1977 (6 contre 2). Parallèlement le nombre des condamnations pour entrave à l'exercice du droit de visite semble rester constant (6 cas).

Question 2

A défaut d'enquête spécialisée sur l'origine du conflit, on peut affirmer que l'augmentation des mariages entre conjoints de nationalité différente, est une des raisons principales des enlèvements d'enfants conjointement avec l'augmentation du nombre des divorces, cela d'autant plus qu'en raison de la forte proportion de population étrangère les conflits familiaux sont plus nombreux.

Question 3

Des statistiques au voeu du questionnaire ne sont pas disponibles.

Question 4

Non.

Conventions

Question 5

La seule Convention à laquelle le Luxembourg est partie est la Convention de La Haye du 5 octobre 1961 concernant la compétence des autorités et la loi applicable en matière de protection des mineurs.

Question 6

Pas de données.

Question 7

Non.

Question 8

Il existe un arrangement administratif avec l'Allemagne sur le rapatriement des mineurs conclu par échange de lettres en date du 9 décembre 1953, assurant la remise aux autorités du pays d'origine des mineurs entrés au pays en se soustrayant à la garde de celui qui en est légalement investi.

Législation et jurisprudence

Question 9

La compétence des juridictions est normalement donnée par le domicile du mineur (art. 393 C.c.). En cas de procédure en divorce, est compétent le tribunal saisi de l'action en divorce. Par ailleurs, la juridiction qui a statué sur la garde reste compétente dans la suite. Mais, après la prononciation du divorce, le tribunal de la jeunesse est déclaré compétent pour modifier ou compléter la décision sur la garde. La compétence de cette juridiction est donnée par le domicile ou la résidence de la personne investie du droit de garde sur les mineurs.

Question 10

Non.

Question 11

a Au cours du mariage le droit de garde appartient en principe conjointement aux père et mère; en cas de conflit la décision appartient au juge des tutelles.

b Après divorce, la garde appartient à celui auquel elle a été confiée par le tribunal, soit le père ou la mère, soit même un tiers.

c Après le décès d'un des parents la garde passe automatiquement à l'autre parent.

d Sur l'enfant naturel, la garde appartient à celui des père et mère qui l'a volontairement reconnu. S'il a été reconnu par ses deux auteurs, la garde appartient à la mère, sauf décision du juge des tutelles l'attribuant conjointement aux père et mère.

Question 12

Non.

Questions 13 et 14

Sans objet.

Question 15

L'opinion de l'enfant qui doit obligatoirement être consulté lorsqu'il a plus de seize ans, si elle n'a pas d'influence en droit, peut toutefois orienter en fait la décision de la juridiction, lorsqu'il a été entendu au cours de l'enquête sociale. Aucun texte ne permet aux autorités judiciaires d'interdire à un parent d'enlever l'enfant à l'étranger. Toutefois, indirectement le parent à qui la garde a été confiée peut être contraint de maintenir l'enfant à l'intérieur du pays pour permettre l'exercice du droit de visite reconnu par le tribunal.

Question 16

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Question 17

D'après la jurisprudence de notre Cour (arrêt du 12 novembre 1958) le droit de garde sur un enfant mineur issu d'un mariage entre parents de nationalité différente est régi par la loi nationale du père, au motif que celle-ci régit l'exercice de la puissance paternelle. On peut se demander si cette jurisprudence sera maintenue après l'abolition dans la législation interne de la puissance paternelle qui a été remplacée par l'autorité parentale reconnaissant aux deux conjoints un droit conjoint en ce qui concerne la garde de l'enfant.

Question 18

Non.

Droit de visite

Question 19

Aux termes de l'article 302 du Code civil un droit de visite et d'hébergement ne peut être refusé au parent à qui la garde de l'enfant n'a pas été confiée que pour des motifs graves.

Question 20

En l'absence d'interdiction légale, il est possible d'amener l'enfant à l'étranger pour l'exercice de droit de visite et d'hébergement. En fait, très souvent l'autorisation du tribunal est demandée pour ce transfert.

Question 21

En droit, l'enfant ne peut rencontrer l'autre parent que dans le cadre du droit de visite.

Question 22

L'exercice du droit de visite constitue évidemment une occasion favorable pour procéder à l'enlèvement, cette circonstance ne devrait toutefois pas aboutir à interdire purement et simplement le droit de visite.

Question 23

C'est possible.

Solutions actuelles non conventionnelles

Question 24

Nous ne connaissons guère de pratique permettant la prévention des enlèvements des enfants. Il existe une sanction pénale, le délit de non-représentation d'enfants.

Solutions conventionnelles possibles

Question 25

a Un régime d'exécution rapide de décisions statuant sur la garde serait de nature, dans la plupart des cas, de sanctionner efficacement l'enlèvement illicite.

b L'institution d'une juridiction internationale, en raison de sa complexité et des lenteurs inévitables de la procédure, paraît un moyen inapproprié.

c La restitution automatique de l'enfant à celui qui légalement est investi du droit de garde, serait un moyen efficace pour éviter la politique du fait accompli.

d Il s'agirait plutôt de prévoir des attributions de juridictions exclusives, en reconnaissant de préférence compétence exclusive à la juridiction du domicile ou de la résidence commune de l'enfant et des parents avant l'enlèvement.

e Notre droit ne permet pas à une juridiction normalement compétente de se déclarer incompétente en considération de comportement personnel des parties au litige.

f La théorie du *forum non conveniens* est incompatible avec notre organisation juridictionnelle.

Dans le cadre du *c* il sera indispensable d'assurer dans la plus large mesure possible la coopération administrative entre autorités nationales. Mais au-delà, il paraît utile de prévoir qu'au cas où les parents ou l'enfant résident en fait dans des pays différents au moment où le litige est soumis à une juridiction que celle-ci soit obligée de consulter les services sociaux du lieu de résidence des différents intéressés et d'instituer une coopération entre services sociaux.

Question 26

Non.

Norvège/Norway

Sociological information

Question 1

There exist no official statistics indicating the number of child abductions. The Ministry of Foreign Affairs, however, has informed me that there has been a substantial increase in the number of child abduction cases during the past five years.

Question 2

There is reason to believe that the growing number of child abduction cases partly is due to an increase in the frequency of marriages between Norwegians and foreigners.

Question 3

No.

Question 4

No.

Treaties

Question 5

As noted in the Secretariat Report (*supra*, p. 30) Norway is Party to the Nordic Convention of 6 February 1931 containing certain provisions of private international law on marriage, adoption and guardianship, and to the Nordic Convention of 11 October 1977 on the Recognition and Enforcement of Decisions in Civil and Commercial Matters. The 1931 Convention contains *inter alia* rules on jurisdiction in 'Internordic' custody cases derogating from the general jurisdiction rules. The rules of the Convention are: When the question of custody is dealt with in connection with a petition for legal separation or divorce, the issue shall be decided in the State where both the spouses are domiciled or where they last had joint domicile and one of them still is resident. If no court is competent according to this provision, the matter is to be decided in a State of which one of the spouses is a national. Petitions for changes in the decision on custody may only be tried by the authorities in the State where the defendant is resident.
Each State applies its own internal legislation.
According to the 1977 Convention, judgments and administrative decisions on custody or on the right of visitation (access to the child), which are enforceable in the State of origin, can be enforced in Norway as well.
The two Conventions are a result of a long-time and close co-operation between the Nordic States in the legal field, which has resulted in a high degree of uniform family law. Moreover, the close links between the countries imply a common approach to the interpretation of the criterion 'the best interest of the child'.

Question 6

The treaty provisions mentioned under 5 above prevent and ameliorate problems arising from child abduction in the Nordic States.

Question 7

Norway is not party to any human rights treaties that have a special bearing on child abduction. (Norway is, however, Party to the U.N. International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights and to the European Convention on the Protection of Human Rights and Fundamental Freedoms.)

Question 8

No.

Legislation and case law

Question 9

When the question of custody is dealt with in the course of a matrimonial suit. Norwegian courts have jurisdiction in the following alternative cases:

a the defendant is domiciled in Norway, or

b the plaintiff is domiciled in Norway and either has had his domicile here during the last 2 years or previously was domiciled here, or

c the plaintiff is a Norwegian national, and it is proved that his Norwegian citizenship bars him from instituting the suit in his State of domicile, or

d both spouses are Norwegian citizens and the defendant does not oppose an action to be brought before a Norwegian court, or

e divorce is sought on the grounds of a decision on legal separation rendered in Norway within the last five years.

If one of the parties is resident outside Norway, the court may refuse to deal with the question of custody.
When an action for custody is brought as a separate matter,

the principal basis for assuming jurisdiction is the habitual residence of the defendant.
As mentioned above in the answer to question 5, the 1931 Nordic Convention contains special provisions on jurisdiction.

Question 10

No.

Question 11

a During marriage both parents have legal custody.

b After a legal separation or divorce the legal custody is assigned to one of the parents unless they agree upon sharing the custody. If the parents fail to reach an agreement as to who shall have custody, the issue is settled either by a court or by the County Governor. Regard shall primarily be had to the interests of the child. As a rule, the mother is granted custody of smaller children, unless it is found to be in the child's interest to be with the father. Importance is also attached to the wishes of the parents. In practice, the mother is given custody in approximately 80-90% of the cases.

c If the surviving parent has custody of the child, no assignment is needed. If the parent having custody dies, the municipal child welfare board settles the question of custody. If the surviving parent requests custody, the board shall comply with the request unless there is a danger that the child will not receive proper care or upbringing, or if living together with the surviving parent would have an unfavourable effect on the child in other respects.

d If the parents separate without seeking legal separation or divorce, the provisions mentioned under *b* apply as well. If the child is born out of wedlock, custody lies with the mother. In the event of the mother's death, the municipal child welfare board may assign custody to the father, if he is willing and provided the board does not consider it unadvisable. The same applies if the mother is unable to exercise custody, or if she is unfit, and also when she agrees that the father is to be given custody.

Question 12

No.

Question 13

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Question 14

As for the age criterion 'smaller children' mentioned in the reply to question 11 *b*, this normally refers to children of less than seven years of age.

Question 15

Where the child has reached the age of twelve, its opinion will be heard before a decision is taken on the issues of custody and visitation rights. In practice, few decisions on custody are made contrary to a clear wish of children above twelve years of age. Children less than twelve years of age are often asked as well, but their opinion is only one of many factors influencing the decision.

Question 16

Yes, see the answer to question 24. Beyond this no authority has the power to order the custodian of a child born in wedlock to keep the child in Norway, or to take other measures serving the same purpose. On the other hand certain powers seem to exist in relation to children born out of wedlock, in cases where custody has been granted to someone other than the mother.

Question 17

There are no general choice-of-law rules, but it is presumed that Norwegian law will be applied.

Question 18

No.

Visitation and access

Question 19

In respect of a child born in wedlock the statute gives the child a right *ex lege* to access to the parent which does not have custody. The parent who is not given custody may demand a decision as to whether he or she shall be entitled to access (visitation right), and as to the extent of the right. Right of access (visitation) is not given if it is probable that the association will have an unfavourable effect on the child. As a rule a father of a child born out of wedlock has no right of access (visitation) to the child. He may, however, be granted visitation rights under certain circumstances.

Question 20

Requests to remove the child to another country will usually not be complied with, if there is a danger of the child being abducted. However, removal to the other Nordic countries is generally not denied, since custody decisions are enforceable in the other countries under the 1977 Convention (see the reply to question 5, above).

Question 21

As mentioned above, a child born in wedlock has a right *ex lege* to associate with both of its parents also when they do not live together. This right, however, cannot be enforced against the will of the non-custodial parent.

Questions 22 and 23

As pointed out in the Report (*supra*, pp. 41-43) both denial and granting of visitation rights might contribute to child abduction, depending on the circumstances of the case. However, denial of access or visitation based on a general assumption of possible abuse, is no advisable solution.

Existing non-treaty remedies

Question 24

When the parents disagree as to who shall have custody of a child, neither may take the child with him (her) out of the country without the consent of the other parent. If there is reason to believe that either will violate this rule, the police can prohibit him (her) to take the child with him (her), provided that the other parent requests such an injunction. If, in the opinion of the police, there is a possibility of the injunction being violated, it shall arrange for the proper boarding-out of the child, until a decision has been reached as to who is to have custody of the child.
An appeal against a decision on custody or visitation has postponing effect, unless otherwise decided.
A Norwegian passport can be recalled if circumstances give

reason to believe that the objective of a journey is unlawful abduction.
Child abduction is an offence under the Penal Code subject to imprisonment up to three years.

Possible treaty remedies

Question 25

a We are in favour of a convention facilitating the enforcement of decisions. However, it may be necessary from a Norwegian point of view to reserve a right for the authorities in the State addressed to decide whether the return of the child is in the child's best interest. This could possibly be done by way of a reservation clause.

b We are sceptical to the idea of creating an international tribunal for solving custody cases. Experience shows that it is difficult to create international tribunals with sufficient authority and efficiency. The fact that such a tribunal would have a worldwide scope, will further complicate efforts to find a common legal basis for solving conflicts.

c We support treaty provisions aimed at expediting the return of the child by avoiding normal hearing on the merits, if such a decision is not incompatible with public policy (*i.e.* 'best interest of the child') in the country to which the child has been removed.

d We are, in principle, in favour of treaty provisions on jurisdiction as a supplement to other measures. From a Norwegian point of view, the best principal basis for assuming jurisdiction would probably be the habitual residence. However, we have some doubts as to how far one should go in giving a single State exclusive jurisdiction – and thus eliminating a party's access to the courts.

e and *f* We share the doubts expressed in the Report (*supra*, p. 49) in finding a standard definition of misconduct by a parent. Granting the courts the discretion to apply the doctrine of *forum non conveniens* seems more flexible.

g We support a strengthening of administrative co-operation, both in respect of exchange of information, as well as the use of more powerful measures. We can, however, hardly take a definite stand on the various measures mentioned in the Report, until they have been worked out in detail.

Question 26

No.

Pays-Bas/Netherlands

Sociological information

Questions 1-4 have been submitted through the Ministry of Justice to the Netherlands Councils for Child Protection. At the date of completion of this reply, a reply had been received from twelve out of the nineteen Councils. The information which follows is based on these replies.

Question 1

Most Councils conclude that they have not observed a striking increase in the frequency of cases of child abduction by parents, although one Council reports that it has found an increasing number of cases of *threat* by one of the parents to abduct a child. The Councils feel that these cases are too occasional and too limited to allow for clearly defined conclusions.

Question 2

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Question 3

There are no data available on the number of cases made known to the courts. The Councils have noted a total number of 40 cases of child abduction over the past five years.
Most of these cases involve situations of type A and B, *i.e.* situations where a child was removed to another country when no custody decision had been handed down or when, in the early phase of divorce proceedings, a provisional custody order had been granted to the other parent (and no conflicting custody decision had been handed down in the country to which the child was abducted). Situations of type C (child abduction in the context of legal visitation periods) became known to the Councils in a very few cases only.
In addition it may be observed that the information supplied by the Councils indicates that most cases concern parents of which one has the Dutch nationality and the other frequently has either German, Spanish, British, Turkish, Tunesian, Moroccan, Italian or Iranian nationality. The country to which the child is removed from the Netherlands generally corresponds with the nationality of the abducting parent. Conversely, children removed to the Netherlands generally had their previous habitual residence in the country of the non-Netherlands parent. In two cases both parents had the same foreign nationality and in three cases a different nationality (Norwegian/Austrian, Italian/Spanish and Turkish/Yugoslavian.

Question 4

So far as is known, no research studies dealing with the causes or effects of child abductions in the Netherlands have been published.

Treaties

Question 5

1 *Multilateral treaties*

The Netherlands have denounced the 1902 Hague Convention Governing the Guardianship of Infants; this denunciation will take effect as from June 1, 1979. The Netherlands are a Party to the 1961 Convention concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants.

2 *Bilateral treaties*

A few bilateral treaties regarding mutual recognition and enforcement of decisions concluded by the Netherlands apply to matters of family law, *e.g.* the Treaty of 28 March 1925 between the Netherlands and Belgium and the Treaty of 17 April 1959 between the Netherlands and Italy*. They may, therefore, be relevant in respect of matters of custody also. (*Cf.* as regards the 1925 Treaty: Court of Appeal 's-Hertogenbosch, 12 April 1973 *NJ* 1973, 263, and District Court of The Hague 27 June 1977 *Asser Kaart* 10538.)

Question 6

A few cases are known where a Dutch court ordered the return of the abducted child to the other parent and based itself on the 1902 or 1961 Hague Conventions. *E.g.*,

* It follows from article 56 read in conjunction with article 55 of the *EEC Convention on Jurisdiction and Enforcement of Judgments* that these Treaties remain in force in so far as, *inter alia*, matters of family law are concerned.

President Amsterdam District Court 17 July 1975 *Asser Kaart* 9434, relating to an order addressed to an Italian father to return the child to the Dutch mother based, *inter alia*, on articles 3 and 4 of the 1902 Convention; Court of Appeal Amsterdam 17 November 1971, *NJ* 1971, 289, where the Court ordered the return by the Swiss/Dutch mother to the Swiss father of the children, basing itself, *i.a.*, on article 3 of the 1961 Convention; and President Alkmaar District Court 10 September 1973, *NJ* 1974, 448: Dutch father ordered to return the child to the German mother in Germany; this order was based, *inter alia*, on a recognition of a previous German custody decision (art. 7 of the 1961 Convention).

Question 7

The Netherlands are a Party to the European Convention on Human Rights. The International Covenant on Civil and Political Rights has been submitted to Parliament for ratification.
Dutch courts would not thus far seem to have considered issues of child abduction from the viewpoint of human rights.

Question 8

An exchange of notes of 21 July 1913 (*Stb.* 371) as supplemented on 17 March 1933, *Stb.* 279, between the Netherlands and Belgium may be mentioned here. This administrative agreement provides for the repatriation by either country of runaway or abducted children on the condition that the custody is not contested (if the country of the requesting person supports the request, it is supposed that this requirement is fulfilled) and the return is deemed to be in the real interest of the child. No examples are known, however, where this agreement has been applied.

Legislation and case law

Question 9

'Child custody' as referred to in this question is a rather broad term, which would seem to include not only the appointment of guardians but also decisions relating to modification of guardianship, visitation rights and requests for an order to return a child.

Two distinctions should be made here:

a between matters of custody concerning Dutch children or children of a foreign nationality;

b between custody in divorce proceedings and in non-divorce proceedings.

It is important to note that in Netherlands divorce proceedings the court does not award custody, but appoints one of the parents to be guardian (which includes personal care of the child).

1 In so far as children of Dutch nationality are concerned, Dutch courts will generally assume jurisdiction. Apart from Netherlands divorce proceedings – where the District Court (*arrondissementsrechtbank*) derives its jurisdiction in respect of guardianship from article 161, paragraph 1, Book I, of the Netherlands Civil Code (*cf. infra* (2)) – the Dutch County Court is competent to appoint a guardian when there is a need to provide for the guardianship, no matter whether the child has its habitual residence in the Netherlands or not (art. 957, Code of Civil Procedure). (It may be noted that the County Court is the competent court also when a foreign court has granted a divorce decree: art. 295, Book I, C.C., *cf.* HR 15 September 1930, *NJ* 1930, 1651 and HR 17 May 1962, *NJ* 1964, 416.)

2 As regards children of foreign nationality, a Dutch court will assume jurisdiction in respect of custody and even *ex officio* appoint one of the parents to be guardian if it renders a divorce decree between the parents, when the child has its habitual residence in the Netherlands or when the child and (one of) the parents are living in a foreign country where the guardianship decision is likely to be recognised. (When that is not likely to happen, the courts will be more reticent and sometimes not assume jurisdiction.)
The basis for this assumption of jurisdiction is to be found in article 161, paragraph 1, Book I, of the Dutch Civil Code, according to which in divorce proceedings the court is obliged to appoint *ex officio* one of the parents guardian over the minor children in the divorce decree or in a separate order. Article 170 of the same Act contains an analogous provision in cases of legal separation. It should be noted here that the Netherlands have made the reservation provided for in article 15 of the 1961 Hague Convention. (Pending these proceedings, the courts may at the request of either parent, order provisional measures including the provisional commitment of the children to the care of either parent. This jurisdiction is based on the procedural character of these measures in connection with article 814 Code of Civil Procedure governing the jurisdiction of the Dutch courts in matters of divorce and legal separation.) As far as subsequent requests to review or modify custody decisions given in divorce proceedings are concerned, Dutch courts will not automatically assume jurisdiction if the child has in the meantime moved its habitual residence to a place outside the Netherlands. Article 429 *c* of the Code of Civil Procedure provides that Dutch courts have no jurisdiction if such a request has no sufficient point of connection with the Dutch legal domain. (*Cf. Court of Appeal Amsterdam 23 April 1977 NJ* 1978, 181.)

3 In non-divorce proceedings Dutch courts will generally assume jurisdiction where the child has its habitual residence in the Netherlands. It would seem that this would only in exceptional circumstances be the case whenever the child has no habitual residence in the Netherlands. (The principle of) Article 429 *c*, Code of Civil Procedure, sets a limit to jurisdiction in these instances.
In several decisions Dutch courts have explicitly based their assumption of jurisdiction on the 1961 Hague Convention (art. 1, 4, 8 and 9).
Special mention should be made of the broad jurisdiction of the courts in injunction proceedings (*kort geding*). These proceedings have often been successfully instituted to obtain an order to return a child to the parent who had been awarded custody under foreign law.

Question 10

There are no provisions or practices specifically established to decline the exercise of jurisdiction in cases of child abduction. However, for certain proceedings article 429 *c*, Code of Civil Procedure, which was mentioned above, limits the scope of jurisdiction.

Question 11

A distinction may be drawn between the assignment of legal custody by operation of law and the assignment by judicial award. In the latter case, the child's best interests are always regarded as the paramount consideration.

a Under article 246, Book I, of the Civil Code (hereinafter: C.C.), the father and mother jointly exercise parental powers over their children during the marriage. In case of disagreement between them, the father's wishes are decisive, but the mother may request the Children's Court Magistrate to annul the father's decision.
In particular circumstances where the child is threatened with moral or physical destruction, the Children's Court Magistrate may place the child under supervision of a so-called appointed family counsellor (*gezinsvoogd*), who may give binding instructions to the parents in respect of the upbringing and education of the child (art. 254 *seq.*, Book I, C.C.). If a parent is incompetent or incapable of fulfilling his

obligations toward a child, he may be relieved of his parental powers. In principle, this measure is taken only if the parent concerned agrees to it. Where the child's welfare is even more seriously in peril (*e.g.* because a parent abuses his parental powers), the court may deprive that parent of his powers (art. 266 *seq.*, Book I, C.C.).
In those instances the public prosecutor may even withdraw a child from the parent's powers and entrust it to the Children's Protection Council; the court must confirm such a measure (art. 271 *seq.*, Book I, C.C.).

b After divorce, one of the parents is appointed guardian. Next to the guardian a co-guardian is always appointed who will usually but not necessarily be the other parent. His task is threefold: he supervises the management of the property of the child by the guardian. Also he manages the financial interests of the child, if these interests are contrary to those of the guardian. Lastly, in the case of absence of the guardian, the co-guardian figures as a guardian. In practice, the institution of co-guardianship is of little real importance. This is because the majority of children under guardianship do not own any property. In case of legal separation one of the parents is charged with the exercise of parental powers. As was pointed out above, the child's best interests constitute the paramount consideration in respect of these decisions.

c In case of death of one of the parents, under article 283 C.C., the surviving parent – provided that he exercises parental powers over the child at that time – becomes the guardian of their children and exercises all the powers theretofore exercised by the parents jointly. A parent who exercises parental powers may by deed or will appoint any person to act in his place as guardian of a child after his death. Such an appointment has no effect, however, if at the time of decease the other parent has custody over the child (art. 292, Book I, C.C.).

d Under article 287, Book I, C.C., the mother who has reached the age of majority is by operation of law guardian over her natural child, unless she does not meet the qualifications defined by article 324, Book I, C.C.
It should be mentioned that the court may in certain circumstances (*e.g. not* in divorce proceedings) appoint a legal person to be guardian.
In respect of all guardians the measures indicated above *sub a* (placement under supervision, relief and deprivation of powers etc.) may also be taken under the circumstances mentioned.

Question 12

No. (It may be recalled, however, that during the marriage in case of disagreement between the parents, the father's wishes, which may extend to decisions concerning the place of residence of the child, are decisive – subject to judicial review, *cf. supra* question 11, *sub a.*)

Question 13

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Question 14

The age of the child does not constitute an autonomous criterion in respect of the award of custody. In the determination of what custodial arrangement is in the best interests of the child, however, the age generally is an important factor.

Question 15

As far as award of custody after divorce or legal separation is concerned, the court must, if possible, hear the child if it is over 14 years of age (art. 167 and 178, Book I, C.C.). Sometimes even younger children are heard: in those instances where the Councils for Child Protection advise the courts, their reports will normally contain information on the opinions even of these children. In this way even the very young may exert an influence on the court's decision. The court will inform itself of the child's preferences. Their influence may be considerable, *e.g.* if both parents would seem capable of being appointed guardian.
Although there is no legal requirement to hear children in non-divorce proceedings, the court will generally either hear the child or inform itself on the child's preferences. This applies also to proceedings concerning rights of access or visitation.

Question 16

The answer would seem to be in the negative. The powers of parents and guardians may not be limited by instructions from judicial or administrative authorities. If a family counsellor (*gezinsvoogd*) is appointed, however, he may instruct parents or guardians not to take the child out of the country without his permission. Also in respect of access arrangements the court may restrict the non-custodial parent's freedom to move the child. These cases would not seem to occur very frequently in practice, however.

Question 17

Generally speaking, the law of the habitual residence wins ground here at the cost of the national law of the child. This is particularly clear from the case law concerning the award of custody in divorce proceedings – a matter which, according to the Netherlands conception of the Convention and for those States having made the reservation under article 15, falls outside the scope of the 1961 Convention. (Out of 85 custody decisions after divorce since 1970 registered at the T.M.C. Asser Institute for International Law at The Hague, 50 applied the law of habitual residence and only 35 the national law of the child.)
Where the choice of law rules of the 1961 Convention are applicable, these rules will of course be followed.
It is remembered here, that the Netherlands have denounced the 1902 Convention on the Guardianship of Infants and will no longer be bound by this Treaty as from June 1, 1979.

Question 18

In its decision of 14 May 1971 *NJ* 1971, 369 (*Ring* v. *Gould*) the *Hoge Raad* affirmed the Appeal Court's refusal to order the return of the child to the American father, which refusal was based on 'the best interests of the child'. The criterion 'best interests of the child' was in this case applied as an autonomous conflict of laws criterion.

Visitation and access

Question 19

Article 161, Book I, C.C., as it presently stands, provides that the court *may* grant a right of access to the parent who does not have custody. Under a reform bill concerning the law of procedure in divorce cases, this parent will have an automatic right of access. The court will only revoke such a right if it would be highly contrary to the child's interests.

Question 20

Within the time-limits set by the access arrangement, the child may be removed to a country other than that where he habitually resides. Preliminary conditions may be set, but are rare in practice.

Question 21

No.

Question 22

The exercise of access or visitation would not seem to further abductions abroad. The inclination to take the law into one's own hands may even decrease as a result of an arrangement in respect of visitation.

Question 23

The answer may be in the affirmative: a few cases are known where a father in despair or bitterness took his child abroad, but was willing to bring the child back after an arrangement for visitation had been made.

Existing non-treaty remedies

Question 24

1 *Administrative practices*

One may think here of the practice – which is not based on any specific legal ground – according to which no passport is issued to children and no children are entered into either parent's passport without the permission of *both* parents.

2 *Judicial practices*

If a child has been placed under supervision (*cf.* above question 11 *a*), the Children's Court Magistrate may order that a child remain with one of the parents. Finally articles 279 and 280 of the Dutch Criminal Code make withdrawing of a child from the parent in charge of custody and hiding of children away from that parent an offence.

Question 25

The Netherlands Government would be in favour of combining the types of method mentioned under *a, c, d* and *g*. As far as method *a* is concerned, it will be necessary to draw clearly a line between a new international convention and the 1961 Convention on the Protection of Minors. Method *c* would be acceptable only in certain well-defined instances, where there is no possibility of conflicting custody decisions*. As far as method *d* is concerned, in principle the child's habitual place of residence immediately preceding the abduction should constitute the sole ground for jurisdiction of courts.
In respect of method *g* one may think of a system as laid down in the 1956 Convention on Recovery Abroad of Maintenance, particularly the rules concerning consultation and legal co-operation.
Method *b* would not seem to lead to any practical results. In abduction cases one needs quick decisions in direct consultation with the parents and child concerned.
Method *e* is unacceptable (the decision on jurisdiction should be made independently of any questions of fault).
Method *f* is superfluous if the rules on jurisdiction are sufficiently narrowly defined; moreover, the consequences of granting this discretion to the courts would be fully incalculable.

Question 26

No.

* It would, *e.g.*, not be acceptable if the abducting parent would have been charged with custody by one of the laws concerned.

Portugal

Informations de caractère sociologique

Question 1

On ne possède pas de données d'information précises, mais on estime que, pendant les cinq dernières années, le nombre d'affaires d'enlèvements d'enfants par l'un des parents a quelque peu augmenté.

Question 2

Cet accroissement est fondamentalement dû à:

– la fixation de l'émigrant portugais dans le pays vers lequel il a émigré, accompagnée du fait qu'il emmène ou veut emmener vers ledit pays ses enfants mineurs;

– l'accroissement de l'émigration, tout particulièrement vers le *Brésil*, depuis le 25 avril 1974;

– l'indépendance des anciennes provinces portugaises d'outre-mer et l'inexistence de traités entre le Portugal et ces nouveaux Etats.

Question 3

Il n'existe pas, au Portugal, de statistiques ou autres données sur le nombre d'affaires portées chaque année devant les autorités judiciaires ou administratives, concernant les situations d'enlèvement d'enfants indiquées dans la note explicative.

Question 4

Aucun travail de recherche sur les causes ou effets d'enlèvements d'enfants par leurs parents n'a été publié dans notre pays.

Conventions

Question 5

En matière de garde d'enfants ou de reconnaissance et d'exécution à l'étranger de décisions en matière de garde des mineurs, le Portugal n'a signé que les Conventions de La Haye du 12 juillet 1902 et du 5 octobre 1961, mentionnées dans le Rapport annexe.

Question 6

Nous n'avons pas d'informations permettant d'arriver à une conclusion pour savoir dans quelle mesure ces Conventions se sont révélées utiles pour prévenir les enlèvements d'enfants ou atténuer les problèmes qu'ils posent.

Question 7

Le Portugal vient d'approuver le Pacte international sur les Droits civils et politiques (Loi No 29/78 du 12 juin 1978) et la Convention européenne des Droits de l'Homme (Loi No 65/78 du 13 octobre 1978) qui, évidemment, n'ont pas encore eu une influence sur la matière en cause.

Question 8

Le Portugal n'est pas partie à des conventions ou ententes administratives contenant des dispositions spécialement destinées à prévenir ou traiter des enlèvements d'enfants.

Législation et jurisprudence

Question 9

Aux termes de l'article 32 du Décret-Loi No 314/78 du 27 octobre 1978, est compétent pour l'application de mesures tutélaires, spécialement en ce qui concerne la garde de mineurs, le tribunal de la résidence de l'enfant au moment où l'affaire fut portée devant la cour.
De plus, selon l'article 65 du Code de procédure civile, la compétence internationale des tribunaux portugais, y compris celle des tribunaux pour enfants, dépend de la constatation des circonstances suivantes:

a «L'affaire devra être soumise au Portugal, selon les règles de compétence territoriale établies par la loi portugaise», ce qui veut dire, lorsque l'enfant sera domicilié au Portugal.

b «Le fait qui est le fondement de l'affaire devra s'être déroulé sur le territoire portugais», particulièrement lorsqu'il s'agit d'un enlèvement d'enfant.

c «L'accusé devra être un étranger et l'auteur un Portugais, pour autant que, en situation contraire, le Portugais pourrait être attrait devant les cours de l'Etat auquel l'accusé appartient».

d «Le fait que le droit ne pourra devenir effectif que par moyen d'action soumis à une cour portugaise, pour autant qu'il existe, entre l'action et le territoire portugais, un élément important de rapport personnel ou réel».

Question 10

Il n'y a aucune disposition ou pratique particulière en vertu de laquelle les tribunaux portugais doivent se déclarer incompétents dans certaines affaires d'enlèvements d'enfants.

Question 11

a Au cours du mariage des parents, l'exercice de la puissance paternelle appartient aux père et mère (art. 1901 du Code civil). Les parents exercent la puissance paternelle d'un commun accord.

b Après leur divorce ou séparation de corps, la garde de l'enfant est réglée par accord des parents, soumis à l'homologation du tribunal (art. 1905, No 1, du Code civil); l'homologation sera refusée si l'accord ne correspond pas à l'intérêt du mineur.
A défaut d'accord, le tribunal décidera, en harmonie avec l'intérêt du mineur, si celui-ci peut être confié à la garde de l'un des parents ou, lorsqu'un danger pour la sécurité, la santé, la formation morale et l'éducation de l'enfant pourrait avoir lieu, à la garde d'un tiers ou d'un établissement d'éducation ou d'assistance (art. 1905, No 2, du Code civil).

c Après le décès de l'un des parents, la garde de l'enfant appartient, en principe, au père ou à la mère survivant.
En cas de danger pour la sécurité, la santé, la formation morale et l'éducation de l'enfant, le tribunal peut, en réglant l'exercice de la puissance paternelle, décider que la garde ne passera pas au survivant en cas de décès de l'époux à qui l'enfant a été confié; le tribunal désignera alors la personne à qui, provisoirement, le mineur sera confié (art. 1908 du Code civil).

d Si la filiation de l'enfant né hors mariage ne se trouve établie qu'à l'égard de l'un de ses parents, la puissance paternelle appartient à celui-ci (art. 1910 du Code civil).
Quand la filiation se trouve établie à l'égard des deux parents qui ne se sont pas mariés après la naissance du mineur, la puissance paternelle est exercée par celui d'entre eux à qui la garde de l'enfant a été confiée; en ce cas, on présume que la mère a la garde de l'enfant (art. 1911 du Code civil). Cette présomption ne peut être écartée qu'en justice.
La garde de l'enfant est toujours décidée dans l'intérêt du mineur.

Question 12

D'après la réponse précédente, le droit de notre pays ne prévoit pas que la surveillance et l'éducation de l'enfant reviennent de plein droit au parent de l'un ou de l'autre sexe, lorsque les parents sont ou ont été mariés et qu'aucune décision judiciaire attribuant la garde n'a été prononcée.

Question 13

La réponse à cette question est difficile, vu la réponse à la question précédente.

Question 14

L'âge de l'enfant ne constitue pas un critère dans les cas envisagés aux questions 11, 12 et 13.

Question 15

Pendant le mariage, lorsque les parents saisissent le tribunal d'enfants dans des questions d'importance particulière concernant l'exercice de la puissance paternelle, le tribunal, si la conciliation ne s'avère pas possible, entendra, avant de décider, l'enfant majeur de quatorze ans, à moins que des circonstances sérieuses ne le déconseillent (art. 1901 du Code civil).
Aux termes de l'article 175, No 1, du Décret-Loi No 314/78 du 27 octobre 1978, le juge de l'affaire peut autoriser la présence du mineur, tout en ayant en considération son âge et son degré de maturité, lors de la séance pour un éventuel accord des parents.

Question 16

Dans les affaires de puissance paternelle, les tribunaux ont décidé, lorsqu'ils l'estiment opportun, que les enfants ne peuvent sortir du pays qu'avec l'accord des deux parents. Cette mesure est souvent adoptée lorsque les père et mère résident en des pays différents. Pourtant, on ne possède pas de données informatives concernant l'efficacité de cette mesure.

Question 17

La règle de conflit applicable aux affaires de garde d'enfants est celle de l'article 57 du Code civil, qui prévoit:

1. Les rapports entre parents et enfants sont régis par la loi nationale commune aux parents et, à défaut de celle-ci, par la loi de leur résidence habituelle commune. Si les parents résident habituellement en des Etats différents, la loi personnelle de l'enfant sera applicable.

2. Si la filiation est établie relativement à l'un des parents, la loi personnelle de ce dernier sera applicable; si l'un des parents est décédé, la loi personnelle du survivant sera applicable.

Question 18

Il n'existe pas, dans notre pays, de normes dérivées de lois constitutionnelles ou d'autres lois fondamentales prenant le pas sur les règles habituelles de conflit de lois dans les affaires de garde d'enfants.

Droit de visite

Question 19

Le système juridique portugais prévoit un droit de visite pour le parent qui n'a pas la garde de l'enfant, à moins que l'intérêt du mineur ne le déconseille (art. 1905, No 3, du Code civil).

Question 20

En principe, il n'y a aucun obstacle légal à ce que l'on conduise l'enfant, pour une durée déterminée, dans un autre pays que celui de sa résidence habituelle, pour permettre l'exercice de ce droit de visite. Pourtant, cette possibilité est conditionnée par l'accord des parents ou, à défaut d'accord, par décision judiciaire, pour chaque cas particulier.

Question 21

La loi portugaise ne prévoit pas que l'enfant a le droit de rencontrer régulièrement le parent qui n'a pas la garde.

Question 22

On estime que les enlèvements d'enfants sont favorisés par l'exercice du droit de visite, mais on n'a aucune information précise sur les conditions et raisons déterminant ces enlèvements.

Question 23

On peut admettre que des enlèvements d'enfants sont favorisés par le refus du droit de visite. D'ailleurs, on estime que les cas de «refus» de ce droit sont bien rares parmi nous et cette mesure n'est adoptée que lorsqu'il y a crainte d'un enlèvement ou de tout autre comportement irrégulier.

Solutions actuelles non conventionnelles

Question 24

Il n'existe pas dans notre pays de pratiques permettant de prévenir les enlèvements d'enfants, sauf l'information par les tribunaux aux autorités des frontières sur la limitation ou l'interdiction de sortie d'enfants vers l'étranger.

Solutions conventionnelles possibles

Question 25

On est d'avis que l'inclusion, dans une convention internationale à conclure, de dispositions destinées à

- faciliter l'exécution des décisions,
- créer un tribunal international,
- accélérer la restitution de l'enfant,
- renforcer la coopération administrative

serait très avantageuse.

Question 26

On n'envisage aucune autre méthode à adopter par la convention à conclure.

Royaume-Uni/United Kingdom

Sociological information

Question 1

See answer to question 3.

Question 2

See answer to question 3.

Question 3

During a recent twelve month period, the Home Office, in relation to England and Wales, were asked to take action in 691 cases involving the possible removal of children to 69 different countries. Not all cases, however, are reported to the courts or administrative authorities, and these figures are not necessarily a reliable guide to the extent of child abduction. There is some evidence, however, that the dimensions of the problem may have increased in recent years. It is assumed that this is a consequence of greater freedom of movement.

Question 4

No.

Treaties

Question 5

No.

Question 6

Not applicable.

Question 7

The United Kingdom is a Party to the European Convention on Human Rights and to the International Covenants on Human Rights. None of these Conventions have any direct bearing on child abduction.

Question 8

No.

Legislation and case law

Question 9

a In *England and Wales* jurisdiction to make orders as to children varies according to the kind of case in which the question arises. In wardship cases jurisdiction is based on nationality, ordinary residence or mere presence. Custody disputes also arise in proceedings for divorce (or nullity or judicial separation) and in those proceedings jurisdiction is based on the domicile or habitual residence of a parent. However, where an issue as to custody or care and control of children arises in a county court or magistrates' court, jurisdiction is based on the residence of one of the parties within the district or area of the court.

b In *Northern Ireland* the provisions about jurisdiction are similar to those in England and Wales but there are differences, particularly in relation to summary jurisdiction.

c In *Scotland* the Court of Session's jurisdiction is based on domicile of the child (for a custody petition) or domicile or habitual residence of a parent (for orders made in consistorial proceedings). The jurisdiction of the sheriff court is in the main based on the residence within the sheriffdom of one of the parties to the proceedings; but in separation proceedings it is also necessary that one of the parties to the marriage should be domiciled or habitually resident in Scotland.

Question 10

Yes. The English grounds of jurisdiction in custody cases are wide but, to avoid the assumption of jurisdiction in inappropriate cases, the courts in England may decline to exercise jurisdiction which they otherwise possess if the

welfare of the child requires it. In addition, the courts have been prepared to make an order for the return of a kidnapped foreign child to his foreign home and so to restore the *status quo* unless satisfied that there would be harm to the child in adopting this course. In Scots law, the principle of *forum non conveniens* is of general application, though the courts are reluctant to apply it where the child is domiciled in Scotland.

Question 11

a Northern Ireland still applies the principle of the common law that the custody of a legitimate child is vested in the father, but in all other parts of the United Kingdom the rights of the father and the mother are equal. In the event of a dispute between them the principle applied is that 'the welfare of the child shall be the first and paramount consideration'.

b This is a matter for the court in the application of the above-mentioned principle.

c On the death of one of the parents, the survivor will normally be entitled to custody along with (in certain cases) the guardian or tutor appointed by the other. Where the spouses have been living apart, however, the person who after the death of one of the spouses has *de facto* custody of the child may apply to the court for the legal custody of the child. If the application is contested, the court will once again apply the welfare principle.

d There are other cases, in particular cases where a child in need of care is withdrawn from the custody of its parents, and placed in the care of a local authority or, exceptionally, of a third person, often a relative of the child. The cases are too varied to be discussed here in detail.

Question 12

No. There is equality of rights between spouses.

Question 13

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Question 14

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Question 15

Where the age of the child permits of this, the court will take account of the expressed wishes of the child in the application of the welfare principle.

Question 16

Yes. Such a power is possessed by the courts and is frequently exercised, though the relevant provisions differ throughout the United Kingdom. In cases of urgency, interim orders may be made during or even before the commencement of custody proceedings prohibiting the removal of the child from the territory of the court.

Question 17

The fact that – almost as a rule of public policy – the court decides issues in custody cases by reference to the welfare of the child has precluded the development of choice of law rules by the legal system of the United Kingdom. In Scotland, the fact that the courts regard the domicile of the child as the appropriate forum to hear custody disputes tends to ensure that the law of the child's domicile will be applied.

Question 18

See answer to question 17.

Visitation and access

Question 19

Only by virtue of a court order.

Question 20

This depends on the terms of the court order, and is entirely a matter for the court.

Question 21

No.

Questions 22 and 23

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Existing non-treaty remedies

Question 24

Requests may be made to the immigration authorities for assistance in preventing the unauthorised removal of a child from England. This procedure does not as yet apply to Scotland or Northern Ireland.

Possible treaty remedies

Question 25

The United Kingdom authorities would wish to be assured that the court or authority ultimately adjudicating upon questions of custody will have regard to the welfare of the child as the first and paramount consideration. Though they are sceptical as to whether the creation of an international tribunal would usefully contribute to the prevention of child abduction, the United Kingdom authorities would otherwise wish to adopt a flexible and pragmatic approach to the adoption of methods likely to contribute to the diminution of international child abductions.

Question 26

Other methods do not occur to us.

Suède/Sweden

Sociological information

Question 1

No official statistics are available. The Foreign Office Legal Department has received an increasing number of requests and inquiries concerning such matters.

Question 2

Only the reasons indicated in the Report.

Question 3

Under Swedish law, the county administrative court may decide – in cases where a child has been removed by one

parent without the other parent's consent – to restore him to the latter. According to the information available, no decision was taken in 1977 concerning the international kidnapping of a child.

Question 4

No.

Treaties

Question 5

a Scandinavian Convention 1931 containing certain provisions of private international law on marriage, adoption and guardianship, article 14 *et seq.* Custody decisions taken in another Nordic country are recognised in Sweden. The question of custody may also be examined in another Nordic country in connection with divorce proceedings or at a later stage. In cases of the latter type, the question of custody shall be examined in the State where the person against whom proceedings are brought is resident.

b The 1977 Nordic Convention on recognition and enforcement of judicial decisions in civil matters, articles 1 and 2. Custody decisions taken in another Nordic country are enforced in Sweden if the decision concerned is enforceable in the State in which it was taken.

c The 1936 Convention between Sweden and Switzerland regarding the recognition and enforcement of judicial decisions and arbitral awards. Custody decisions taken by the Swiss courts are recognised and enforced in Sweden if the court concerned was competent to hear the case. This condition is considered to be satisfied if a Swedish court would have been competent under corresponding circumstances.

Question 6

It is impossible to give an accurate answer.

Question 7

a The Universal Declaration of Human Rights.

b The European Convention on the Protection of Human Rights and Fundamental Freedoms.

c The International Covenant on Civil and Political Rights.

Legislation and case law

Question 8

No.

Question 9

If a case concerning the divorce of spouses of different nationalities is heard by a Swedish court, the question of custody of their children may also be examined. If the respondent is a national of a Nordic country and resident in Sweden, the question of custody may be examined in Sweden independent of divorce proceedings. No further legal provisions exist on such matters. The Swedish courts would seem to be competent, however, when the child is a Swedish national or resident in Sweden, in any event when he is living in Sweden with the person having custody and that person is a Swedish national.

Question 10

No.

Question 11

a Both parents have custody of the child unless they agree that only one of them shall have custody. In such cases the court decides in accordance with the parents' wishes unless these are obviously contrary to the child's interests. If one or both parents show serious negligence in fulfilling their custody obligations, or in similar cases, the court may decide that custody shall be given solely to the other parent or to a guardian specially appointed for this purpose.

b If the parents agree on joint custody, the court shall decide in accordance with their wishes unless these are obviously contrary to the child's interests. Should the parents be unable to agree on custody, the court shall decide according to what seems reasonable in the child's interests. If it is obvious that custody should be given to neither parent, a guardian shall be specially appointed for this purpose.

c The surviving parent shall have sole custody if he shared custody of the child prior to the death of the other parent. Should this not be the case, the court decides whether custody shall be given to the surviving parent or to a guardian specially appointed for this purpose.

d Parents who have not been married to each other may have joint custody of their child if they so agree and if the court does not find this arrangement to be contrary to the child's interests. If the parents were not married at the time of the child's birth, the mother shall automatically have sole custody.

Question 12

No.

Question 13

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Question 14

No.

Question 15

There are no legal provisions specifying how far account is to be taken of the child's wishes though in practice his opinions are normally taken into consideration when he is 12 years of age or older.

Question 16

No.

Question 17

If the question of custody is examined in connection with a divorce case, Swedish law applies when the child is resident in Sweden. Otherwise no legal provisions exist on this matter. *Lex fori* is frequently applied. Under no circumstances are foreign rules of law applied when they obviously conflict with Swedish legal principles.

Question 18

No.

Visitation and access

Question 19

Yes.

Question 20

Yes. If the parent who has custody is in Sweden and the other parent in another country, the difficulty of having the child returned to Sweden may be grounds for refusing exercise of the right of access abroad. The courts may, when granting right of access, make it a condition that this right shall be exercised in Sweden.

Question 21

No.

Questions 22 and 23

Kidnapping may seem the only solution to a parent denied any contact with his or her child. On the other hand, misuse of the right of access cannot be ruled out, resulting in failure to return the child to the parent who has custody at the end of the visiting period. In cases where the courts have actually considered whether access outside the country should be granted, this right of access abroad would not seem in most cases to 'contribute' to kidnapping.

Existing non-treaty remedies

Question 24

If there is a risk that the child may be illegally abducted from the country, the police authorities are authorised by law to take charge of him immediately if this is possible without harming him.

Possible treaty remedies

Question 25

Sweden's position is provisionally as follows:

a Yes.

b No.

c Yes, but provided that some consideration is given to the child's interests.

d Yes.

e No.

f No.

g Yes.

Question 26

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Suisse/Switzerland

Remarque préliminaire

S'il est vrai, comme cela ressort de la pratique des tribunaux et de cas portés sur le devant de la scène publique, que les cas d'enlèvements d'enfants connaissent une recrudescence, il n'est pas possible néanmoins de répondre avec satisfaction à toutes les questions posées. Cependant, les présentes réponses doivent permettre de se faire une idée plus claire sur la situation telle qu'elle est en Suisse et telle qu'elle semble être dans d'autres Etats membres de la Conférence.

Informations de caractère sociologique

Question 1

En général, un accroissement d'enlèvements d'enfants a été ressenti, selon les régions du pays.

Question 2

Incontestablement, le nombre d'enlèvements internationaux d'enfants est dû au grand nombre de mariages mixtes et au départ à l'étranger d'un des parents après la séparation ou le divorce.

Question 3

Il n'y a pas de statistiques disponibles.

Question 4

Le problème n'a pas été abordé de front mais a été abordé dans des ouvrages consacrés au problème de la dissolution du lien conjugal.

Conventions

Question 5

La Suisse est partie à la Convention de La Haye du 5 octobre 1961 concernant la compétence des autorités et la loi applicable en matière de protection des mineurs, qu'ont ratifiée également l'Allemagne, l'Autriche, la France, le Luxembourg, les Pays-Bas et le Portugal.
Les mesures qui peuvent être prises en vertu de cette Convention peuvent également comprendre le retrait de la garde d'un enfant, son placement auprès d'autres personnes ou son placement dans des établissements adéquats, en un mot, la protection de la garde de l'enfant.

Question 6

Si la Convention est saluée comme très utile en matière de protection des mineurs, au sens large, elle ne semble jouer aucun rôle pour prévenir ou atténuer les enlèvements d'enfants.

Question 7

La Suisse a ratifié, en 1974, la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales, du 4 novembre 1950. Cette Convention n'exerce, à ce jour, aucune influence sur les affaires d'enlèvements d'enfants. Il est vrai que son application en Suisse est encore trop récente.

Question 8

Pas de réponse.

Législation et jurisprudence

Question 9

Pour se déclarer compétents en matière de garde des mineurs, les tribunaux suisses peuvent fonder leur compétence soit sur le Code pénal suisse (CPS), soit sur le Code civil suisse (CCS), soit sur la Convention de La Haye citée à la question 5 ci-dessus.

A *Le Code pénal suisse*

Il s'agit principalement des délits suivants:

– *violation du devoir d'élever l'enfant* (art. 219 CPS) lorsque les père et mère ont abandonné l'enfant à un milieu moralement et matériellement dangereux, et

– *l'enlèvement d'un enfant* (art. 220 CPS) visant spécifiquement les cas envisagés ici, à savoir la soustraction ou le refus de remettre un mineur à la personne qui exerce l'autorité parentale ou la tutelle.

En général, *le for* est donné par l'article 346 CPS au juge du lieu où l'auteur a agi. Mais si le lieu où le résultat s'est produit, ou devait se produire, est seul situé en Suisse, c'est l'autorité de ce lieu qui est compétente.
En outre, l'article 185 CPS traite des enlèvements d'enfants au sens «*kidnapping*» du terme, à savoir aux fins d'obtenir une rançon, d'exploiter l'enfant ou encore, dans le cas de l'article 202, de la traite des mineurs aux fins de débauche.

B *Le Code civil suisse*

Il s'agit des mesures provisoires à prendre dès l'introduction d'une action tendant au divorce ou à la séparation de corps (art. 154 CCS), du jugement rendu en cette matière (art. 156 CCS) ou de modification de la situation de fait après le jugement (art. 157 CCS).
Le juge civil est amené à s'occuper des problèmes de garde des enfants dans le cadre de mesures protectrices de l'union conjugale, lorsqu'il autorise la suspension de la vie commune des époux (notamment les articles 169, 170 et 172 CCS).
Le nouveau droit suisse de la filiation a supprimé la puissance paternelle au profit de l'autorité parentale des articles 296 et s. CCS. Le juge est ainsi appelé à intervenir dans les cas où la vie commune est suspendue (art. 297, al. 2, CCS) ou lors du décès d'un des parents ou en cas de divorce (art. 297, al. 3, CCS) et aussi lorsque les parents d'un enfant ne sont pas mariés (art. 298 CCS) ou lorsque l'enfant est confié à des parents nourriciers (art. 300 CCS).
Par ailleurs, en vertu des nouveaux articles 307 et s. CCS, qui organisent la protection de l'enfant, le juge est compétent pour s'occuper de la garde des enfants. L'article 310 CCS concerne tout particulièrement le retrait du droit de garde des père et mère lorsque le développement de l'enfant serait compromis si l'enfant restait chez ses parents. On relèvera entre autres le fait que le droit suisse renforce maintenant le droit de garde des parents nourriciers vis-à-vis des père et mère de l'enfant (art. 310, al. 3, CCS).

Question 10

Il n'existe pas de dispositions ou pratiques particulières en vertu desquelles les tribunaux doivent se déclarer incompétents dans certaines affaires d'enlèvements d'enfants.
En revanche, en vertu de l'article 31 de la Convention de Vienne sur les relations diplomatiques, du 18 avril 1961, l'agent diplomatique accrédité en Suisse jouit de l'immunité de la juridiction non seulement pénale et administrative mais également civile, pour autant qu'il ne s'agisse pas d'un litige d'ordre successoral, ou provenant de la propriété immobilière ou de l'exercice d'une activité commerciale ou professionnelle où l'agent agit à titre privé.
Signalons toutefois que pareille immunité n'est pas garantie aux membres des organisations internationales accréditées en Suisse. En vertu des accords de siège passés avec le Gouvernement suisse et ces organisations, des privilèges et immunités ne sont tout d'abord accordés qu'à certains de ses hauts fonctionnaires et ne sont accordés que dans l'intérêt de l'organisation en question et non à leur avantage personnel (v. p. ex. art. V, sect. 16 et 17, de l'Accord sur les privilèges et immunités de l'ONU conclu entre la Confédération suisse et le Secrétariat général de l'ONU, le 11 juin 1946).

Question 11

Le principe fondamental régissant l'attribution du droit de garde sur un enfant consiste dans l'intérêt de l'enfant (principe affirmé par le Tribunal fédéral: ATF 94 II 2; 96 II 73).

a Pendant la durée du mariage, ce sont les parents qui ont la garde de l'enfant (art. 297, al. 1, CCS) et ils l'exercent éventuellement mais, s'ils le demandent, avec le concours de l'autorité tutélaire, qui peut prévoir le placement de l'enfant dans un établissement approprié (art. 310, al. 2, CCS). En outre, il faut relever que si l'enfant a vécu longtemps chez des parents nourriciers, les père et mère naturels de l'enfant peuvent se voir interdire par l'autorité tutélaire de reprendre l'enfant sous leur garde (art. 310, al. 2, CCS).
Dans le cadre des mesures protectrices de l'union conjugale (v. sous question 9, B, ci-dessus), le juge peut attribuer la garde des enfants à l'un des époux (art. 170 CCS).

b Après le divorce ou la séparation de corps, il appartiendra alors au juge de conférer la garde des enfants à celui des deux parents qui lui semble le mieux à même de garantir le bien-être et l'intérêt de l'enfant. La protection de l'intérêt de l'enfant n'englobe pas simplement ses intérêts matériels, mais surtout affectifs et sociaux. Le Tribunal fédéral considère, en général, que c'est la mère qui peut assumer le mieux la garde des enfants, tant du point de vue de l'éducation, que de la formation et des soins. Cela est d'autant plus vrai pour les enfants en bas âge pour lesquels le lien avec la mère, sous l'angle de l'amour maternel, apparaît déterminant dans les décisions judiciaires. Ce quasi-principe ne serait affecté que dans la mesure où des lacunes essentielles seraient constatées dans la personne de la mère ou, du côté du père de très grands avantages par rapport aux conditions de vie que l'enfant aurait auprès de sa mère. Des avantages pécuniaires ne sont point pris en compte en premier lieu (v. ATF 85 II 231; 79 II 241).

c Après le décès d'un des parents, la garde de l'enfant est conférée de par la loi à l'autre (art. 297, al. 2, CCS).

d –

Question 12

Lorsque les parents sont mariés, l'autorité parentale, et donc la garde de l'enfant, est attribuée conjointement aux deux époux (art. 297, al. 1, CCS).
Lorsque la vie commune est suspendue, l'autorité parentale est attribuée par le juge à l'un des époux, qui exerce la garde (v. question 11*b*, ci-dessus). Lorsqu'il s'agit d'un enfant né hors mariage, c'est la mère qui exerce l'autorité parentale et qui a la garde de l'enfant (art. 298, al. 1, CCS).

Question 13

Oui; l'article 298, alinéa 2, CCS dispose en effet que si la mère est mineure, interdite ou décédée ou si elle a été déchue de l'autorité parentale, l'autorité tutélaire nomme un tuteur à l'enfant (dans ce cas l'autorité parentale et la garde pourrait demeurer à la mère) ou transfère l'autorité parentale au père, si le bien de l'enfant le commande.

Question 14

La pratique des tribunaux recommande de confier la garde des enfants en bas âge à la mère.
Dans l'intérêt de l'enfant toujours, les tribunaux ne modifient pas le droit de garde en considération de l'âge des enfants mineurs, même s'il est admis par l'article 301 CCS que l'avis de l'enfant peut être pris. Cependant, de graves inconvénients peuvent en résulter pour lui et être des sources de perturbations importantes.
L'alinéa 2 de l'article 301 dispose ce qui suit:

L'enfant doit obéissance à ses père et mère, qui lui accordent la liberté d'organiser sa vie selon son degré de maturité et tiennent compte autant que possible de son avis pour les affaires importantes.

Le libellé de la dernière phrase de cette disposition montre bien qu'il n'y a pas d'injonction donnée par la loi.

Question 15

L'article 301, alinéa 2, CCS prévoit donc que l'on doit tenir compte dans une certaine mesure de l'avis de l'enfant.
En ce qui concerne les droits de garde et de visite, le Conseil fédéral avait tout d'abord prévu que l'enfant âgé de 16 ans révolus devrait consentir à toute décision prise à propos des relations personnelles qu'il devait entretenir avec ses parents.
Mais le Parlement s'est en définitive prononcé contre cette règle conservant simplement le droit pour les père et mère d'entretenir avec l'enfant mineur qui n'est pas placé sous leur autorité parentale ou sous leur garde, les relations personnelles indiquées par les circonstances (art. 273 CCS).
La loi parle bien d'un droit du parent mais renonce à instituer un devoir de l'enfant à supporter une visite qu'il ne souhaite pas.
Le juge ne peut obliger le parent à rester en Suisse.

Question 16

Les tribunaux ne considèrent pas *a priori* que le fait d'emmener un enfant à l'étranger dans la période réservée au droit de visite soit incompatible avec l'exercice de ce droit. Le Tribunal fédéral a d'ailleurs reconnu qu'on ne pouvait interdire à un parent d'emmener un enfant dans son pays d'origine. En effet, en matière d'attribution de l'autorité parentale après divorce ou séparation de corps (art. 156 CCS), celui des parents qui en est investi peut déterminer le lieu de résidence ou le domicile de l'enfant et il n'est pas limité dans son droit de s'établir où il l'entend; le bénéficiaire du droit de visite doit subir les conséquences de cette situation et il appartient au juge d'en tenir compte pour l'attribution du droit de visite comme du droit de garde (ATF 101 II 202 c. 2).

Question 17

Les articles 8 *d-e* de la Loi fédérale du 15 juin 1891 sur les rapports de droit civil des citoyens établis ou en séjour (LRDC) disposent ce qui suit:

*Article 8*d

Une action en constatation ou en contestation de la filiation peut être intentée auprès du juge du domicile suisse de l'enfant ou du père ou de la mère.
A défaut de domicile suisse et s'il n'existe aucun for à un domicile étranger selon les règles qui y sont en vigueur, l'action peut être intentée auprès du juge du lieu d'origine suisse de l'enfant ou du père ou de la mère.
La compétence suisse sera déclinée si l'espèce présente des rapports prépondérants avec un autre pays et si celui-ci ne reconnaît pas la juridiction suisse.

*Article 8*e

L'établissement et la contestation de la filiation sont régis:

1. par la loi du pays où les père et mère et l'enfant ont leur domicile;

2. à défaut de domicile dans un même pays, par la loi nationale commune de l'enfant et des père et mère;

3. à défaut de domicile dans un même pays ou de nationalité commune, par la loi suisse.

*Si le juge suisse est compétent en vertu de l'article 8*d, *2e alinéa, la loi suisse est applicable.*
Toutefois, lorsque l'espèce présente des rapports prépondérants avec un autre pays, la loi de ce pays est applicable.

Ces règles de droit international privé autonomes sont toutefois, en ce qui concerne plus précisément le droit de garde, remplacées par la Convention de La Haye du 5 octobre 1961 concernant la compétence des autorités et la loi applicable en matière de protection des mineurs (v. question 5, ci-dessus).

Question 18

(V. sous question 17, ci-dessus.)

Droit de visite

Question 19

L'article 273 CCS dispose que «*les père et mère ont le droit d'entretenir avec l'enfant mineur qui n'est pas placé sous leur autorité parentale ou sous leur garde les relations personnelles indiquées par les circonstances.*»

Question 20

Selon les cas, l'enfant peut être conduit pour une durée déterminée dans un autre pays que celui de sa résidence habituelle. Une interdiction pourrait cependant être prononcée par le juge du divorce par exemple, dans les cas où le bénéficiaire du droit de visite entraverait l'éducation assurée à l'enfant par le détenteur de la garde. L'arsenal de mesures que le juge peut prendre est vaste. Il peut notamment charger le curateur de l'enfant de la surveillance de l'exercice du droit de visite (art. 308, al. 2, CCS), mais l'efficacité de pareille mesure semble réduite dans le cas particulier lorsqu'il s'agit d'une visite à l'étranger.
Une autre mesure consiste à faire déposer les passeports du bénéficiaire du droit de visite. Mais il semble que cette mesure peut aussi être détournée. On a vu, en effet, l'auteur d'un «*legal kidnapping*» déposer le double de ses papiers d'identité, ou opérer un enlèvement alors qu'il prenait un repas avec son époux et son enfant dans un restaurant.

Question 21

Si le père et la mère ont le droit d'entretenir avec l'enfant mineur qui n'est pas placé sous leur garde «les relations personnelles indiquées par les circonstances» (art. 273 CCS), il en découle pour l'enfant un droit identique à entretenir avec son père ou sa mère pareilles relations régulières.
Mais ce droit souffre de quelques limites, notamment si ces relations compromettent le développement de l'enfant, aussi bien moral, physique que psychique. On citera le cas d'un parent qui s'emploie à cultiver la haine de son enfant contre celui qui est détenteur de la garde. L'article 274/2 prévoit alors expressément le retrait du droit d'entretenir ces relations personnelles.

Question 22

Il est difficile de donner une réponse catégorique à cette question. En effet, si l'exercice du droit de visite favorise, certes, les enlèvements d'enfants, il ne semble pas qu'il constitue la majorité des causes d'enlèvements pour autant.

Question 23

Même remarque que sous question 22 ci-dessus. Certaines autorités suisses interrogées ont fait remarquer que plus que le refus d'un droit de visite, c'était le rejet d'une demande en

réintégration du droit de garde qui présentait un danger d'enlèvement d'enfant.

Remarques concernant les questions 22 et 23

Exercice du droit de visite, refus ou retrait de ce droit favorisent donc les enlèvements d'enfants. Mais les magistrats ont constaté une modification de l'attitude des parents vis-à-vis de ce droit. En effet, on comprend de moins en moins la raison qui conduit les juges à restreindre le droit de garde ou à le supprimer. Un sentiment de frustration est encore amplifié par une sorte de méfiance à l'égard des juges. L'impatience aussi pousse des parents à alerter toujours davantage la presse dont les comptes rendus largement diffusés alimentent la perte de confiance en la justice. Or souvent, les articles de presse ne sont étayés que sur un état de fait lacuneux, voire partisan.

Solutions actuelles non conventionnelles

Question 24

A part les menaces de peines pénales – dont il faut dire qu'elles peuvent paraître légères et donc peu dissuasives – il existe peu de moyens pour prévenir ces enlèvements.
Il est à relever qu'une réglementation souple du droit de visite favorise l'adaptation des contacts parents et enfants, mais son efficacité devient inopérante lorsque le père et la mère vivent dans des pays éloignés et aux cultures différentes.
Les solutions qui paraissent actuellement le mieux prévenir les enlèvements sont, au cours de l'exercice du droit de visite, la présence d'une tierce personne ou mieux, le dépôt, en main de l'autorité, des passeports aussi bien du parent qui exerce le droit de visite que de l'enfant lui-même.
Un magistrat nous a même proposé de faire en sorte que celui qui est parti dans un autre pays au mépris d'une décision judiciaire soit contraint rapidement à ramener les enfants dans le pays d'où il les a enlevés.

Solutions conventionnelles possibles

Question 25

Parmi les méthodes possibles à introduire dans une convention à conclure, celles consistant à faciliter l'exécution des décisions (*litt. a*), à accélérer la restitution de l'enfant (*litt. c*), à donner aux tribunaux le droit de se déclarer incompétents en raison de la conduite répréhensible d'un parent (*litt. e*) et surtout le renforcement de la coopération administrative (*litt. g*) seraient acceptées par la Suisse.

a Les décisions envisagées ici ne sauraient cependant être restreintes aux seules décisions judiciaires. En effet, parfois la décision sur la garde peut émaner d'une autorité administrative. En outre, une «décision» peut avoir été prise postérieurement à un enlèvement, décision valant ordre de restitution immédiat de l'enfant.

c Accélérer la restitution de l'enfant doit constituer le motif fondamental de la Convention envisagée.

e Donner le droit aux tribunaux de se déclarer incompétents dans des cas où l'un des parents a une conduite répréhensible doit constituer une dissuasion à l'égard de ce parent de venir chercher l'appui de l'autorité judiciaire. Par exemple, dans un chapitre de la Convention, il serait possible de fixer expressément les cas dans lesquels une autorité doit agir et ceux dans lesquels elle doit refuser d'agir. Dans un tel chapitre, cette cause de refus serait vivement souhaitable.

g La Suisse s'est toujours intéressée à renforcer une coopération administrative.
Si la question de faciliter l'exequatur d'une décision est certes souhaitable, l'importance est mise avant tout sur le «rétablissement» quasi immédiat de l'enfant dans l'Etat d'où il a été enlevé.
Or seules des autorités administratives peuvent agir avec la célérité souhaitable en l'occurrence.
Mais il faut bien souligner alors que les décisions administratives qui ordonneraient la restitution de l'enfant ne sauraient statuer sur le droit de la garde lui-même et donc avoir l'autorité de la chose jugée à cet égard.

Tchécoslovaquie/Czechoslovakia

Sociological information

Question 4

We have no information about such publications.

Treaties

Question 5

A Bilateral treaties on legal assistance which the Czechoslovak Socialist Republic concluded with other States and the provisions of which deal also with the subject of care of children:

1 Treaty between the Czechoslovak Socialist Republic and the People's Republic of Albania concerning legal assistance in civil, family and penal matters, concluded in Prague on 16 January 1959 (Notice No 97/1960, Collection of Laws).

2 Treaty between the Czechoslovak Socialist Republic and the People's Republic of Bulgaria concerning legal assistance and regulation of legal relations in civil, family and penal matters, Sofia, 25 November 1976 (Notice No 3/1978, Collection of Laws).

3 Treaty between the Czechoslovak Socialist Republic and the Hungarian People's Republic concerning the regulation of legal relations in civil, family and penal matters, Prague, 2 November 1961 (Notice No 91/1962, Collection of Laws).

4 Treaty between the Czechoslovak Socialist Republic and the Mongolian People's Republic on the provision of legal assistance and on legal relations in civil, family and penal matters, Ulanbatar, 15 October 1976 (Notice No 106/1978, Collection of Laws).

5 Treaty between the Czechoslovak Socialist Republic and the German Democratic Republic concerning legal regulations in civil, family and penal matters, Prague, 11 September 1956 (Notice No 38/1957, Collection of Laws) and Protocol amending and supplementing the Treaty between the Czechoslovak Socialist Republic and the German Democratic Republic concerning legal relations in civil, family and penal matters, Berlin, 10 December 1975 (Notice No 113/1976, Collection of Laws).

6 Treaty between the Czechoslovak Socialist Republic and the Polish People's Republic concerning the regulation of legal relations in civil, family and penal matters, Warsaw, 4 July 1961 (Notice No 66/1962, Collection of Laws).

7 Treaty between the Czechoslovak Socialist Republic and the Socialist Republic of Rumania concerning legal assistance in civil, family and penal matters, Prague, 25 October 1958 (Notice No 31/1959, Collection of Laws).

8 Treaty between the Czecholovak Socialist Republic and the Socialist Federal Republic of Yugoslavia concerning the regulation of legal relations in civil, family and penal matters, Belgrade, 20 January 1964 (Notice No 207/1964, Collection of Laws).

According to treaties with the Polish People's Republic, the Socialist Republic of Rumania and the Mongolian People's Republic in matters of the upbringing of minors, there are competent the courts of the State whose citizen the child is, according to treaties with the Socialist Federal Republic of Yugoslavia and the German Democratic Republic also the courts of the State on the territory of which the child lives, and according to treaties with the Hungarian People's Republic and the People's Republic of Bulgaria only the courts of the State on the territory of which the child lives. The law applicable in matters of the upbringing of minors in these treaties is determined by the principle of the *lex patriae* of the minor. In conformity with these treaties the decisions of courts in matters of the upbringing of minors will be recognized and executed under general conditions for the recognition and execution of decisions in civil and family matters.

B The Czechoslovak Socialist Republic is Member to the following multilateral treaties which deal with the subject in question:

1 Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations Towards Children, The Hague, 15 April 1958;

2 Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations, The Hague, 2 October 1973.

Question 7

The Czechoslovak Socialist Republic is Member to the International Covenant on Civil and Political Rights, New York, 19 December 1966, and to the International Convention on the Suppression of Traffic in Women and Children, Geneva, 30 September 1921.

Legislation and case law

Question 9

For the solution of the question of jurisdiction of Czechoslovak courts in these matters, the consideration of whether the minor is or is not a Czechoslovak citizen has fundamental significance.

1 If the bilateral treaties on legal assistance, which the Czechoslovak Socialist Republic concluded (which are mentioned in answer to question 5), do not contain any other regulation; jurisdiction of Czechoslovak courts is always given when the minor is a Czechoslovak citizen and this even in cases when the minor lives abroad (Section 39, paragraph 1, first sentence, of the Act No 97/1963, Collection of Laws, concerning private international law and the rules of procedure relating thereto, as amended and supplemented by the Act No 158/1969, Collection of Laws).
This principle is, for cases of minor Czechoslovak citizens who are living abroad and are not in care of parents, specified in Section 39, paragraph 2, in such a manner that the care for such minors may also be taken over by a Czechoslovak consular organ to the extent of a court's jurisdiction, if such jurisdiction is recognized by the State in which the minor is living. (This condition corresponds to the rule of the general international law in the field of the regulation of consular relations. Some of the Czechoslovak consular agreements with other States recognize expressly this jurisdiction of consular authorities in bilateral relations. Also the Vienna Convention on consular relations facilitates the exercise of this consular duty to the extent determined by laws and regulations of the receiving State.)
Appeals against decisions of consular organs are decided by the Federal Ministry of Foreign Affairs.

2 *If the minor is a foreigner*, the jurisdiction of Czechoslovak courts comes into account particularly in the case when the minor *is living on the territory of the Czechoslovak Socialist Republic.*
In these cases the activity of Czechoslovak courts is limited only to measures necessary for the protection of such minors and their property which will be notified accordingly to the respective authority of their home State. If such authority fails to settle the affairs of the minor within an appropriate period of time, the Czechoslovak court shall do so. (Section 39, paragraph 3, of the Act No 97/1963, Collection of Laws, as amended and supplemented by the Act No 158/1969, Collection of Laws.)
A special provision is given for cases when the Czechoslovak court divorces marriage of the parents of a minor alien living on the territory of the Czechoslovak Socialist Republic. In its decision divorcing the marriage, the court shall fix the rights and obligations of the parents towards their child for the period following the divorce, with the effects of this regulation being limited in such a manner that they are valid only if the minor will continue to live on the Czechoslovak territory and if the authorities of his home State do not take another measure (Section 39, paragraph 4, of the Act No 97/1963, Collection of Laws, as amended and supplemented by the Act No 158/1969, Collection of Laws, similarly the Supreme Court in decision No 1 Cz 39/68).

If the minor alien is living abroad, the Czechoslovak courts, according to Section 39, paragraph 1, second sentence, of the Act No 97/1963, Collection of Laws, as amended and supplemented by the Act No 158/1969, Collection of Laws, shall have jurisdiction also:

a in maintenance proceedings against a Czechoslovak citizen against whom the claim is advanced by a minor alien living abroad, and

b in proceedings in which the Czechoslovak citizen proposes against a minor alien living abroad the cancellation or alteration of decisions of Czechoslovak courts.

Question 10

The Czechoslovak legislation does not contain any provisions for declining the exercise of jurisdiction in certain cases of child abduction.

Question 11

a The Family Code – the Act No 94/1963, Collection of Laws, determined the following basic principles concerning the upbringing of children:
– Marriage in our society rests on strong emotional ties between a man and a woman. Both are equal in marriage. The main social purpose of marriage is the founding of a family and the proper upbringing of children.
– Parents are responsible to society for the overall mental and physical development of their children and, in particular, for their proper upbringing, so as to consolidate the unity of interests of the family and society.
– Society attends to the upbringing of children and to the satisfaction of their material and cultural needs, cares for them and protects them through agencies of the State, public organizations, schools and cultural, educational and health facilities.
Under Section 50 of the Family Code, if the parents of a minor child do not live together, the court shall determine their rights and obligations even in the absence of a motion to this effect; it shall decide in particular who should have the custody of the child and how each parent should contribute towards its maintenance.

b Under Section 26 of the Family Code:

– In its decision divorcing the marriage of the parents of a minor child, the court shall specify the rights and obligations towards their child in the period after the divorce, in particular by determining which parent will be entrusted with the upbringing of the child and how each parent is to contribute towards the maintenance of the child.
– The decision specifying the rights and obligations of the parents towards their child may be replaced by an agreement between the parents which requires the approval of the court for its validity.
– When deciding on the rights and obligations of the parents or when approving their agreement, the court shall always see to it that the most favourable conditions for the healthy development of the child into a politically conscious citizen are secured.

c In case of death of one of the parents, all the parental rights go, on principle, to the other parent. Thus the court does not deal with the question of regulating the upbringing of the child in this case.

d Under Section 45, paragraph 1, of the Family Code, if the interest of a child so requires, the court may place the child under the care of another individual than the parent, who provides the guarantee that the child will be properly brought up. Further, under Section 45, paragraph 2, an institutional care may be ordered, by which the child is removed from the custody of parents, if the upbringing of a child is seriously disturbed and no other educational measures have corrected the situation.

Questions 12 and 13

In the Czechoslovak Socialist Republic there is valid the principle of full equality of a man and a woman in all spheres of the social life, *i.e.* also in the sphere of the upbringing of children. This principle is embodied in the Constitution of the Czechoslovak Socialist Republic.
From the point of view of Section 36 of the Act No 97/1963, Collection of Laws, as amended and supplemented by the Act No 158/1969, Collection of Laws, the main principles of the Czechoslovak family law and therefore also the principle of the equal status of both parents, are considered to be a part of the Czechoslovak public order.

Question 14

The age of the child is not the determining criterion for the courts when they decide on the placing of a child under custody. In practice, the Czechoslovak courts in most cases place children of small age under the care of the mother if she has the prerequisites for such care. In deciding there is applied the requirement of the steadiness of the educational environment and that, if possible, the siblings be brought up together. The courts decide on the placing of a child under care till his maturity, *i.e.* till the child reaches the age of 18 years.

Question 15

In practice, the courts usually ask for the opinion of older children. If their opinion is not in contradiction with objective facts ascertained by the court (*e.g.* the facts found out about the parents), they respect such opinion.

Question 16

The courts in their decisions do not order the person, under whose care the child has been placed, the obligation of securing that the child is kept on the Czechoslovak territory. For travels of children abroad the consent of both parents is required. If one of the parents does not agree with the travel of the child, the consent of such parent, necessary for the issuance of the travel document for the child, can be replaced by the decision of the court, and this under Section 176, paragraph 1, of the Code of Civil Procedure, which provides that in matters concerning care for minors, the court decides on the upbringing and maintenance of minor children, the contact between such minors and their parents, the restriction or abolishment of parental rights, the approval of important acts made by a minor, and on the affairs of a minor, on which the minor's parents cannot agree.

Question 17

Relations between parents and children, particularly the questions of upbringing and maintenance of the children, contact between the children and their parents, restrictions or abolishment of parental rights, approval of certain acts on behalf of a minor as well as the affairs of a child on which the child's parents cannot agree, are governed by *the law of the State whose citizen the child is – lex patriae.* According to this principle the foreign law is not applied only in cases of the operation of public order.
Section 24, paragraph 1, second sentence, of the mentioned Act 97/1963, Collection of Laws, extends the application of the Czechoslovak law. Under this provision, *if the child lives in the Czechoslovak Socialist Republic, such relations may be considered under Czechoslovak law, if it is in the interest of the child.*
The principle of the child's *lex patriae* is taken over also by the choice-of-law rules contained in the treaties on legal assistance given in the answer to question 5.

Question 18

Czechoslovak law does not contain any rules resulting from constitutional or other fundamental laws which would override the usual choice-of-law rules.

Visitation and access

Question 19

Under Section 27 of the Act No 94/1963, Collection of Laws, concerning family, the contact between parents and their child in case of their divorce is governed by the agreement of both parents, which does not require the approval of the court. The contact of a child with the parent who was not entrusted with his upbringing is regulated by the court only if the parents cannot agree or if the interest of the upbringing of the child so requires. The question of contact is, however, considered always individually with a view to ensuring that the contact is in the interest of the child and does not disturb his upbringing. In addition to that, the court may restrict or even prohibit the contact between the child and his parent, if it is necessary in the interest of the child's health.

Question 20

In realization of the contact between the parent and his child in another country, the rules contained in items 16 and 19 are followed.

Question 21

As it was mentioned in the answer to question 19, the contact between the parents and their child is governed, on principle, by the agreement of the parents, but, if the interest in the upbringing of the child so requires, the contact between the parents and their child is determined by the court. As it was mentioned in the answer to question 14, the court takes into consideration the opinion of older children.

Possible treaty remedies

Questions 25 and 26

The Czechoslovak Socialist Republic is interested in the preparation of a general international convention on international child abduction by one parent which would codify the progressive rules of private international law and thus would ensure effective protection of the interests of children. The Czechoslovak Socialist Republic reserves its attitude as to different possible methods of the solution of the problems, given under items *a* - *g* of the Questionnaire, for the further stage of work of the Commission.

Turquie/Turkey

Sociological information

Question 1

There has been an increase in the number of child abductions by parents during the last five years.

Question 2

There are about a million and a half Turkish migrant workers abroad. About half of these workers have their families with them. In other words the spouses and children live together in a foreign country of a different culture and social standards. It frequently happens that one of the spouses (in most cases the wife) faces a great difficulty in adapting to the new conditions. In some cases the solution is found in coming back home bringing the children along, without the consent of the other spouse. Some workers get married to citizens of the country they work in. When the marriage breaks down for one reason or other, the Turkish spouse (in most cases the husband) returns home with the child. In some other cases the family comes to Turkey and settles down in the home town of the husband. Mostly due to social and cultural differences, the discontented alien wife abducts the children and returns to her home country.
These are the reasons for the increase of the abductions of the child by one parent along with the other general reasons mentioned in the Report.

Question 3

Unfortunately there are no statistics nor other available data.

Question 4

There are no such research studies.

Treaties

Questions 5 and 6

Turkey is not a party to any bilateral or multilateral treaties dealing with jurisdiction or the applicable law in cases concerning the custody of the child.

Question 7

Turkey is a Party to the Universal Declaration of Human Rights and the European Convention on Human Rights. Related provisions of these Conventions are mentioned in the Report.

Question 8

Turkey is not a party to any treaty or administrative agreement containing provisions dealing with child abduction.

Legislation and case law

Question 9

Article 262 of the Turkish Civil Code provides that the minor child is under the custody of both parents. The right of custody is exercised jointly. According to articles 273 and 274 of the Code, whenever the welfare or the interests of the child are in danger, the judge assumes jurisdiction automatically in order to determine which of the precautions indicated in the law are to be ordered. When serious danger is envisaged, the right of custody could even be taken away from the parents.

Question 10

There are not any special provisions or practices where the exercise of jurisdiction is declined.

Question 11

a As was mentioned before, by law the child is under the custody of both parents during marriage. They both exercise the right of custody and fulfil the duties it comprises together. However, when disagreement arises between them, the father's judgment prevails.

b In cases of divorce or legal separation the judge decides on the parent to whom legal custody is to be granted. The judge also decides on the personal relationship between the parents and the child. This includes the right of access of the other parent. The judge would hear the parents before taking a decision on the matter. The judge does not have to hear the child. But since the principle which governs custody is the interest and welfare of the child, it is common legal practice to hear the child who is old enough to have a capacity to distinguish. Considering every factor relating to the welfare and interest of the child, the judge shall decide on the parent who shall have the legal custody in cases of divorce or legal separation.
Where the parent to whom custody is granted remarries or changes his residence or any other changes occur in the circumstances, the judge takes the appropriate precautions necessitated by these changes. These precautions include the grant of the custody to the other parent.

c In cases where one of the parents dies during marriage the custody of the child is conferred by law on the living parent. Where the parent who holds custody after divorce or legal separation dies it is up to the judge to decide on the custodian. The judge may grant custody to the living parent, or may appoint a guardian for the child.

d In the case of a child born out of wedlock, where affiliation is established by a judicial decision or voluntary recognition, custody is not conferred on both parents or one parent automatically. The judge, considering the welfare and the interests of the child may grant custody to either parent or to a guardian. Where parental affiliation is not established the judge, considering the same factors, may attribute custody to the mother or again, may appoint a guardian.

Question 12

The Turkish Civil Code provides that both parents exercise custody over the child jointly. Therefore the care and education of the child is controlled by both parents (article 265). However the provision in article 263 states that in cases of

disagreement between the parents in custody matters, the father's judgment prevails. This provision is an exception to the general rule.

Question 13

The Turkish Civil Code does not contain a provision which gives power to the court to award custody to one of the parents in cases where custody is exercised by both, by operation of the law.

Question 14

As mentioned under question 11*b*, the judge is not obliged by law to hear the child. However, it is common practice to hear the child if it is old enough. The age of the child does not constitute a criterion by law in determining the custodian. In other words there is no legal provision to this effect. However the age of the child is an important factor to be taken into consideration by the judge whose duty is to take the interest and welfare of the child as a predominant factor in custody cases.

Question 15

Article 148 of the Civil Code states that the visiting right and other personal relationships are to be agreeable and suitable to the requirements of the condition or situation. The court decision on custody and right of access is rendered on the discretion of the judge after an overall evaluation of the facts. The child's opinions in such cases have considerable influence on these decisions. However, there is no specific provision to this effect.

Question 16

According to article 137 of the Civil Code, upon the initiation of a divorce case the judge takes the necessary precautions for the protection of the children. There is a similar provision in article 149 which states that the judge may take measures as the situation requires on certain changes in the circumstances which include the moving of the parent who has the custody after divorce, to another place. These provisions could be interpreted to mean that the court may order the parent who has the custody of the child to refrain from taking the child abroad. However, there are no data available as to how frequently this power, which applies only to limited cases, is used. Such a decision once rendered, would prevent the removal of the child to another country provided that the proper administrative authorities are informed in time.

Question 17

Turkish law favours national law in cases on custody. Turkish law is applied in all cases where the child is a Turkish citizen. According to the general rule Turkish courts have jurisdiction in matters concerning personal status and family law of aliens only under one of the following conditions: *a*) the mutual consent of both parties, *b*) the involvement or concern of a Turkish citizen with the case, *c*) the case would bear effects on another case pending in a Turkish court. When a Turkish court is seized by a case on custody under one of the conditions mentioned above, it shall apply the national law of the parties and the child. In all cases national law is applicable to the extent that it is compatible with the public order. Where public order is concerned, Turkish law is applicable. It must be mentioned here that regardless of any rule of jurisdiction or applicable laws, nothing prevents the courts from taking appropriate measures for the protection of an alien child.

Question 18

Conventions which are ratified according to the procedure provided for in the constitution, have the same force and applicability as other laws. Therefore, present legal rules which are incompatible with the provisions of such a convention would be considered to have been modified or revoked. In other words, provisions of the convention replace the rules of a previous law on the same subject.

Visitation and access

Question 19

Article 148 of the Civil Code provides that the parent who does not have the custody has the right of having a personal relationship with the child. This relationship includes the right of access. This right is exercised as prescribed by the judge.

Question 20

The Civil Code does not contain a provision on the subject. It is up to the judge to decide on how the right of access is to be exercised. However the judge has to abide by the rule stated in the law.
Article 148 states that the personal relationship should be favourable to the requirements of the condition. While the law does not prevent the judge from granting a right of access which requires the removal of the child for a certain period of time to another country, judges in Turkey would hesitate to grant such an arrangement, unless it is justified by the welfare of the child.

Question 21

The Turkish law deals with the subject from the parent's side rather than the child's. However the personal relationship between the child and his other parent may be arranged by the judge so that it is the child who visits the parent on regular bases.

Question 22

It is obvious that visiting and access to the child induces the parent who does not have custody to abduct the child. On the other hand it is unavoidable that this parent should have such rights. It is both human and essential for the child to know his other parent and be able to feel affection for him. The judge must be very careful in deciding on the parent to whom custody is to be granted as well as in arranging the visiting right of the other parent. The right of access must be so arranged that the non-custodial parent would have the least opportunity and incentive to abduct the child.

Question 23

It is only natural for a parent to see and love its child. When the right of access or visit is denied to a parent, increased attempts for abduction are unavoidable. This would also give a good excuse to the parent for resisting restitution. The kidnapper shall have more sympathy and legal protection in another country of different legal arrangements.

Existing non-treaty remedies

Question 24

The Law on the Execution of Court Decisions provides for some penal sanctions against the parent who violates the terms and conditions of custody or visitation as provided in

the court order which has been executed. However these sanctions are not considered to be successful in the prevention of child abductions.

Possible treaty remedies

Question 25

It is difficult to base a convention dealing with kidnapping on a single method. My country prefers to make use of a method which combines the compatible elements of the methods under *a*, *c*, *d* and *g* as described in the Report. The methods of facilitating the enforcement of decisions and expediting the return of the child could be used in cases of kidnapping by violating the law or an existing court decision. Examination of the merits could be prohibited allowing for documented written objections for examination without a hearing. These documented objections would be allowed for very limited cases which shall constitute grounds for refusal. Narrowing the jurisdiction of the courts over custody suits would deprive the abductor of obtaining a custody order in the country of refuge aimed at the creation of grounds for refusal, particularly when a custody order did not exist before the kidnapping. However some exceptions must be allowed for this method. In addition to any or all methods, administrative co-operation must be employed through Central Authorities with a system similar to that provided for in the Convention on the Collection of Maintenance Abroad.

Yougoslavie/Yugoslavia

Sociological information

Question 1

There are no official statistical data on the subject, but, if the number of questions and requests for legal aid, directed to Yugoslav consular authorities by Yugoslav nationals (parents) is considered as an indicator, the number of abductions is rising recently.

Question 2

The reason is primarily the growing number of emigrant workers who conclude marriages with nationals of the countries where they are employed, or with other foreigners whom they meet in these countries. These marriages are frequently unstable ones, and the normal legal way to the decision, or to the change of the decision with regard to the custody of children, is for many of those concerned often very complicated and expensive, due to their level of education and limited financial means.

Question 3

The answer is negative.

Question 4

The answer is negative.

Treaties

Question 5

Yugoslavia is a party to several bilateral treaties:

a Yugoslavia - Czechoslovakia

Treaty regulating legal relationships in civil, family and criminal matters (January 20, 1964).
Article 28, s. 3: applicability of the law of the State of which the child is national.
Article 28, c. 4: competence of organs of the State of which the child is national alternatively with organs of the State where the child is living.

b Yugoslavia - France

Convention on applicable law and jurisdiction of courts in personal and family matters (May 18, 1971).
Article 10 (and 5): the laws applicable to relationships between parents and children are:
- common national law; in the absence of it:
- the law of common domicile; if non-existent:
- the law of the last common domicile.

Article 12: jurisdiction of courts of the country of which the child is national, alternatively with courts of the child's domicile.

c Yugoslavia - German Democratic Republic

Treaty on legal aid in civil, family and criminal matters (May 5, 1966).
Article 38: applicability of child's national law.
Article 39: jurisdiction of courts of the State of which the child is national, alternatively with courts of child's domicile or residence.

d Yugoslavia - Hungary

Treaty on legal aid (October 18, 1960).
Articles 32 and 33 (provisions are the same as in the Treaty with German Democratic Republic).

e Yugoslavia - Poland

Treaty on legal aid in civil and criminal matters (February 6, 1960).
Article 28: applicability of the child's national law.
Article 29: jurisdiction of the courts of the State of which the child is national. If both parties live in the same Contracting State, the courts of that State are alternatively competent.

f Yugoslavia - Rumania

Treaty on legal aid (October 18, 1960).
Articles 26 and 27 (provisions are the same as in Treaty with Poland).

Question 6

Child abduction cases usually do not occur in connection with these countries.

Question 7

Yugoslavia is a Party to the International Covenant on Civil and Political Rights, and is, of course, bound by the Universal Declaration of Human Rights, Declaration of the Rights of the Child, etc.

Question 8

The answer is negative.

Legislation and case law

Question 9

The normal basis for assuming jurisdiction in custody cases is the domicile of the child, and in absence of it, the residence of the child. The domicile of the child is, however, construed as the common domicile of its parents or of a parent to whose custody a child is entrusted. *Perpetuatio fori* is an accepted principle in Yugoslav procedural law, but the

court can decline to apply it in cases where the court of a new domicile, or residence, could much easier deal with the case or when the change of competence would result in better protection of the child.
There is no possibility of choice of forum (*prorogatio*) in custody cases.
Jurisdiction for urgent and temporary measures or injunctions pertains to the court of the place where these measures should be executed.

Question 10

The answer is negative, except in cases of *perpetuatio fori*, mentioned under question 9.

Question 11

a Both parents have the same parental rights, which they have to exercise jointly. If they are not living together during their marriage, they should agree to whom the child will be given in custody. The parental right can be denied to one of the parents by the decision of the court only for reasons specified in law. In cases where parents are not living together and cannot agree to whom the child will be given in custody, the decision is rendered by the administrative authority which controls custody and protection of minors.

b In the decision on divorce of parents the court will decide to which one of them the child will be given in custody. This part of the divorce decision can be changed subsequently if the circumstances have changed and interests of the child would be better served by giving it in custody of the other parent.

c After death of a parent who had the child in custody, the other parent can require the custody of the child. The administrative authority for custody and protection of minors will be competent to render the decision.

d In all other cases the competent administrative authority will decide to whom the child (or children) will be given in custody, taking always into consideration interests of the child's welfare. The child can be given in custody to third persons or to the institution for care and education of children.

Question 12

The answer is negative.

Question 13

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Question 14

In cases mentioned under question 11, the court or the administrative authority will consult an expert (psychologist) and can take into consideration the wishes of the child who is over 10 years of age.

Question 15

As already mentioned under question 14, the child's opinion is taken into consideration if it is over 10 years of age. The child will be asked for its opinion and wishes without presence of its parents or other persons and, if it is considered advisable, outside of the official premises of the administrative authority.

Question 16

No rules exist on that subject, but upon request of the parent to whom the child is not given in custody, the administrative authority could reconsider its previous decision and change it if there are sufficient reasons for change.

Question 17

There are no statutory rules, but common opinion of the theory is that the following laws should apply:
– common national law of parents and the child; in the absence of it:
– their last common national law; and if they have never been nationals of the same State:
– the national law of the child.

Question 18

The answer is negative.

Visitation and access

Question 19

The answer is affirmative.

Question 20

There are no specific rules on this subject. It generally depends (as under question 21) on the agreement of parents, or in the case that agreement cannot be reached, on the decision of the administrative authority which can limit or prevent visitation and access only for reasons of the child's health or other important interests of the child.

Question 21

Yes, the procedure is the same as under question 20.

Questions 22 and 23

The exercise of access or visitation is in most cases helpful to the normal relationships between parents and children. Most of the abduction cases are the result of denial of access or visitation of the child to the other parent by the one having a custody right. If the contacts between one parent and the child are made difficult or impossible, the parent may resort to unilateral acts, in many cases to abduction, either because of spitefulness or because of sincere belief that he (or she) is better qualified for the child's care and education and/or has better financial possibilities or circumstances in general.

Existing non-treaty remedies

Question 24

The answer is negative.

Possible treaty remedies

Question 25

Probably the inclusion of the provisions under *a*, *e*, *d* and *g* would be the most appropriate way.

Question 26

No, at least not at this moment.

Summary of findings on a Questionnaire studied by International Social Service

Document préliminaire No 3 de février 1979
Preliminary Document No 3 of February 1979

I Introduction

In the past International Social Service has been honoured by invitations from the Permanent Bureau of the Hague Conference on Private International Law to contribute to studies for the preparation of an international treaty dealing with problems of family and child welfare. Thus, ISS papers were presented related to the following Conventions:

- Protection of Minors (October 1961)
- Adoption (November 1965)
- Celebration and Recognition of the Validity of Marriages (March 1978).

International Social Service is a professional social welfare organisation – non-political and non-sectarian. In 1974 ISS commemorated its 50th anniversary.
ISS operates through a world-wide network of branches, delegations, affiliated bureaux and qualified correspondents with a co-ordinating General Secretariat in Geneva. Its service is centred on the individual, his family and his background. Thus, especially in the course of recent years, ISS has increasingly been confronted with problems around international child abduction and on the invitation of the Permanent Bureau a summary of findings relating to a Questionnaire drawn up by the Hague Conference on Private International Law is submitted herewith.
ISS is grateful for the support received from members of the Permanent Bureau while working on the present paper; also the August 1978 Report prepared by Mr Adair Dyer on international child abduction by one parent was of great value in this respect.

II Background

The authors of this Report were informed that in January 1976 it was first suggested that the Hague Conference on Private International Law undertake the preparation of a convention dealing with the specific problem of international abduction of children by one of their parents. It was further noted that at the Thirteenth Session of the Conference the recommendation was supported that the Conference undertake this topic, which has become broadly intercontinental in its scope.
It is clear that child abduction cannot be treated as a strictly legal subject and that the solution of the problem cannot be found in a simple unification of legal rules concerning jurisdiction and choice of law or recognition of custody decisions. Such rules may not be an effective rein upon the factual action of kidnapping.
On the contrary it was felt that an essential element will lie in the creation of conditions favourable to co-operation between governmental authorities in this very delicate area of parental rights and children's welfare, because the competent courts may be able to avoid decisions which may bring the non-custodial parent into a psychological state, where he will revert to the *ultima ratio* of kidnapping, which in itself usually brings irreparable harm to the child, so that the aim of the Conference must tend towards prevention.
It is also hoped that better understanding of the patterns of motivation inspiring the kidnappers as well as patterns of legal procedure which do not presently deter them, will lead to the finding of improved legal solutions on the international level. The paths to solutions lie amongst the causes and therefore an identification of the phenomenon in its various manifestations must be made.
Since the units of International Social Service (ISS) around the world have had extensive experience in dealing with international cases involving family difficulties including the types of difficulties here referred to as 'child abduction by a parent', it has been thought that an analysis of ISS case files will help to provide sociological data for the study of this problem and for the eventual development of new legal solutions to such problems in international cases.
In consultation with a working group of the International Social Service Mr Adair Dyer of the Hague Conference on Private International Law prepared a Questionnaire, which should serve as a base for gathering case material on the topic of child abduction.

III The Questionnaire and its accompanying letter

The Questionnaire, which is copied hereafter, was sent to the ISS units. In an introductory letter the units were asked to send not more than three examples on each of the listed categories of cases, to send case material based on the Questionnaire rather than straight answers to the questions raised and not to send material of cases dated earlier than 1974.
The confidentiality of the case material has been provided for. Family names were deleted: in most cases only reference numbers were given. If in some cases place names were mentioned, they were replaced by names of other towns in the same country.

Questionnaire on the international abduction of children by a parent

Explanatory Note

This Questionnaire has been designed to obtain information on cases of international abduction of children by a parent, handled by branches of ISS, which involved any of the following five situations at the time when the case became known to ISS –

1 The child was removed from one country to another at a time when both parents technically had equal custody rights and no governmental authority was yet involved, but problems between the parents, whether married to each other or not, already existed.

2 The child was actually abducted from the judicially determined custodian in one country and removed to another, where no conflicting custody decision had been handed down.

3 The child was retained by the non-custodial parent or other relatives beyond a legal visitation period, in a country other than that in which the child habitually resided.

4 The child was abducted from the legal custodian in one country and removed to another, where the abductor had been granted custody under a conflicting order in that other country.

5 The child was removed from one country to another in

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violation of a court order which expressly prohibited such removal.

The information requested would be more useful if it were to reflect the various aspects of the situation brought to the notice of ISS, as they existed at the time of the abduction, removal or retention (the latter three forms are covered in the Questionnaire by one term: 'abduction').

A FACTUAL MATERIAL

Parents

1 Countries of birth
2 Present nationalities (including dual citizenship)
3 Number of years since arrival in country
4 Time of abduction in relation to the marital situation or other relationship of the parents –

a before separation,
b after separation but before divorce, or
c after divorce.

5 Ages
6 Occupations
7 Length of marriage or other relationship (in years)

Child (children) abducted

1 Age
2 Nationality (note if dual citizenship)
3 Person with whom child resided prior to abduction
4 Sex and ages of siblings not abducted

Abduction

1 Parent (or grandparent, etc.) who removed or retained the child
2 Date or dates of abduction, and place
3 Country to which removed
4 Type of passport or other travel document utilised
5 Any previous abductions of child and, if so, by whom
6 How was the abduction carried out?

B MOTIVATION FOR ABDUCTION

Please list the *main reasons* for the abduction as far as can be determined; not more than three should be given.

1 Love of the child and desire to have it
2 To protect the child from inadequate treatment by other parent
3 To spite, upset, etc. the other parent
4 To gain access to the child
5 To unite the child with siblings
6 To control the cultural (religious, educational, ethnic) upbringing of the child
7 To avoid maintenance payments for the child where these should be made to the other parent
8 To gain access to the child's assets
9 To force the other parent to rejoin the family
10 To exclude the other parent from all access
11 Other – please state

As far as can be determined, indicate the main factor(s) *precipitating* the abduction.

1 To avoid a pending court order
2 To avoid forcible removal of the child, following a court order in favour of the other parent
3 Frustration due to inadequate or undetermined access arrangements
4 Concern about the child's current physical or mental health
5 Argument with the other parent
6 The other parent's recent treatment of the child
7 Remarriage or formation of a new relationship by the other parent
8 Pressure from the child
9 Other – please state

C LEGAL SITUATION AND OUTCOME

1 Did any court order relating to the child exist prior to the abduction?
If so, give details of form, time, etc.

2 Did the abducting parent seek a court order in the country to which the child was removed?
If so, give details of time, nature and outcome.

3 Did the deprived parent or anyone else initiate court action relating to the child after the child's departure –

a in the country of the child's habitual residence;
b in the country to which the child was removed; or
c in a third country?

If so, give details of time, nature and outcome.

4 Did any of the courts handing down orders mentioned in 1, 2 or 3, above, take into account the laws, judicial decisions or social reports or other documents deriving from the other countries involved?
If so, please specify.

5 Did the deprived parent seek to take action, but refrained from doing so because –

a it was not legally possible to do so;
b it was possible to do so, but of no real advantage (if so, specify why not);
c the other parent and the child could not be located;
d the legal costs were prohibitive;
e legal counsel was unavailable;
f the deprived parent was held back by ignorance and fear of using the legal system; or
g for some other reason? (Please give details.)

6 What amount of time elapsed between the abduction and the taking of a final decision by a court in one or more countries concerning *a)* custody of the child and *b)* visitation rights?

D RESULTS AND CONSEQUENCES

1 Were the abducting parent and the child located?

2 Was direct contact made between the deprived parent and the child or the abducting parent?

3 Was the child returned?
If so, for what reason?

4 If the child was not returned, was access by the deprived parent obtained?

5 Did the child continue to live –

a with the abducting parent;
b with his or her relatives;
c with friends;
d in an institution;
e elsewhere? (Please specify.)

6 Did the deprived parent eventually accept the result of the abduction as being in the child's best interest?

7 What is known about the effects of the tension between the parents, the abduction and its aftermath on the child's development concerning in particular –

a education;
b general adjustment;
c relations with the deprived parent?

E ADDITIONAL COMMENTS

(To be added where desired.)

IV Replies to the Questionnaire and comments

In total data were received on 110 cases. Distracting the double documented cases leaves a number of 99 different abduction or retention cases. The 5 reabduction cases are headed under the initial abduction case.
The 110 cases were sent in by 11 different countries, *viz.* Australia (18 cases), France (19 cases), Germany (10 cases), Great Britain (11 cases), Greece (11 cases), Italy (2 cases), Japan (3 cases), Netherlands (10 cases), Switzerland (6 cases), USA (13 cases), and Venezuela (7 cases).
The way in which ISS units interpreted the question and submitted questionnaire-based case material determined the way they presented the documentation. Cases documented with significant court decisions, correspondence or newspaper articles were rare.
It was found that the variety and complexity of the case material did not allow for establishing 'pure' statistical data. Therefore a method of enumeration of the various events was used.

V Findings

One should bear in mind that the data given do not constitute a representative sample of all the occurring child abductions by a parent. The findings of this Report are based upon a limited number of cases in which International Social Service was involved.
Taking into account the numerically limited scope of the ISS operations no binding conclusion can be reached, *e.g.* on the frequency of occurrences of the phenomenon. Often ISS is only involved in part of the process, primarily in the period around the actual kidnapping. In some cases branches may be provided with background information underlying the problem or be able to follow up on the case for a longer or shorter time following the abduction. Yet, in many cases this background information and follow-up possibilities are scarce, so that one should handle the conclusions with care.
It was found that reporting on the material for each case happened at a different stage: some cases were already closed at the time of this study and they contain all available data. However, also cases were reported which were rather new. The questionnaires about these cases show many reactions under the heading 'not known'.
It was further observed that some questions were multi-interpretable and that anyhow the filling in of a questionnaire is a rather subjective action. In this Questionnaire this subjectivity was evident in answers where the words 'assumed to be . . . ' or 'probably' were added.
The answers to the questions about the motivation for the abduction and about the precipitating factors are vulnerable to the distortions of subjectivity. One branch solved this problem by giving information in a more specific way. They filled in this question threefold: once reflecting the abducting parent's viewpoint, once from the deprived parent's viewpoint and once from an objective viewpoint, if available, *e.g.* custody report. While no other unit has commented on this question, the several answers given in one case by the workers of this specific branch were taken together.
More subjectivity can be found in the way two units were classifying the same case in other categories: from the 11 double documented cases 4 were classified in different categories. Of course this different categorising can also be the result of the different stages the case is in in each country.
To classify a case under one of the categories formed a problem in itself. There were 9 cases which could not be classified, according to the country which sent the case. Of these cases one seems to belong to category 2, 7 resemble the cases of the first category, but through certain facts they are not exactly fitting in this category (*e.g.* parents not married, retainment in the country of holiday of the whole family, parents were separated but custody was not ruled legally, the abducting parent did not take children to another country but hid them, etc.) and one case is very complicated: the parents having nationalities of different countries, are living in a third country and during proceedings mother is going to live in a fourth country. There are a lot of legal difficulties: the validity of the marriage is being discussed, conflicting court orders are being made, etc.
The 99 different cases presented by units were classified as follows:

category 1	30
category 2	20
category 3	19
category 4	8
category 5	9
difficult to classify	9 + 4.

The double documented cases in which the units agreed in the way they should be classified are included. The cases in which the units did not agree about the category are headed under 'difficult to classify', behind the plus sign. Interesting in reference to this classification matter may be the cases mentioned by some units of ISS. These cases do not fit directly into any of the mentioned categories and therefore they were not included in the presented material. Reference numbers of these cases were given.
They relate to:
– A case where a non-custodial parent abducts his adopted child, living with the mother in another country in violation of a court order in his own country granting the care of the child to the mother.
– 3 cases where problems arise when the legally determined custodian removes the child to another country against the wish of the non-custodial parent although at that time not in violation of a court order.

Furthermore:

– 3 cases of children being kidnapped and retained from local or State authorities. In all cases the children were in the custody and care of local agencies and were removed and retained by a parent and sent out of the country in which they had been living.
– A case of the custody being awarded to the father, but the child at the mother's request (but on his own initiative) went to live with his mother.
– A case in which a legal kidnapping happened many years before the file was opened, but the problem, tracing of a missing person, was a result of a legal kidnapping.
– 2 cases where parents have equal custody and one parent leaves the country hoping that the other parent and children will follow. In both cases the children were retained in the country of origin by the parent who remained behind and refused to join husband/wife in his/her new country of settlement.
– A case in which the father was granted custody of his 4 children, but decided to leave them with their mother for 8 years. Eventually the father claimed his children but the mother refused to return them. She therefore retained them illegally until she was able to obtain a court order in the new country of residence awarding her the legal custody of her 4 children.

Now as to the answers to the Questionnaire.

A FACTUAL MATERIAL

Parents

1 *Countries of birth.* In 20 out of the 99 reported cases the parents have the same country of birth and in 4 cases of these they had their residence in that country. In 79 cases the parents have different birth countries and 62 of these couples had their residence in the country of birth of one of the spouses.

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2 *Present nationalities.* The nationality of parents who or whose relatives were *abducting* was dual in 8 cases out of 99. Six had the nationality of the residence country, 73 the nationality of the country of birth, and 6 had the nationality of both the country of residence and the country of birth (about 6%). Only 6 parents had other nationalities.
The nationality of the *deprived* parent was reported as dual in 8 cases too. Seven had the nationality of the residence country, 23 the nationality of the country of birth, 51 had the nationality of both the country of residence and the country of birth, and 10 parents had other nationalities.
In only 24 cases out of 99 the parents had the same nationality. From 3 couples it is not known and of 73 couples the spouses had different nationalities.
In his outline of a model of the typical situation which produces the abduction of a child by one of his parents, Mr Dyer suggests that the international character of a family is the first typical condition[1]. The cultural differences between the adults which are frequently linked to different nationalities of the parties was seen as a second typical element of such a situation. The results confirm these hypotheses.

3 *Number of years since arrival in country.* From the replies it appeared that it was not clear to all ISS units what information was asked for. In processing the material it has therefore been interpreted as 'length of stay in country from which abduction took place'. For this question information is lacking in many cases: for the mother it is not known in 19 cases and for the father even in 29 cases. Often one of the parents was resident in the country since his/her birth: father in 15 out of the 99 cases and mother in 36 of the 99 cases.
The length of stay in the country from which the abduction took place had for 55 fathers an average of 9 years and 9 months, with a range from less than a year to 26 years. For the 44 mothers this average was 7 years and 9 months, ranging from less than a year to 28 years.

4 *Time of abduction in relation to the marital situation or other relationship of the parents.* Most of the 99 abductions and 5 reabductions took place after the parents were separated, but before a court had issued a divorce order, *viz.* in 53 cases. In 27 of the cases parents were divorced and in 18 cases the abduction took place before the parents separated. Six cases were special: one or both parents died; parents were living together but the deprivation of parental rights was precipitating the abduction; or the divorce was only technical because spouses were relatives. It is very interesting to relate the data listed above to the results of counting the abduction cases in which abduction or retainment was facilitated by a holiday or a visit, either legally arranged or not.
The abductions or retainments which occurred before parents separated had nothing to do with a holiday or visit. Nearly half (22 out of 53 cases) of the abduction/retainment cases which occurred after separation of the parents, but before divorce, were carried out during or after a holiday or a visit.
All the cases of abduction or retainment which were carried out after divorce occurred during or after a holiday or visit period (27 out of 27 cases). In 2 out of 6 special cases there is a link beween access and abduction.
So, in 51 out of 104 abductions or retainments, access played a role, access either being legally ruled or agreed upon by the parents.
Mr Dyer's fourth typical element of the abduction situation is the opportunity. He states that available indications tend to show that periods of legally permitted visiting rank high on the list of occasions offering the opportunity for abduction[2].
Although the numbers listed above also include visits which were not arranged by court order, they show that visits are often used as an opportunity for abduction. For other opportunities and ways of abducting the child see under 'How was the abduction carried out?'.

5 *The ages* of the parents of the abducted children are not always known: of 20 fathers and 23 mothers the age is not known. The known age of 79 fathers show an average of 38 years, ranging from 21 to 64 years. The average age of the 76 mothers is 33 years, ranging from 20 to 50 years.
The average age difference between the parents is 6 years and 3 months, ranging from some months to 22 years.

6 *The occupations* of the parents were classified into 4 categories: 14 of the fathers and 6 of the mothers had an occupation at university level; 22 fathers and 22 mothers an occupation at high school level; 18 fathers and 9 mothers were skilled workers and 9 fathers and 22 mothers were unskilled workers. Information about occupation is lacking for 36 fathers and 40 mothers.

7 *Length of marriage or other relationship of the parents.* Fourteen cases did not contain this information. The average length of the relation is 7 years and 5 months, ranging from 1/2 year to 22 years. In total there were 7 cases in which the parents had another relation than marriage.

Child (children) abducted

1 *Age.* In total there were 149 children abducted, their age being 6 years and 9 months. The range of ages is from 1/2 year to 19 years, most of the children being between 2 and 12 years old. In this group of children 80 were boys, 53 were girls and of 16 children the sex was not given.
Because 149 children were abducted in 104 instances of abduction, it is evident that abduction of more than one child occurred several times. In 66 cases only one child was abducted, in 31 cases two children were abducted together, in 5 cases three children and in 2 cases even four children were abducted at the same time.

2 *Nationality* of the abducted children. In almost half of the cases (43 out of 99) the children had dual citizenship, most of them (in 33 cases) having the nationality of the father and that of the country of residence. The nationality of the children is not known in 8 cases and in 48 cases they have only one nationality which is mostly (in 40 cases) the same as the father. In 15 of these cases the mother also has the same citizenship as father and child, and in only 5 cases the child has the same nationality as the mother.

3 *Person with whom the child resides prior to the abduction.* Before they were abducted most children (in 53 cases) lived with their mother, who is sometimes living with her relatives. In only 20 cases the children were living with their father and mother. In 10 cases they were living with the father, who lives with his relatives mostly. Living alternately with their father and their mother were the children in 5 cases. In 4 cases the maternal and in one case the paternal

[1] *Questionnaire and Report on international child abduction by one parent, supra,* p. 19.

[2] *Questionnaire and Report on international child abduction by one parent, supra,* p. 20.

relatives were caring for the children before they were abducted. Finally, in 4 cases the children were living in a children's home, and in 2 cases it is not known where the children were residing prior to the abduction.

4 About the *sex and ages of siblings not abducted* nothing can be said because in the cases where the abducted child or children had siblings the sex and age of these siblings were rarely given. We can therefore only report about the occurrence of not abducted siblings.
In 71 out of the 99 cases the abducted child or children did not have siblings who were not abducted. This means that the abducting parent was almost always abducting all the children he or she had. The number of the children they had is often just one, because we saw earlier in this Report that in 66 of the cases just one child was abducted. In 17 cases there were brothers and/or sisters who were not abducted: in 5 cases these siblings were older, in 9 cases they were younger and in 3 cases both younger and older siblings were not abducted. In 9 cases the siblings not abducted were stepsiblings, because they were from previous relationships one or both of the spouses had. In one case this stepsibling is a child from a later relationship of one of the spouses. For two cases no information is given about siblings not abducted.

Abduction

1 *Parent (or grandparent, etc.) who removed or retained the child* was in 80 cases the father or his relatives (seldom). The mothers or their relatives (seldom) were abducting the child or children in 18 cases. In 3 cases the paternal relatives were abducting and in another 3 cases the maternal relatives removed or retained the child or children. In the 5 cases of double abductions, the mother was 3 times the one who abducted first.
From the foregoing it appears that fathers tend to abduct their children more than mothers. In this light it may be useful to refer to the comments of the German branch of ISS about this issue:

In the cases which have been handled by us generally speaking, fathers have committed abductions more often than mothers. In our opinion, one should not come to the conclusion, however, that women abduct their children less frequently than men.
Often, cases where the mother abducted the children are not immediately recognized as abduction cases, as demonstrated in the following example:
'The mother returns from the USA to Germany with her child as she does not get along with her husband anymore. She seeks our assistance in arranging for the divorce and in settling the maintenance problem. During the progress of our enquiries, we find out that the father disapproves of the child's stay in Germany.'
There is probably another reason for the fact that, in our files, astonishingly few women appear as the abductor. We define a case as a matter of abduction whenever it was carried out against *the will of the other parent and this parent takes measures against the abduction.*
Fathers from Western cultures often do not initiate actions after the abduction either because they consent to the transfer of the child or because they feel that their plight is hopeless to begin with. In our culture (and law), the mother is to a great extent responsible for the child's upbringing; thus parental rights are granted to her more often by the courts.
The placing of the child with his mother does not apply to the Moslem culture where the extended family structure dominates and the child is usually raised within the parental extended family. For this reason, a Moslem father has the tendency to take the child to his country of origin, so that the child will be educated according to the father's ideas within the parental extended family.

Perhaps it is interesting to give an estimation of the proportion of the reported cases in which the Moslem father takes his child to his country of origin. Counted from the data, 15 of the 80 abducting fathers were Moslem and took their child to their country of origin. This is so in some cases in which it was the father who abducted. It may be that the results under the section 'Motivations for abduction' will reveal more clarifications for this inequality.

2 *Dates and places of abduction.* 22 out of the 104 reported abduction cases took place in the years 1966 through 1973. The remaining 82 cases were divided as follows over the years 1974 through (early) 1978:

1974	15 cases
1975	14 cases
1976	23 cases
1977	24 cases
early 1978	6 cases

One can see from these frequencies the rising number of abductions which is parallel to the increase of incidences that was found among all Member States of the Hague Conference on Private International Law and nearly all the units of International Social Service.
The number of reported abductions was also influenced by the request made in the accompanying letter of the Questionnaire that reported cases *should date from no earlier than 1974.*
About the exact place from which the children were abducted nothing can be said because in most cases only the country is mentioned. But yet an overview of the countries from which the child is abducted was made. This scheme is given under 3 'Country to which removed'.
In cases of retainment, the country where the child habitually resided was seen as the country from which the abduction took place.

3 *Country to which removed.* The data of this part are combined with the data of the last part in the following scheme:

Countries involved in the international abduction cases

	a cases of 'export'	*b* cases of 'import'	*c* number of cases reported by ISS unit
Algeria	–	3	–
Australia	18	–	18
Austria	–	2	–
France	13	6	19
Germany	17	10	10
Great Britain	9	2	11
Greece	2	12	11
Guyana	1	2	–
Hungary	–	2	–
Israel	1	1	–
Italy	3	16	2
Japan	2	–	3
Morocco	1	2	–
Netherlands	7	6	10
Philippines	–	2	–
Spain	–	5	–
Switzerland	9	–	6
Tunisia	–	6	–
Turkey	–	2	–
USA	12	9	13
Venezuela	6	2	7
Yugoslavia	–	4	–
other	2x1	–	–
other	–	9x1	–
total	103	103	110

The total number mentioned under *a* and *b* is 103, because in one case the child was not taken out of the country.

In this scheme the number of cases which was sent in by the ISS units was added because the numbers mentioned under *a* and *b* were dependent on this number. Therefore one should not speak about real 'import' or 'export' countries although some information is of interest. This may appear from the following list showing from which country children were abducted to another one.

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the abducted children were moved –		abductions/retainments	total
from Australia to	Italy	4	
	Greece	3	
	Yugoslavia	3	
	Great Britain	2	
	Hungary	2	
	USSR	1	
	Austria	1	
	Lebanon	1	
	Syria	1	
			18
from France to	Germany	2	
	Spain	2	
	Tunisia	2	
	Morocco	2	
	Italy	1	
	Algeria	1	
	Cameroon	1	
	Portugal	1	
	Senegal	1	
			13
from Germany to	Greece	5	
	USA	4	
	Italy	1	
	France	1	
	Algeria	1	
	Yugoslavia	1	
	Spain	1	
	Turkey	1	
	Tunisia	1	
	Netherlands	1	
			17
from Great Britain to	Italy	4	
	Netherlands	2	
	France	1	
	USA	1	
	Venezuela	1	
			9
from Greece to	USA	1	
	Germany	1	
			2
from Guyana to	Venezuela	1	
			1
from Israel to	Germany	1	
			1
from Italy to	Germany	2	
	Netherlands	1	
			3
from Ivory Coast to	France	1	
			1
from Japan to	Germany	1	
	Philippines	1	
			2
from Morocco to	France	1	
			1
from Netherlands to	Italy	2	
	France	1	
	Philippines	1	
	Tunisia	1	
	Turkey	1	
	USA	1	
			7
from South Africa to	Germany	1	
			1
from Switzerland to	Italy	2	
	Tunisia	2	
	France	1	
	Netherlands	1	
	Guyana	1	
	Algeria	1	
	USA	1	
			9
from USA to	Greece	4	
	Germany	2	
	Israel	1	
	India	1	
	Netherlands	1	
	Philippines	1	
	Yemen	1	
	Austria	1	
			12
from Venezuela to	Italy	3	
	Spain	2	
	Guyana	1	
			6
			103

The country to which the child is taken is in 78 of the cases the country of birth of the abductor. In only one case out of 104 abductions is the child taken to the country of birth of the deprived parent. In 13 of the cases the 'import' country is the birth country of both the parents. In 11 cases the country to which the child is taken is another country than a birth country of one of the parents.

4 *Type of passport or other travel document utilised.* Unfortunately information given on this question is minimal or missing and even the information given was often preceded by 'probably' or 'assumed to be . . .'.
In 54 cases the units replied with 'not known'. In 6 cases it was said that a travel document was not necessary or that this question was not applicable. In 26 of the cases a passport was used, without specific information about what type of passport. One case was reported where the document utilised was the abductor's passport and in 15 cases this was the passport or identity card of the child or children.

5 *Any previous abductions of child and if so by whom?* In 83 of the cases no mention about previous abductions was made in the files. In 16 cases it was reported that the other parent abducted (seldom) or retained (most) the child prior to the reported abduction. When one combines this with the number of reabduction cases reported, one has to conclude that even though a previous abduction or retainment occurred, no detailed information about this event is known to the ISS units.

6 *How was the abduction carried out?* In more than half of the cases the abduction consists of retainment: after an access visit (13 cases), after holiday (13 cases), during access (unspecified) (26 cases) or after a stay of several years (9 cases). In 12 cases the way in which the abduction was carried out was not known. In one case, a grandmother simply took the child after death of its parents. In 15 cases the child was living with both parents, before one of them simply took the child with him or her. In another 15 cases the child was living with just one parent, before the other parent just took the child and disappeared. In 3 of these 15 cases the child was 'snatched' at school, 4 cases were forcible abductions and in 3 cases the help of relatives as abductor was employed.
Where mention was made about the way of travelling this was recorded too: in 20 abduction cases the abductor and the child were travelling by air, in one case they travelled by car, in one case by train and in one case by boat and plane. 37 cases are recorded where an intercontinental abduction took place, but no mention was made about the method of travel. In all the other cases it is not known how the abduction was carried out.

B MOTIVATION FOR ABDUCTION

Before summarizing the answers given to these questions a reference to an earlier part of this Report should be made: the part about the biasing effect of subjectivity. In this part one branch was mentioned as solving the problem by giving three different viewpoints of the motives of the abducting parent. Another branch commented as follows on the draft Questionnaire:

The ISS files give little clarification about the motivation of the kidnapping parent. If he gives a motivation this may often not be what was really his motive, but what he thinks the Social Service would accept as a positive motivation. Moreover the real motivation may often not be evident to the kidnapper himself. Nevertheless, one can ask questions about the possible motivation.

As to the *main reasons for the abduction* the units gave for the 104 abductions a total of 213 motives. For the number of times a specific motive was mentioned, see the following table:

- love for the child and desire to have it: 43
- to control the cultural (religious, educational, ethnic) upbringing of the child: 33
- to spite, upset, etc. the other parent: 29

- to exclude the other parent from all access: 24
- to force the other parent to rejoin the family: 20
- to protect the child from inadequate treatment by other parent: 19
- to gain access to the child: 17
- to avoid maintenance payments for the child, where these should be made to the other parent: 5
- to offer the child better (material) conditions: 3
- to unite the child with siblings: 2
- the abducting parent did not want to live in a strange country: 2
- other reasons: 5x1
- to gain access to the child's assets: –

In 10 cases the motives are not known.

The number of *precipitating factors* of the abduction mentioned in the cases is 151:

- argument with the other parent: 29
- to avoid a pending court order: 20
- frustration due to inadequate or undetermined access arrangements: 13
- concern about the child's current physical or mental health: 11
- other parent's recent treatment of the child: 11
- remarriage or formation of a new relationship by the other parent: 9
- to avoid forcible removal of the child, following a court order in favour of the other parent: 8
- frustration due to problems in the marital situation: 4
- coming into position to care for the child(ren) again: 4
- hostility between the parents and their mutual relatives: 4
- pressure from the child: 3
- the first abduction: 2
- frustration due to the unwillingness of the authorities to help execute a decision: 2
- other: 15x1

For 16 cases the precipitating factors are not known.

In the part about the person who abducted the child or children it has been found that fathers were abducting more than mothers. From the data about the motivation for abduction, the only motive which was used more by fathers than by mothers is the motive of wanting to control the cultural upbringing of the child. This motive was mentioned in 33 of the 104 cases of abduction, so that this motive and other aspects of the cultural differences in the upbringing of the child deserve more attention, which will be given in Chapter V of this Report. Mr Dyer gave as a third typical condition of the model of the abduction situation the frustration or fear of one of the parents[3]. From the results listed above one can see that frustration is indeed playing an important part in the reported abduction cases:

– in 13 cases the frustration was due to inadequate or undetermined access arrangements;
– in 4 cases the frustration was due to problems in the marital situation;
– in 2 cases the frustration was due to the unwillingsness of the authorities to help execute a court decision;
– in 1 case the frustration was due to the legal situation;
– in 1 case due to the rapid adaptation of the other parent to the strange culture of their country of residence;
– in 1 case the father was frustrated by the loss of the feeling of being the authority of the family;
– in 1 case the frustration arose forth from the cultural differences in expectations of roles between the parents.

So frustration played a role in the abduction in 23 of the 104 cases.

One can assume that in the 20 cases where parents were abducting their child to avoid a pending court order they were haunted by fear. In the 8 cases where parents were abducting because they wanted to avoid a forcible removal of the child, fear is also assumed to play a role, so that in total in 28 of the 104 cases the abductions were precipitated by feelings of fear of the abductor.

C LEGAL SITUATIONS AND OUTCOME

1 *Did any court order relating to the child exist prior to the abduction?* To this question information is completely lacking in 5 cases. On the other cases the information given is often minimal. In most cases where a court order exists it is not clear whether it concerns a temporary order or not.

In 40 cases no court order existed prior to the abduction, in 19 cases the custody of the child was given to the deprived parent, the abductor having access rights, and in 20 cases the same was true, but no mention about access rights was made. In 5 cases the children were wards of court and in 5 cases a prohibition existed for the child not to leave the country. In 3 cases the care was given to the parent who retained the child, in one case conflicting court orders ruling custody existed and in 6 cases other orders existed. More details of form and time cannot be given.

2 *Did the abducting parent seek a court order in the country to which the child was removed?* For 22 cases (out of 99) it is not known if the abducting parent did seek a court order. The abductor did not seek a court order in 38 cases, in some of which a reason was given: 2 abductors had intentions of doing so, 2 did not need to seek an order because of an existing ruling giving him/her rights to the child, in one case the abductor had already a court order issued and in one case the abductor did not seek a court order, but asked for financial help instead.

In 39 cases the abducting parent was seeking a court order in the country to which the child was removed, in 30 of which the guardianship, custody or care of the child was asked for, which was granted in 10 cases, not granted in 6 cases and in 14 cases the decision was not known. From the details given it is not possible to say anything general about the time the parent was seeking the court order.

In 2 of the remaining 9 cases the child was made a ward of a British court, and in 2 cases the man officially rejects his wife. In the other 5 cases there were special orders, *e.g.* adoption after remarriage, invalidation of divorce decree etc. More details about these court actions are not given.

3 *Did the deprived parent or anyone else initiate court action relating to the child after the child's departure?* After the child's departure in 22 cases the deprived parent did not initiate court action, in 2 of which there was no need to do it because the children were already wards of court, and in 2 cases the deprived parent tried to kidnap the child back; only one of them succeeded.

For 7 cases it is not known if the deprived parent did seek court action and in 75 cases the deprived parent sought court action. Mostly they were asking for custody of the child. In 14 of these 46 cases custody was awarded to them, in 3 cases the application was not granted and in 29 cases the decision is not known.

The number of deprived parents who were asking for the return of the child or children is 14, 4 appealed against a foreign court order, 4 asked for access arrangements, 2 were asking to prevent the other parent and the child to leave the country and 5 took other measures.

In the 75 cases where the deprived parent sought court

[3] *Questionnaire and Report on international child abduction by one parent, supra*, p. 20.

action, in 35 cases this was done in the country of the child's habitual residence, in 23 cases in the country to which the child was removed and in 9 cases the deprived parent initiated court action in both countries. In 8 cases it is not known in which country the initiation of court action took place.

4 *Did any of the courts handing down orders mentioned in 1, 2 or 3, above, take into account the laws, judicial decisions or social reports or other documents deriving from the other countries involved?* In 39 cases this question was answered with 'no', in 9 cases with 'not applicable' and in another 9 cases with 'not known'. In the 42 cases where the answer is 'yes' for 17 cases it is known that the courts were using social reports in taking their decisions, in 13 cases ISS was involved, in one case the other parent was asked for the hearing and in one case there existed a bilateral international treaty (Germany/Greece – 11.4.61). In the other 10 cases the co-operation was not specified.

5 *Did the deprived parent seek to take action but refrained from doing so for a special reason?* This question was not applicable to 53 cases and in 11 cases the answer was 'not known'. In the other 40 cases the reasons which were given and the frequency of the answers were as follows:

- it was possible to do so, but of no real advantage: 10
- the deprived parent was held back by ignorance and fear of using the legal systems: 6
- it was not possible to travel to the other country: 4
- it was not legally possible to do so: 3
- the legal costs were prohobitive: 3
- the deprived parent was half-hearted about the issue: 3
- no need because children wards of court: 2
- the other parent and the child could not be located: 1
- legal counsel was unavailable: 1
- other (*e.g.* mother died, was in prison, committed suicide, held back by principles, etc.): 7x1

In most of the cases in which it was possible for the deprived parent to take action but of no real advantage, it concerned countries which were not likely to change the awarding of custody from the father to the mother (*e.g.* Greece, Spain and Tunisia).
Mr Dyer mentioned as a sixth element of a typical 'childnapping' the ambiguity of the attitude or response of the deprived parent towards the abduction[4]. This ambiguity was stated explicitly in 3 cases.
Referring to this question the Australian branch mentioned the inability of the mothers to take strong action to regain their child or children. Perhaps the observation or the notion of the fathers that the mothers seldom have the knowlegde, experience, finance or strength of will and purpose to take action for the return of the children, may be another clarification of the observed fact that fathers tend to abduct their children more often than mothers do.

6 *What amount of time elapsed between the abduction and the taking of a final decision by a court in one or more countries concerning a) custody of the child and b) visitation rights?* In 7 cases the answers to this question was not known. In 44 cases the final decision was not yet taken. One cannot say anything about this number, without combining it with the lapse of time since the abduction. Doing this, we find a total of –

42 cases in which no final decision was taken within 6 months;
32 cases without a decision after 12 months;
24 cases without a decision after 1½ years;
19 cases without a decision after 2 years;
10 cases without a decision after 3 years;
7 cases without a decision after 4 years;
4 cases without a decision after 5 years;
2 cases without a decision after 6 years; and even
1 case without a decision after 12 years!

A final decision about custody was taken in 39 cases, 14 of which happened within the period of 6 months after the abduction. In 17 cases this decision was taken more than a year after the abduction, in 9 cases it took more than two years to reach a decision, in 4 cases more than three years; in 3 cases five to six years and in 1 case seven years to take the decision about custody. Maybe together with this decision a decision about visiting rights was made, but this was not mentioned in the cases.
In 5 cases mention was made of a decision on visiting rights: in 2 cases this decision was made after a period of 12-18 months after the abduction, in one case after two years, in one case after three years and in one case after five years.
In 9 cases a decision about custody or visiting rights was not necessary: of these, in 3 cases the child was returned, in 3 other cases a reabduction took place, in 2 cases the parents were reconciled, and in one case the mother died seven months after the abduction.
From many sources the relation between the amount of time which elapsed between the abduction and the taking of a final decision, and the outcome of this final decision, is accentuated. We can assume from the above findings that the child will be returned very rarely because in most cases it took too long a time to take a decision in favour of the deprived parent. The child will have adjusted to the new surroundings and cannot be sent back to a setting from which it has grown estranged.

D RESULTS AND CONSEQUENCES

1 *Were the abducting parent and the child located?* The abducting parent and the child could not be located definitely in 2 cases. Their location was known in 93 of the 104 cases and in 9 cases they could not be traced.

2 *Was direct contact made between the deprived parent and the child or the abducting parent?* In 19 out of 104 cases information about this issue was lacking. No contact was made in 34 cases and in the remaining 51 cases contact, more or less direct, was made. In 8 cases of these 51 it was stated explicitly that direct contact between the parents existed; in 7 cases contact between parents and child was made by mail and in 3 cases by telephone.

3 *Was the child returned and if so, for what reason?* The child was not returned in 73 cases out of 104 and in 2 cases it is not known. In 29 cases the child was returned: 9 times on court order, 5 times by reabduction, twice when the parents were reconciled and in 13 cases the reason was not clear.
The number of 73 cases in which the child was not returned may also include the cases in which the child was not yet returned. The German branch remarked that in many cases ISS is not involved in the later bringing back of the child, because they are no longer informed after the Service is no longer needed.

4 *If the child was not returned, was access by the deprived parent obtained?* This question was not applicable in 29 cases, because in these the child was returned. In 13 cases it is not known if access was obtained by the deprived parent; in 41 cases access was not (or not yet) obtained and in 21 the deprived parent was awarded visiting rights.

5 *The child did continue to live* with the abducting parent and his/her relatives in 50 out of 104 cases. In 21 cases the

[4] *Questionnaire and Report on international child abduction by one parent, supra,* p. 20.

child continued to live with the deprived parent. In 17 cases the child with the relatives of the abductor and in 4 cases with both parents. In one case where both parents died, the child continued to live with an aunt; in one case in an institution and in one case with the relatives of the deprived parent. In 9 cases the persons with whom the child continued to live were not known.

6 *Did the deprived parent eventually accept the result of the abduction as being in the child's best interest?* The answer given to this question was in 10 cases 'not applicable', in 26 cases 'not known' and in 48 cases 'no'. In 21 cases the deprived parent seems to accept the results of the abduction and in one case the deprived parent died.

So, for the deprived parent there was often no alternative but to accept the facts and give up the attempts to change the situation.

7 *What is known about the effects of the tension between the parents, the abduction and its aftermath on the child's development?* The information given to this question was very varied in amount and specificity. Nothing was known about the effects in 57 cases. In 25 cases the answer to this question was more or less positive and in 17 cases it was more or less negative.

Among the positive answers, *i.e.* the answers where no problems were reported, one can find such answers as: 'nothing known about problems', the adjustment is 'apparently good'. But also a lot of very positive answers were given: 'according to the social report the adjustment was very satisfactory' or 'the child reintegrated very quickly' (in the country of habitual residence).

Among the negative answers only 3 cases described the difficulties in terms of language problems. In the 14 other cases detrimental effects were described, ranging from emotionally disturbed children (one of them even needed psychological help), inhibition of general development and character, shy and withdrawn behaviour to fear of strangers. Some children are very confused by the way the abduction took place: one mother snatched two of the four children in the house (the other two children were hiding themselves from her) and in this way caused a breaking up of the family. For some children their longing for their missing parents or siblings was described.

About the effects of the abduction on the child much has been written in the preliminary reports and comments sent by several branches. One unit reported:

There was seldom any reference to the effects of these family upheavals on the children involved in them. Sometimes this was impossible because of complete lack of contact, or distances between countries and difficulties of communication. At other times, and more often than not, ISS *had no reason or need for further contact with clients once the issue for which its help was wanted, had been settled, either satisfactorily or not.*

Another branch was pointing to the psychological consequences of the abduction on the child, specially that the changes which occur in an abduction case will have effects on the child. They mentioned the change of the person taking care of the child, the change of the environment and the learning of another language. They also suggested that the age of the child is playing a role in the way the child reacts to these changes.

In relation to change of environment it was observed that where the father is the kidnapper, he often is not the person subsequently caring for the child. Paternal grandparents, other members of the extended family and servants were variously described as being *in loco parentis.*

Other effects as reported by ISS units were:

– the actual threat of an abduction which can be an intolerable burden for children from international marriages;

– the threat of abduction or reabduction and the stress on the child caused by continual fear of one 'kidnapper-parent' that the other parent will come and in turn kidnap the child. The child is thus subjected not only to his parents' hostility towards each other, but also to the over-protection which may result from one parent's fear of the other.

Yet, notwithstanding the rude way in which only too often kidnapping is carried out and the traumatic effect this may have on a child, no confirmation could be found for the hypotheses that kidnapping is *always* bad for a child.

In cases where on the one hand a European country and on the other a Moslem country is involved, one branch mentioned the security and affection a child may find when removed to his father's 'extended family' as contrasted with the possible alternative of being brought up in Europe by his mother. This observation was made even though it was recognised that an industrialised western society may have more to offer the child from a material point of view. The branch considered that the mother is likely to have to be employed to support herself and the child; also she may remarry. The branch observed that especially when a young child is involved the affectionate ties the extended family in a Moslem country can provide may be more positive for a balanced development of the child's personality than when he would be growing up more or less isolated in an alien environment in Europe. If, however, there is question of an older child who is already aware of the relationship existing between himself and either of his parents, the effect of removal from familiar surroundings involving also interruption of the educational pattern may be far more traumatic.

It was tried to ascertain from the reported effects on the child in the available material what relationship there might be between the age of the child and the delay in making a social report or estimating the effects of the abduction on the child. Unfortunately detailed information is lacking. Yet we found a rough indication that the children in the cases where negative effects were reported, were somewhat younger than the children in the cases where positive effects were reported, their average age being respectively 7½ years and almost 8 years. The lapse of time since the abduction took place and the moment the branches were reporting the effects, was in the 'negative' group 3 years and 2 months and in the 'positive' group 4 years and 11 months.

Although the estimation was made roughly, these last findings tend to confirm the suggestion made by Mr Dyer[5] that the later the time of reporting the effects of abduction, the more these data tend to be positive. According to the estimation, the children with positive effects had also nearly two more years to develop in positive direction than the children on whom more negative effects of the abduction were reported.

VI Observations and suggestions

In cases where children without any preparation at all are torn away from one parent, their familiar surroundings, friends, school and other relatives and brought to another country, the parents are almost always disputing the custody of the child or children. The task for the court is then to find a satisfactory solution for the child.

The legal standard used in most countries for determination of the custody and care of a child is keyed to 'the best interest of the child'. ISS too focusses on the child's interest.

[5] *Questionnaire and Report on international child abduction by one parent, supra,* p. 22

ISS Summary

Yet, it has appeared from the case material that 'the best interests of the child' are valued differently in the various cultures. In some countries the religious education plays an important part. In western countries, a certain degree of consensus probably prevails as to how the best interests of the child should be defined.
Furthermore, it is not clear whether the 'interests' of the child to be served are those of the immediate aftermath of the decision, of the adolescence of the child, of young adulthood, maturity, senescence or old age! This apparently indeterminate nature of the standard is set out by Mr Dyer in his preliminary Report[6].
It was observed by various ISS units that visiting social workers may tend to identify with the parent of his own nationality and language. The desirability of employing 'truly internationally trained workers – preferably in an international team' was brought forward by one branch, so as to achieve utmost objectivity when reporting and recommending in relation to the future welfare of a child. This branch observed that also courts having to render judgment are sometimes found to be subject to influences of a national nature.
In relation to problems around the issuance of children's passports and procedures governing immigration and emigration, the question was raised if States have a possibility to check that no such passports are issued in defiance of an existing custody order. ISS cases show that supervision of regulations concerning passport-issuance to minor children should not only be effected internally within a given State, but also at a diplomatic/consular level.
An additional problem to be mentioned here is that nationality legislation in an increasing number of countries is allowing for children to have dual nationality.
Closely related to the difficulty of determining a formula for a convention dealing with international abduction of children by one parent are questions concerning recognition and execution of custody decisions between different countries. Without going into details here, it is felt that the 1961 Hague Convention on the Protection of Minors may provide a 'directing hand' in finding a framework.
While being aware of different family laws ISS feels that no State should recognise the decisions of another State when it is not clear that the decision is based on the welfare of the child. This means that:
– the welfare of the child must be examined thoroughly by the first decision-making authority, on the basis of a social report, or a psychological investigation where appropriate, and a personal interview of the judge with the parties concerned including, if possible, the child if he is old enough;
– if one parent in another country also claims custody of the child, a social report on his/her situation should be obtained, as part of the decision-making process.

International Social Service has long experience in dealing with international cases relating to custody of children. If the authorities do not co-operate directly between the States, the International Social Service of both countries can be involved to ensure that the social situation of the party involved in the other country is investigated. His/her interests and readiness and capacity to bring up the child can be examined *before* the decision.
The same applies to a child who is not under parental care but in a foster family or a children's home. Before a decision is made, thorough investigations about the situation are necessary.
Last but not least, the preparedness of each of the parents to implement legal orders concerning access and maintenance should be explored. In this respect reference is made to the relation shown in this study between frustration caused by lack of visiting rights, or denial of access, and child abduction.
It is thought that observation of the foregoing may contribute to the preventive effect aimed at by the Hague Conference on Private International Law.
If after all abduction still takes place, there should of course be adequate investigations on all the parties involved by a social worker in a recognised social agency with international experience, providing full information on the child in his environment (*e.g.* at home, at school, etc.) which will enable a decision to be taken corresponding to his welfare. Here, the time element is vital and ideally a convention should contain provisions for the observation of certain time-limits. Further ways in which workers trained in the international field can approach abduction cases and act in the interest of the child are:

– helping clarify the socio-legal situation around the child;
– obtaining a first-hand report on the welfare of the child;
– trying to set up lines of communication between the deprived parent and the child;
– helping overcome difficulties created by distance and/or language, different legal systems, different cultural patterns, etc.

Final remark

International Social Service is aware of the fact that the present study is only a limited contribution towards realization of the difficult project undertaken by the Hague Conference on Private Internaional Law to prepare an international treaty dealing with abduction of children by one of their parents. Yet, ISS hopes that it may serve as a tool towards finding 'the least detrimental alternative available for the safeguarding of the child's growth and development' (quoted from: 'Beyond the best interests of the child', Goldstein-Freud-Solnit)[7].

VII Six case examples

CASE 1 (Category 1 and 5)

Concerns the boy Nicky, aged: 2½ at the time of (first) abduction; nationality: Greek – American
father's nationality: Greek
mother's nationality: American – Greek by marriage

Background information

Nicky – an only child – was abducted twice. First the mother took him from Greece to the USA. At that time (1976) the parents, who had been married for 4 years, were living separated and had filed petitions with the Greek court for a custody decision. Neither petition had been heard at the time of abduction (Category 1).
Secondly, some 2 years later, the father kidnapped the child back again and returned with him to Greece.
There is no mention in the file of a divorce order.
It is assumed that Nicky lived with both parents prior to the first abduction. After their separation he was mostly with his mother, but with frequent visits with his father at times staying over at night.
In that period, *viz.* preceding the first abduction, the mother had tried to leave Greece with Nicky but was stopped as the father had obtained a restraining order on the child's exit from the country. This order applied to a child holding a

[6] *Questionnaire and Report on international child abduction by one parent, supra*, p. 22.

[7] Macmillan, New York 1973.

Greek passport in the father's surname. It had been registered with Passport Control at all points of exit forbidding the child to leave Greece.
The mother then obtained a US passport for the child in her maiden name and took him by boat to Italy: then flew on to the USA (Category 5).

ISS involvement

Approximately one year after Nicky was removed to the US the father applied for ISS intervention to help him obtain access to his child. He had tried to contact his wife and son without success. He had telephoned once speaking to his mother-in-law. Although he could hear his son in the background he was not allowed to speak to him. He wanted ISS to obtain news from the USA on Nicky's welfare and assist in arranging for access. He was willing to visit Nicky in the USA, but did want to bring him to Greece occasionally to know his paternal family, culture and homeland. He would post bond for the return of the child each time to its mother. ISS intervention in the US failed due to lack of co-operation from the mother. When approached by a social worker she changed telephone to an unlisted number; when visiting the home it was either found closed, or the worker was not allowed to enter. When this was reported to the father, he decided to engage a lawyer, and finally had recourse to reabduct his son back to Greece.
Although under the given circumstances no information could be obtained on the effects of abduction on the child, the ISS worker in Greece commented as follows on the motivation which may have caused the mother to remove the child to the USA:

I believe, in this case and in many similar cases, motivation is based on the mother's desire for her own freedom from the control of her child's father. Her freedom to decide where she will live, motivated by considerations of work availability, cultural familiarity, proximity of her relatives, etc.
Under Greek law even though the mother may be granted temporary custody of the child, the father retains parental authority to make any decisions affecting the life of the mother as well as the child. Many foreign women especially resent this control and the fact that it can prevent them from living in their country of origin or for that matter country of choice it need not be origin.
A woman may have access to a good job, career advancement, but cannot accept it and still raise her child and keep it near her, because she cannot take the child out of Greece if the father refuses to give his consent.

Comments

Some considerations for selecting this example:

– it demonstrates especially in the case of a child having dual nationality that passport control can be avoided rather easily;

– problems for a woman from a more 'emancipated' area to conform to Greek patterns, set for a mother and housewife.

CASE 2 (Category 2)

Concerns the boy Juanito, 4 years old at the time of abduction; nationality given as Venezuelan
father's nationality: Trinidadian
mother's nationality: Venezuelan

Background information

The parents married and lived in Venezuela where their only child, Juanito, was born. After three years of marriage, in 1977, they separated and the mother took the child with her to her parents' home.
Meanwhile, the father was allowed to have the child every second week for the weekend. In January 1978 the final decision of the court gave the paternal rights to the mother. This was followed by abduction carried out by the father.
The child was left in Trinidad, first at his paternal grandparents' home, where he lived alone, and later in the house of a neighbour who took care of the child. On behalf of the judge of the Minors' Court of Caracas, ISS asked the correspondent in Trinidad for a social report on the present conditions of the child. This was carried personally by the mother to Trinidad, where she traced her son and took him with her (she had a regular passport for him) without notifying the ISS correspondent. The child is now again living with his mother and grandparents.
The father has not contacted his wife again.

Comments

This case was selected as an example because when Juanito was back in Venezuela, the local social worker was able to observe the effect of the abduction on the child. She reported: *He (Juanito) is thinner, emotionally affected and shows fear when he hears the word 'Trinidad' or his father's name.*

CASE 3 (Category 2)

Concerns the girl Aimai, age 7 at the time of abduction, the girl Lalia, age 8 at the time of abduction; nationality of both: Tunisian
father's nationality: Tunisian
mother's nationality: Netherlands

Prior to the abduction the two children were living with their mother in the Netherlands. The parents had been granted divorce by a Netherlands court; following divorce the court appointed the mother guardian and the father co-guardian. The court took the decision on the basis of the following consideration: though the minors derive Tunisian nationality from their father, the court considered that there are more points of contact to apply Netherlands law than for applying Tunisian law, since the parties concerned married in the Netherlands, the wife possesses Netherlands nationality and the children were born in the Netherlands, where they have been growing up and are still residing.
About two and a half years after this decision, the father came to the mother's home to take the children for an outing, but instead he took them by train to his brother in the South of France. As appeared afterwards one week later he took the children to Tunisia by plane.
After the abduction the mother asked for help everywhere to get the children back. She approached politicians and authorities but without result. The father contacted her a few times asking for money. He was in Switzerland at that time. The mother replied that she would see to the money, provided she would have the children back. The father said that the children were not for sale and that he hoped the mother would be unhappy her whole life. In 1973 and 1974 the mother went to Tunisia to see the children. It then appeared that the father had left them with his relatives who did not know about the divorce.
The father had merely gone away saying that he was going to Switzerland. The relatives did not know his address there. During her first visit the mother observed that the material and housing situation was very poor. Yet, under the circumstances the eldest daughter seemed to do relatively well. Her teeth were not too good. The mother noticed that a permanent molar was in a bad state, but there was no money to take her to a dentist. The younger child, however, had lost very much weight, the different food did not agree with her. While at home with the mother, this girl wetted her bed at night only occasionally, but in Tunisia she was doing this

frequently and was frequently beaten for it. She sucked her thumb, but the relatives raced each other to pull her thumb out of her mouth. The children were never cuddled, because the mother found that it is not customary to do so.
The mother did not blame the grandmother on the father's side, an elderly lady of about 70 years old and the other relatives, because she realised that they were doing what they could for the children.
The relatives on the father's side would have told the mother various times, that they did not approve of the children's stay in Tunisia, but that they could not return the children to her without the consent of the father. They would try to persuade the father as soon as he would be back.
At the second visit the mother observed the children becoming more and more like Tunisian children. Because the eldest child still mastered the Netherlands language a little, there was some correspondence between the mother and this child at the time.

ISS involvement

The only possibility for the mother to get the children back would be to reach a mutual agreement with the father. ISS was asked to try to locate the father in Switzerland, but unfortunately all attempts to do so failed.
Some considerations for selecting this example:

– as an example of a case in which the abducting parent leaves the children with his relatives to look after and to educate;

– in particular in relation to the youngest child it shows the impact of a change in cultural environment.

CASE 4 (Category 3)

Concerns the girl Ayse, age 5 years at the time of abduction;
nationality: Turkish by birth – German (since early 1976)
father's nationality: Turkish
mother's nationality: German

Background information

The parents married in Germany where Ayse lived with them till they separated. Until abduction by the father, approximately one year later, Ayse stayed with her mother.
During the divorce proceedings, the father wanted to travel abroad with the child for three weeks. He applied to the German court to have permission for the trip. Although the mother feared that he would not bring the child back, the judge gave his permission for the father to spend the holidays with the child for three weeks. Both went to Turkey, the father's home country and did not return. This was summer 1976.
After father and child did not come back, the same judge made a decision ordering the father to return to Germany with the child. He based his decision on articles 262 and 263 of the Turkish Family Law and his competency on the Convention of Protection of Minors of The Hague. According to articles 262 and 263, both parents are normally in possession of parental rights. Therefore – the judge argued – the father could not change the residence of the child after three weeks without the knowledge and consent of the mother.
The father did not follow this order and stayed with Ayse in Turkey. The German decision could not be executed in Turkey because of article 540, sect 4 of the Turkish Civil Procedure Law. After his arrival, the father filed for a divorce suit in Turkey. The mother instructed a Turkish solicitor to protect her interests at the Turkish court. She travelled to Turkey in order to take part in the court hearing.
In the meantime, upon the request of the German court, ISS had tried to receive a social report about the girl without success. When the Turkish social worker visited the father's house, he found neither him nor the girl. A relative explained that the child had been staying with him before, but that he would not know where Ayse is now.
However, one year after the abduction, the mother was able to see her daughter, while she stayed in Turkey. After her return, she wrote that this meeting was terrible for her to bear, because the child did not know her and obviously did not understand any German word. (Ayse did not understand and speak Turkish before the abduction.)
Some months later ISS received a short social report from Turkey. The social worker only stated that the health of the child was very good.
Around the same time the mother was granted a divorce by the Turkish court with guilt on her side. The court stated that she left her husband without a reason. The guardianship for Ayse was given to the father. According to the divorce decision, the father *has a reasonable social environment, necessary facilities for the future of the child and possible training facilities for the child to grow up according to Turkish tradition and beliefs.* The mother was allowed to see Ayse on two days every month and once in a year for two weeks during summer holidays.
There is no information about implementation of these visiting arrangements.

Comments

– The Turkish father had studied medecine in Germany, where he subsequently worked and lived for a number of years, where he and his wife met and married.
Yet, ties with his native country appeared predominant.

– In the Turkish court order there further appears to be question of 'influences of a national nature', as referred to in Chapter VI-1.

EXEMPLE 5

Père: M. Mohamed ben Ahmed*, né en 1948 à Taounate (Fes), Maroc;
en France depuis 1969;
ouvrier dans une usine automobile;
domicilié à La Bassée (62), France;
nationalité marocaine.

Mère: Mme, née Nahas Fatima, née en 1954 à Casablanca;
arrivée en France en 1962 avec toute sa famille;
ouvrière en filature;
domiciliée à Roubaix (59);
nationalité marocaine.

Mariés le 8 juin 1976 au Consulat du Maroc à Lille.

Enfant: Fatima, née le 20 novembre 1976 à Roubaix;
actuellement à Taounate (Maroc).

M. et Mme M., originaires de deux régions très différentes au Maroc, se sont connus et mariés en France. Mme y était arrivée très jeune avec sa famille.
En juin 1977, environ un an après leur mariage, la mère de M. M. est venue faire un séjour en France chez une fille. Elle a demandé à garder sa petite-fille quelques jours. Mme M. a accepté de la lui confier et a poursuivi son travail. Le 30 juin, elle a appris l'intention de son mari d'emmener leur petite fille au Maroc. Elle s'est immédiatement rendue au *Consulat du Maroc* à Lille où on lui a dit qu'un laissez-passer avait été effectivement établi pour l'enfant.

* Les noms qui apparaissent ici sont fictifs. Les noms de ville ont été modifiés.

Mme M. s'est alors adressée au Commissariat de Police de sa ville qui a convoqué M. M. Il s'y est présenté et a été mis en demeure de rendre l'enfant pour le 30 juillet 1977. L'enfant était, de fait, déjà parti au Maroc avec la grand-mère paternelle. M. M. les y a rejoint à son tour le 14 juillet.
Dans les mois qui ont suivi, M. M. a répudié son épouse au Maroc. Selon les dispositions du statut personnel marocain, cette répudiation a pu être faite en l'absence de la femme ou de son représentant, et l'acte ne fait aucune mention de la garde de l'enfant.
Mme M. pense que son mari s'est remarié aussitôt au Maroc.

Action menée par la mère

– demandes répétées au Consulat de Lille qui lui répond que l'enlèvement s'étant fait en France, seuls les tribunaux français sont compétents;

– sollicitations faites à trois avocats français qui se sont déclarés incompétents;

– demandes adressées à un oncle maternel domicilié à proximité du domicile des grands-parents paternels qui ont la garde de l'enfant. Il n'a pas pu voir l'enfant.

Mme M. pense que cet enlèvement n'a été motivé que par le désir de lui faire du mal.

Action du Service Social

Comme dans tous les cas où il s'agit de milieux marocains, il nous est difficile d'intervenir directement – ceci d'autant plus que la tradition musulmane – comme le statut personnel marocain – n'admettent pas d'ingérences extérieures dans les problèmes familiaux.
La situation vient de nous être signalée. Assistantes sociales spécialisées, nous pensons avoir un soutien à apporter à la mère pour l'aider à se faire une idée plus juste de la situation (scolarisée en France, elle situe mal tout le poids de la tradition) et «l'armer» pour les démarches qu'elle aura à mener. Personne n'a voulu (au Consulat) ou n'a été en mesure (avocats français) de lui donner des orientations valables:

1 La réaction de la mère de M. M. peut s'expliquer. Selon la tradition, c'était à elle de choisir une épouse pour son fils. Elle avait, sans doute, depuis des années fait des projets avec d'autres familles de Taounate. Le fils émigré lui a échappé. Il a épousé en France une fille de la ville ... européanisée, qui ne lui apparaît plus capable d'élever des enfants dans la tradition musulmane.
En revenant en France, le lien mère-fils, très fort au Maroc, a été renoué. L'enlèvement de la petite-fille a permis à la mère de reprendre en main son fils ... et probablement de le marier au Maroc, donnant suite à ses projets initiaux.

2 L'acte de répudiation ne fait pas mention de la garde de l'enfant. La disposition habituelle prévoyant que la «hadhana» ou garde de l'enfant, selon le statut personnel marocain, reste la fonction de la mère et est donc applicable. Mme M. n'en était pas informée.

3 Seul le Cadi au Maroc a compétence pour faire appliquer cette disposition. Il serait donc indispensable que Mme M. ait les moyens d'aller faire un séjour au Maroc pour faire reconnaître ses droits. L'appui de son père, lui-même émigré en France, serait nécessaire comme tuteur de sa fille pour ces problèmes conjugaux et familiaux, et comme garant pour l'avenir de l'enfant. C'est tout autant à la lignée maternelle qu'à la mère que l'enfant est confié au Maroc.
Ces démarches sont difficiles à réaliser. Par ailleurs la jeune femme, bien adaptée à la vie française, devra veiller – pendant ce séjour au Maroc, à ne pas apparaître comme trop «affranchie». Si elle a affaire à des adouls (juges notaires attachés au Cadi) traditionnalistes, la famille paternelle arrivera aisément à prouver qu'elle doit être déchue de la «hadhana».

6 ADDITIONAL CASE EXAMPLE (non-classified) (Category 1)

Father born in USA on October 27, 1942
American citizen, employed by an international firm
Mother born in Denmark in 1945
Danish citizen, nurse
Children boy born in USA, July 1970
girl born in Denmark in 1972
both American citizens

Couple met and married in Spain, beginning of 1968, when he was there with the American army and she was student nurse in Spain. In the fall of 1968 they left Spain to live in USA where the wife also had a number of family members. Their son was born in July 1970 and in October the same year the family moved to Denmark, as the wife was not happy in the USA. Their daughter was born in Denmark in 1972. The family was not happier in Denmark either, allegedly due to interference from the wife's family and an unusual attachment of the mother to her father. In December 1974 the family went to the USA on vacation and then decided to stay there. The husband worked with an international firm and had no great difficulty in moving back and forth to USA. On April 2nd, 1975, when the father went home after his work, he found that his wife and the children had gone taking their belongings. On April 3rd, after he had learned that they were with the wife's relatives in the US, he gave notice to the Department of State in Washington not to issue new passports to the children upon the request of the mother. However, the wife, with the help of the Danish Embassy, included the children on her passport and fled with them to Denmark. All attempts by the father to locate the children failed. He then turned to the American branch of International Social Service.
May 6th, 1975. ISS referred the case to their correspondent in Denmark giving addresses of the maternal family and asking for an investigation of the situation of the children and plans for their future.
May 25th, 1975. The father went to Denmark. The mother informed the police that he might kidnap the children and got temporary custody for them by the authorities. She did not agree that her own and the children's address be given to the father, so he could not see the children. At that time there was no separation or divorce; the wife just left home with the children.
June 1975. The mother rejected any co-operation with ISS correspondent. They could only refer the case to the child welfare advisor who was prepared to offer consultation to the father.
September 1975. The Danish authorities gave permission to the father for three hours monthly visits under supervision, but the Danish Ministry of Justice cancelled the decision.
November 1975. The visits – three hours monthly under supervision – were approved. At that time the mother changed the name and the nationality of the children without the knowledge and approval of the father.
Continued efforts of the father for better access resulted in referring the parents and children to a psychiatrist in August 1976.
April 1977. The divorce was granted, the mother retained the children, the father appealed against the decision for custody.
June 1977. The psychiatrist's report was completed – there was no reason, according to the report, for better visiting rights for the father.
August 1977. The authorities and the Ministry of Justice gave right to the father for normal visits – two Sundays per month for nine hours after the father gave his American passport to the authorities.
September 1977. The mother appealed against the father's visiting rights and the father feared her appeal would be accepted.

ISS Summary

November 1977. A letter from the father informed ISS that father and children were in the US, enjoying 'their new but well-guarded life together'.
August 1978. ISS received copy of the court decision in USA, dated July 28th, 1978, under which custody was awarded to the father. Visiting rights to the mother both in US and in Denmark after assurance was received by the court from the Danish authorities that the children will be returned to the US.
In a brief letter accompanying the court decision, the father wrote that the mother was to appeal against this decision, as he himself would do, and he did not agree that the children visit their mother in Denmark (he had no more confidence in the Danish authorities).
In the present summary no mention is made of the enormous difficulties of this marriage, that led to its breakdown. The experiences that the two little children had during those three years of continuous fights between their parents, of which they were the focus, resulted in the boy being often aggressive vis-à-vis his mother and the little girl continued bed wetting. One can only hope that those experiences will not seriously affect the future life of the children.
It is not known at what legal stage the situation is now in the US and whether the fight of the parents over the children will ever come to end.
It is believed though that if it had been possible for better social work services to be given to the parents and visiting rights had been respected, the second kidnapping would have been avoided and the children's lives would not have been disturbed to this extent.

Contents of the ISS Summary

Observations du Secrétariat du Conseil de l'Europe relatives au Questionnaire établi par le Bureau Permanent de la Conférence de La Haye de droit international privé

Document préliminaire No 4 de mars 1979

A INTRODUCTION

Les présentes observations portent sur les travaux du Conseil de l'Europe en matière de garde des enfants et, en particulier, sur les deux projets de Convention (voir *infra*, partie C) que le Comité d'experts sur le droit relatif aux enfants (CJ-EN) vient de mettre au point, à savoir:

– le projet de Convention européenne sur la reconnaissance et l'exécution des décisions en matière de garde des enfants et le rétablissement de la garde des enfants;

– le projet de Convention européenne relative à une instance internationale pour régler les conflits en matière de garde des enfants.

Au cours de la réunion qu'il a tenue du 29 janvier au 3 février 1979, le Comité d'experts sur le droit relatif aux enfants a adopté le texte de ces deux projets de Convention et constaté qu'ils se trouvaient en état pour être soumis aux Gouvernements pour observations en vue des discussions que le Comité européen de coopération juridique (CDCJ) consacrera à ce sujet lors de sa 31ème réunion (2-6 juillet 1979). On espère qu'après l'examen de ces projets par le CDCJ, le Comité des Ministres en adoptera le texte et ouvrira les deux Conventions à la signature des Etats membres en 1979.

Ces Conventions seront ouvertes à la signature des Etats membres du Conseil de l'Europe, mais il faut noter que l'article 21 du projet de Convention sur la reconnaissance et l'exécution des décisions en matière de garde des enfants et le rétablissement de la garde des enfants et l'article 21 du projet de Convention relative à une instance internationale pour régler les conflits en matière de garde des enfants autorisent le Comité des Ministres, après l'entrée en vigueur de ces Conventions, à inviter tout Etat non-membre du Conseil de l'Europe à y adhérer.

Les présentes observations ne sont pas destinées à apporter une réponse à chacun des points du questionnaire établi par le Bureau Permanent et, en particulier, elles ne portent pas sur les questions sociologiques ni sur la législation et la jurisprudence des Etats. Le présent document vise simplement à présenter rapidement certains des travaux menés par le Conseil de l'Europe dans ce domaine et notamment les solutions envisagées dans les projets de Convention précités en cas de déplacement d'un enfant à l'étranger par son père ou sa mère.

B INSTRUMENTS INTERNATIONAUX EN VIGUEUR DANS LE CADRE DU CONSEIL DE L'EUROPE

1 Convention européenne de sauvegarde des Droits de l'Homme et des Libertés fondamentales

Cette Convention, qui a été ouverte à la signature à Rome en 1950, est entrée en vigueur en 1953. Tous les Etats membres du Conseil de l'Europe sauf deux (soit 19 Etats) l'ont ratifiée. Les deux Etats en question (le Liechtenstein et

Observations by the Secretariat of the Council of Europe relating to the Questionnaire prepared by the Permanent Bureau of the Hague Conference on private international law

Preliminary Document No 4 of March 1979

A INTRODUCTION

These observations deal with the work of the Council of Europe concerning the custody of children and in particular the following two draft Conventions (see Part C of this paper) which have just been completed by the Committee of Experts on the law relating to children (CJ-EN):

– the draft European Convention on recognition and enforcement of decisions concerning custody and on restoration of custody of children;

– the draft European Convention relating to an international tribunal to settle conflicts in matters of custody of children.

The Committee of Experts on the law relating the children at its meeting from 29 January to 3 February 1979 adopted the two draft Conventions and agreed that they were ready to be submitted to Governments for observations with a view to the discussions which would take place within the European Committee on legal co-operation (CDCJ) at its 31st meeting (2 to 6 July 1979). It is hoped that, after these texts have been examined by the CDCJ, the Committee of Ministers will adopt the texts of these Conventions and open them to signature by Member States in 1979.

Although the Conventions are to be opened to signature by Member States of the Council of Europe it should be noted that article 21 of the draft Convention dealing with recognition, enforcement and restoration and article 21 of the draft Convention dealing with an international tribunal allow the Committee of Ministers, after the entry into force of the Conventions, to invite any State not a Member of the Council of Europe to accede to them.

These observations are not intended to reply to each question of the Questionnaire prepared by the Permanent Bureau and, in particular, they do not deal with sociological questions or the legislation and case law of States. The intention is to outline some of the relevant work of the Council of Europe and in particular the solutions envisaged in the above-mentioned draft Convention with regard to international child abduction by one parent.

B EXISTING INTERNATIONAL AGREEMENTS OF THE COUNCIL OF EUROPE

1 The European Convention for the Protection of Human Rights and Fundamental Freedoms

This Convention was opened to signature in Rome in 1950 and came into force in 1953. All Member States of the Council of Europe with the exception of 2 States (*i.e.* 19 States) have ratified this Convention. The two remaining

l'Espagne) ne sont que récemment devenus Membres du Conseil de l'Europe: ils ont signé la Convention et on s'attend qu'ils la ratifient bientôt.

Article 8

1 Toute personne a droit au respect de sa vie privée et familiale, de son domicile et de sa correspondance.

2 Il ne peut y avoir ingérence d'une autorité publique dans l'exercice de ce droit que pour autant que cette ingérence est prévue par la loi et qu'elle constitue une mesure qui, dans une société démocratique, est nécessaire à la sécurité nationale, à la sûreté publique, au bien-être économique du pays, à la défense de l'ordre et à la prévention des infractions pénales, à la protection de la santé ou de la morale, ou à la protection des droits et libertés d'autrui.

Les principes suivants ont été définis par la Commission européenne des Droits de l'Homme en ce qui concerne l'application de l'article 8 à la question de la garde des enfants et du droit de visite:
Celui des parents qui n'a pas la garde d'un enfant ne peut, en vertu du paragraphe 1 de l'article 8, être empêché de lui rendre visite, à moins que des circonstances spéciales, telles que celles définies au paragraphe 2 du même article, ne le justifient.
Les termes «protection de la santé ou de la morale» ne visent pas seulement la protection de la santé ou de la morale de la société dans son ensemble, mais aussi la protection de la santé ou de la morale des personnes qui la composent. Les termes «santé» et «morale» désignent le bien-être tant physique que phsychique d'un enfant et également son équilibre mental. Les tribunaux internes peuvent en principe refuser le droit de visite sur la base des «circonstances spéciales» définies au paragraphe 2 de l'article 8. Ce paragraphe laisse aux tribunaux nationaux une grande latitude pour apprécier ces circonstances. La décision finale sur le bien-fondé du refus d'accorder le droit de visite échoit à la Commission européenne (Requête No 911/60 contre la Suède).
Dans l'affaire No 1449/62 contre les Pays-Bas, la Commission européenne a noté qu'en cas de divorce, la garde ne peut être confiée qu'à une seule des parties. L'article 8 ne peut être invoqué par l'une des parties pour justifier une demande en attribution de la garde d'un enfant. Il est donc clair que le droit pour un des époux de se voir confier la garde d'un enfant de préférence à l'autre n'est pas, en tant que tel, garanti par la Convention.
Après avoir rappelé sa décision sur la recevabilité de la requête No 911/60 (*cf. supra*), la Commission a noté que les considérations qui y sont développées sur la question du droit de visite s'appliquent *a fortiori* à la question de la garde elle-même.
En outre, la Commission a estimé que le divorce des parents ne met pas fin à la vie familiale dans les relations entre parents et enfants, mais qu'il est légitime que la législation nationale régisse dans ce cas leurs relations par des règles différentes de celles qui sont applicables lorsque l'unité familiale est encore intacte (Requête No 2699/65 contre la République Fédérale d'Allemagne).
Dans une autre affaire, la Commission européenne a estimé que l'article 8 de la Convention est une disposition surtout négative en ce sens qu'elle protège contre une ingérence injustifiée de l'autorité publique dans la vie familiale mais n'oblige pas l'Etat à intervenir positivement pour rétablir les conditions de la vie familiale qui ont déjà été dégradées par le fait des intéressés (Requête No 6577/74).

2 Convention européenne sur le statut juridique des enfants nés hors mariage

Cette Convention, qui a été ouverte à la signature à Strasbourg en 1975, est entrée en vigueur en 1978. Les Etats suivants l'ont ratifiée: Norvège, Suède et Suisse. Les Etats

States have only recently become members of the Council of Europe (*i.e.* Liechtenstein and Spain) and have signed the Convention and are expected to ratify soon.

Article 8

1 Everyone has the right to respect for his private and family life, his home and his correspondence.

2 There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others.

The following principles have been decided by the European Commission of Human Rights in relation to article 8 with regard to custody of and access to a child:

The parent who does not have the custody of a child may not be prevented, under article 8, paragraph 1, from having access to this child, unless there are special circumstances, as set out in paragraph 2 of this article, which justify such a refusal.
The words 'protection of health or morals' include not only the health or morals of society as a whole but also the health or morals of the persons forming part of this society. The words 'health' and 'morals' include both the physical and mental well-being as well as the mental stability of a child. The national courts may in principle refuse to grant a right of access on the basis of the 'special circumstances' set out in paragraph 2 of article 8. This paragraph allows the court a considerable discretion to determine the circumstances. But the merits of a refusal of access might be subject to review by the European Commission (No 911/60 against Sweden).

In case No 1449/62 against the Netherlands, the European Commission noted that in a divorce custody may be granted to only one of the parties. Article 8 may not be invoked by the party to justify an application for the custody of a particular child. Therefore it is clear that the right for one spouse to obtain the custody of a child in preference to the other is not guaranteed as such by the Convention.

After having recalled its decision on the admissibility of applicant No 911/60 (*cf.* above), the Commission noted that the matters which were considered in relation to the right of access applied *a fortiori* to the question of custody itself.

In addition the European Commission considered that the divorce of the parents did not end the family life of the parents and their children but that it was justified for the national law to deal with matters between them by different rules than those applicable to the family unit as a whole (No 2699/65 against the Federal Republic of Germany).

In another case the European Commission considered that the provision of article 8 of the Convention is in particular a negative one as it protects family life from an unjustified interference by the public authorities but does not require the State to make a positive intervention to re-establish the conditions of family life which have already been upset by the parties (No 6577/74).

2 The European Convention on the Legal Status of Children born out of Wedlock

This Convention was opened to signature in Strasbourg in 1975 and came into force in 1978. The following States have ratified this Convention: Norway, Sweden and Switzerland.

suivants l'ont signée: Autriche, Chypre, Danemark, France, Irlande, Luxembourg et Royaume-Uni.

Les articles 7 et 8 de cette Convention sont ainsi rédigés:

Article 7

1 Lorsque la filiation d'un enfant né hors mariage est établie à l'égard des deux parents, l'autorité parentale ne peut être attribuée de plein droit au père seul.

2 L'autorité parentale doit pouvoir être transférée; les cas de transfert relèvent de la législation interne.

Article 8

Lorsque le père ou la mère d'un enfant né hors mariage n'a pas l'autorité parentale sur cet enfant ou la garde de celui-ci, ce parent peut obtenir un droit de visite dans les cas appropriés.

3 Résolution (72) 1 sur l'unification des concepts juridiques de «domicile» et de «résidence»

Les règles Nos 4, 5 et 11 de l'Annexe à cette Résolution sont ainsi rédigées:

No 4. Lorsqu'un mineur n'a pas la capacité juridique d'acquérir un domicile propre, son domicile est celui de la personne qui est investie du droit de lui fixer une résidence. Toutefois, si à l'initiative ou avec le consentement de cette personne ou d'une autorité compétente, le mineur réside dans un pays différent et y possède le centre de ses intérêts personnels, sociaux et économiques, il est censé avoir son domicile dans cet autre pays.

No 5. Lorsqu'un majeur n'a pas la capacité juridique d'acquérir un nouveau domicile, il conserve son ancien domicile, sous réserve toutefois des dispositions ci-après, applicables lorsqu'une personne est investie du droit de lui fixer une résidence.

Dans le cas où l'incapable et la personne investie du droit de lui fixer sa résidence sont domiciliés dans le même pays, l'incapable est censé y avoir son domicile, au même lieu que le domicile de cette personne. Si, à l'initiative ou avec le consentement de cette personne ou d'une autorité compétente, l'incapable réside dans un pays différent et y possède le centre de ses intérêts personnels, sociaux et économiques, il est censé avoir son domicile dans cet autre pays.

No 11. La résidence ou la résidence habituelle d'une personne ne dépend pas de celle d'une autre personne.

4 Résolution (72) 29 relative à l'abaissement de l'âge de la pleine capacité juridique

Les trois premières recommandations figurant dans cette Résolution sont ainsi rédigées:

1 Recommande aux Gouvernements des Etats membres d'abaisser l'âge de la majorité au-dessous de 21 ans et de le fixer, s'ils l'estiment opportun, à 18 ans, étant entendu que les Etats peuvent maintenir un âge de capacité plus élevé pour l'accomplissement de certains actes limités et déterminés dans des domaines où ils jugent qu'une plus grande maturité est requise;

2 Recommande aux Gouvernements des Etats membres, en particulier à ceux des Etats dans lesquels l'âge de la majorité resterait fixé au-dessus de 18 ans, d'examiner l'opportunité d'accorder à certains mineurs la capacité d'accomplir les actes courants de la vie quotidienne et d'agir seuls dans d'autres domaines appropriés;

3 Recommande aux Gouvernements des Etats membres dans lesquels l'abaissement de l'âge de la majorité réduirait de façon substantielle les droits résultant pour les enfants du devoir d'entretien de leurs parents à leur égard et risquerait de les priver du soutien nécessaire pour poursuivre leurs études ou achever leur formation professionnelle, de prendre des mesures propres à pallier de telles conséquences.

The following States have signed this Convention: Austria, Cyprus, Denmark, France, Ireland, Luxembourg and the United Kingdom.

Articles 7 and 8 of this Convention provide:

Article 7

1 Where the affiliation of a child born out of wedlock has been established as regards both parents, parental authority may not be attributed automatically to the father alone.

2 There shall be a power to transfer parental authority; cases of transfer shall be governed by the international law.

Article 8

Where the father or mother of a child born out of wedlock does not have parental authority over or the custody of the child, that parent may obtain the right of access to the child in appropriate cases.

3 Resolution (72) 1 on the Standardisation of the Legal Concepts of 'Domicile' and of 'Residence'

Rules 4, 5 and 11 contained in the Annex to this Resolution provide:

No 4. If a minor lacks legal capacity to acquire a domicile of his own, his domicile is that of the person who has the right to fix his residence. Nevertheless, if at the instance or with the consent of that person or of a competent authority, the minor resides in another country and has there the centre of his personal, social and economic interests, he shall be deemed to have his domicile in that other country.

No 5. If a person of full age lacks legal capacity to acquire a new domicile, he shall retain his existing domicile, subject however to the following rules applicable where another person has the right to fix his residence.

Where the incapax and the person who has the right to fix his residence are both domiciled in the same country, the incapax shall be deemed to have his domicile there, in the same place as that person. If, at the instance or with the consent of that person or of a competent authority, the incapax resides in another country and has there the centre of his personal, social and economic interests, he shall be deemed to have his domicile in that country.

No 11. A person's residence or habitual residence does not depend upon that of another person.

4 Resolution (72) 29 on the Lowering of the Age of Full Legal Capacity

The first three recommendations contained in this Resolution provide:

1 Recommends Governments of Member States to lower the age of majority below 21 years and, if they deem it advisable, to fix that age at 18 years, provided that States may retain a higher age of capacity for the performance of certain limited and specified acts in fields where they believe that a higher degree of maturity is required;

2 Recommends Governments of Member States, especially those States where the age of majority may remain above 18 years, to consider the advisability of granting to certain minors capacity to carry out everyday transactions and to act independently in other appropriate fields;

3 Recommends Governments of Member State in which the lowering of the age of majority would substantially curtail the rights enjoyed by children under their parents' maintenance obligations, with the possible consequence of depriving them of the necessary assistance for pursuing their education or training, to take appropriate measures to remedy such consequences.

5 Résolution (78) 37 sur l'égalité des époux en droit civil

Les paragraphes 18 et 19 de cette Résolution sont ainsi rédigés:

18 de prendre toutes les mesures nécessaires pour que les deux époux aient des obligations et droits égaux à l'égard des enfants nés de leur mariage ou adoptés par eux, particulièrement dans les domaines suivants:

i l'utilisation, l'administration, la perception de fonds ou la disposition du patrimoine et des revenus de l'enfant;

ii la représentation légale de l'enfant;

iii les décisions touchant à la vie personnelle de l'enfant, notamment l'éducation, la religion, la santé, les déplacements, le consentement au mariage, l'adoption, le choix du ou des prénoms de l'enfant, les visites et les autres droits et obligations relatifs à la personne de l'enfant;

iv la contribution des époux à l'entretien de leurs enfants selon les possibilités de chacun d'eux;

19 de prendre toutes les mesures nécessaires pour qu'en cas de séparation et après la dissolution du mariage, les obligations et droits des époux ou ex-époux concernant leurs enfants communs soient attribués sans discrimination fondée sur le sexe des parents.

C SOLUTIONS CONVENTIONNELLES EN PRÉPARATION DANS LE CADRE DU CONSEIL DE L'EUROPE

1 *Documents d'identité et de voyage*

Le Comité *ad hoc* d'experts pour les documents d'identité et la circulation des personnes (CAHID) a proposé d'étudier, dans le cadre de l'Année internationale de l'enfant, les problèmes spécifiques posés par la circulation des enfants, notamment en ce qui concerne les documents d'identité et de voyage.
On espère que ce Comité sera en mesure de résoudre les problèmes soulevés par les possibilités accrues d'enlèvement international d'un enfant qui résultent de la tendance à simplifier le franchissement des frontières, à réduire les formalités de visa et à contrôler moins sévèrement les passeports (*cf. supra*, p. 18, Questionnaire et Rapport sur l'enlèvement international d'un enfant par un de ses parents).

2 *Droit matériel dans le domaine de la garde des enfants*

En vertu de son mandat, le Comité d'experts sur le droit relatif aux enfants étudiera, entre autres, l'harmonisation du droit matériel dans le domaine de la représentation et de la garde des enfants, y compris:

– l'étude des droits à attribuer à celui des père et mère chez qui l'enfant ne réside pas,
– l'étude des droits à reconnaître à l'enfant dans le cadre de l'exercice de l'autorité parentale;
– l'examen du point de savoir si des solutions doivent être adoptées en cas de désaccord entre les père et mère dans l'exercice de leur autorité parentale et, dans l'affirmative, quelles doivent être ces solutions.

A cette occasion, le Comité d'experts pourrait, s'il le juge approprié, élaborer une Convention portant loi uniforme. A cette fin, les questions suivantes pourraient être examinées:

– principes régissant l'attribution de la garde d'un enfant après le divorce ou de la séparation de ses parents ou le décès de l'un d'eux:
– règles régissant l'attribution du droit de visite à des personnes qui n'ont pas la garde de l'enfant et l'étendue de ce droit:
– différents éléments des décisions relatives à la garde;
– dispositions relatives à la représentation légale;
– moyens d'accélérer la procédure judiciaire dans les affaires relatives à des enfants;

5 Resolution (78) 37 on Equality of Spouses in Civil Law

Paragraphs 18 and 19 of this Resolution provide:

18 to take all necessary steps to grant both spouses equal rights and obligations in respect of the children of the marriage and children adopted by them in particular in the following matters:

i the use, administration, receipt of profits, disposal of the property or income of the child;

ii the legal representation of the child;

iii decisions concerning the personal life of the child, in particular matters relating to education, religion, health, travel, consent to marriage, adoption, choice of the first name or first names of the child, access and other rights and obligations concerning the child itself;

iv the contribution of spouses towards the maintenance of their children according to the means of each spouse;

19 to take all necessary steps to ensure that, in the case of separation and after the dissolution of the marriage, the rights and obligations granted to spouses or former spouses concerning their common children, shall be given without any discrimination based on the sex of the parents.

C TREATY REMEDIES BEING PREPARED WITHIN THE FRAMEWORK OF THE COUNCIL OF EUROPE

1 *Identity and travel documents*

The *ad hoc* Committee of Experts for identity documents and movement of persons (CAHID) proposed to study, in connection with the International Year of the Child, the specific problems raised by the movement of children, particularly when it comes to identity and travel documents.

It is hoped that this Committee will be able to solve the problems relating to the greater opportunity for international abduction of children which arise from the trend towards freer crossing of borders, fewer visa requirements and decreasing rigour of passport control (*cf. supra*, p. 18, Questionnaire and Report on International Child Abduction by One Parent).

2 *Substantive law on custody of children*

According to its terms of reference the Committee of Experts on the law relating to children will study, *inter alia*, the harmonisation of substantive law on the legal representation and custody of children including:

– a study of the rights to be conferred on the parents with whom the child does not live;
– a study of the rights to be conferred on the child in connection with the exercise of parental authority;
– consideration of whether solutions could be sought to problems arising when a father and mother disagree about the exercise of their parental authority and, if so, what these solutions should be.

In considering these questions the Committee of Experts might, if appropriate, prepare a uniform law Convention. In this connection the following matters could be examined:

– principles governing the grant of custody of a child after the divorce or separation of its parents as well as on the death of a parent;
– rules governing the grant of access to children for persons not having custody and the extent of access to be granted:
– the different elements of custodial decisions;
– the rules governing legal representation;
– means to accelerate court proceedings in matters relating to children;

– importance des enquêtes sociales dans les affaires relatives à des enfants.

3 *Reconnaissance et exécution des décisions en matière de garde des enfants et rétablissement de la garde des enfants*

Le projet de Convention européenne sur la reconnaissance et l'exécution des décisions en matière de garde des enfants et le rétablissement de la garde des enfants, tel qu'il a été adopté par le Comité d'experts sur le droit relatif aux enfants, traite des trois situations suivantes:

i Le rétablissement de la garde, en cas de déplacement sans droit lorsque les deux parents et l'enfant ont la seule nationalité de l'Etat où la décision a été rendue et que, de plus, l'enfant y a sa résidence habituelle. Dans cette hypothèse, visée à l'article 8, si la demande est introduite dans un délai très court, qui a été fixé à six mois à partir du déplacement, la restitution de l'enfant ne devrait être soumise à la constatation d'aucune autre condition que celle de l'hypothèse visée.

ii Le rétablissement de la garde lorsque les parents sont de nationalité différente et que la demande de rétablissement est introduite dans un délai de six mois à partir du déplacement. Ce cas est visé à l'article 11. Dans un but de protection, c'est-à-dire afin que l'enfant puisse être replacé rapidement dans le milieu dont il a été illicitement enlevé, le rapatriement ne doit être subordonné qu'à un nombre limité de motifs de refus. Ceux-ci se rattachent, en principe, au respect des droits de la défense.

iii Dans tous les autres cas, réglés à l'article 12, notamment ceux où la demande est introduite après plus de six mois, les conditions mises au rapatriement sont plus nombreuses, étant donné que l'enfant peut déjà être intégré au milieu dans lequel il a été emmené.

Dans le but de rendre la Convention accessible à un plus grand nombre d'Etats, une disposition spéciale (article 16) permet, par le jeu d'une réserve, aux Etats qui le désirent d'appliquer les conditions prévues sous le point *iii*) à l'une ou l'autre ou aux deux situations prévues sous les points *i*) et *ii*) ci-dessus.

Ce projet de Convention prévoit également la mise en place d'un système d'autorités centrales. Conformément à ce projet:

– chaque Etat contractant désignera une autorité centrale, de réception et de transmission, qui pourra être une autorité judiciaire ou administrative;
– les autorités centrales auront pour tâche de coopérer entre elles et de promouvoir une concertation entre les autorités compétentes de leurs pays respectifs;
– les autorités centrales se communiqueront réciproquement des renseignements sur leurs lois ou sur les obstacles éventuels à l'application de la Convention et assureront la transmission des demandes de renseignements;
– les demandes de reconnaissance et d'exécution d'une décision relative à la garde d'un enfant devront être adressées à l'autorité centrale et celle-ci, si elle est autre que l'autorité centrale de l'Etat requis, transmettra les demandes à cette dernière;
– les autorités centrales prendront toutes dispositions qu'elles jugeront appropriées pour:
  – retrouver le lieu où se trouve l'enfant;
  – protéger les intérêts de l'enfant;
  – assurer la reconnaissance ou l'exécution de la décision rendue à l'étranger;
  – assurer la remise de l'enfant au demandeur; et et
  – tenir l'autorité requérante informée;

– l'autorité centrale de l'Etat où la reconnaissance ou l'exécution a été refusée aidera le demandeur, dans les cas appropriés, à introduire une nouvelle action;

– the importance of welfare reports in matters relating to children.

3 *Recognition and enforcement of decisions concerning custody and on restoration of custody of children*

The draft European Convention on recognition and enforcement of decisions concerning custody and on restoration of custody of children, as adopted by the Committee of Experts on the law relating to children, deals with the following three types of cases:

i The restoration of custody, in cases of improper removal when both parents and the child have as their sole nationality that of the State in which the decision was given and where, furthermore, the child has his habitual residence. In this hypothesis, covered by article 8, if the application is made within a very short space of time, laid down as six months from the removal, the child's restoration should not be subject to the establishment of any condition other than the hypothesis referred to.

ii The restoration of custody when the parents have different nationalities and the request for restoration is made no more than six months following the removal. This case is covered by article 11. For the purpose of protecting custody, repatriation must be subjected to only a limited number of grounds for refusal generally concerned with observance of the rights of defence, so that the child may speedily be restored to the surroundings from which he has been improperly removed.

iii In all the other cases, covered by article 12, including those where the request is made after more than six months, the conditions laid down for repatriation are more numerous, since the child may already have been integrated in the surroundings to which he has been removed.

With the aim of making the Convention accessible to a larger number of States, a special provision (article 16) enables States so wishing, through the operation of a reservation, to apply the conditions laid under *iii*) above to either or both of the situations described at *i*) and *ii*) above.

This draft Convention also provides for a system of central authorities. According to the provisions of this draft Convention:

– each Contracting State shall appoint a receiving and sending central authority – such an authority may be judicial or administrative;
– the central authorities have the task to co-operate with each other and promote co-operation between the competent authorities of their respective countries;
– the central authorities shall provide information to other central authorities on their laws or on any obstacles to the application of the Convention and shall deal with the transmission of requests for information;
– the central authority must receive applications for recognition and enforcement of custody decisions and, if it is not the central authority in the State addressed, it must send the application to the relevant central authority;

– the central authorities shall take appropriate steps:
  – to discover the whereabouts of the child;
  – to protect the interests of the child;
  – to secure recognition and enforcement of the foreign decision;
  – to ensure the delivery of the child to the applicant; and
  – to keep the requesting central authority informed;

– the central authorities of the State where recognition and enforcement has been refused shall, in appropriate cases, assist the applicant to bring fresh proceedings;

– dans certains cas, l'autorité centrale de l'Etat où un enfant a été retrouvé fera procéder immédiatement à la restitution de l'enfant en cas de déplacement sans droit;
– l'autorité centrale de l'Etat sur le territoire duquel l'enfant se trouve pourra fixer les modalités de la mise en oeuvre et de l'exercice du droit de visite;
– dans certains cas, l'autorité centrale de l'Etat sur le territoire duquel l'enfant se trouve pourra entendre ou faire entendre celui-ci et demander que des enquêtes appropriées soient effectuées.

4 *Instance internationale pour régler les conflits en matière de garde des enfants*

Le projet de Convention européenne relative à une instance internationale pour régler les conflits en matière de garde des enfants, tel qu'il a été adopté par le Comité d'experts sur le droit relatif aux enfants, tient compte du projet de Convention visé dans la partie C (3) ci-dessus: l'un ou l'autre instrument pourra être mis en oeuvre sans difficulté tant par des Etats qui seront des Parties contractantes à l'autre Convention que par des Etats qui ne le seront pas.
L'instance internationale prévue dans le projet de Convention est un organe judiciaire non permanent créé dans le cadre du Conseil de l'Europe. Elle pourra être saisie lorsqu'il existe deux ou plusieurs décisions incompatibles quant à leurs effets à l'égard de l'enfant.
En réglant le litige, elle fera passer le bien-être de l'enfant avant les intérêts des personnes qui demandent le droit de garde ou tout autre droit parental sur l'enfant. Elle est conçue pour s'occuper surtout des points de fait, en particulier de ceux qui ont un rapport avec le bien-être de l'enfant.
Elle devra être saisie dans le délai de deux mois à compter du jour où la dernière décision nationale aura été notifiée au demandeur. Celui-ci devra introduire la procédure devant elle en informant l'autorité désignée de l'Etat dont relève le tribunal qui a rendu la décision invoquée par lui. Une fois que l'instance internationale a été saisie, toute procédure entamée pour attaquer les décisions nationales sera suspendue.
L'instance internationale sera composée de juges professionnels en activité; elle tiendra ses sessions à Strasbourg ou, dans certains cas, dans un lieu différent. Elle pourra effectuer ou faire effectuer des enquêtes notamment en vue de l'audition de l'enfant, des parties ou de toutes autres personnes.
Toute partie à la procédure pourra soumettre à l'instance internationale des mémoires. Elle pourra aussi se présenter, personnellement ou en la personne de représentants, à la session de l'instance internationale.
Le principe fondamental sur lequel repose le projet de Convention dans son ensemble est que l'instance internationale ne sera liée par aucune loi nationale et pourra prendre la décision qui lui paraîtra la meilleure pour l'enfant. Cette juridiction pourra donc ignorer les systèmes traditionnels de règlement des conflits de lois et se prononcer sur la base des grands principes d'équité en se préoccupant uniquement de l'intérêt de l'enfant.
Les autorités compétentes de chaque Etat contractant auront le droit de prendre, dans l'intérêt de l'enfant, toutes mesures provisoires dictées par une nécessité urgente.
La décision rendue par l'instance internationale devra être reconnue sur le territoire de tous les Etats contractants et y aura le même effet qu'un jugement définitif rendu par une juridiction nationale.

– in certain cases the central authority of the State where a child has been found shall proceed forthwith to restore the custody of a child in the case of an improper removal;
– the central authority of the State where the child is present may fix conditions for the implementation and exercise of access;
– in certain cases the central authority of the State where the child is present may hear the child or ensure that he is heard and may request that the appropriate enquiries be carried out.

4 *International tribunal to settle conflicts in matters of custody of children*

The draft European Convention relating to an international tribunal to settle conflicts in matters of custody of children, as adopted by the Committee of Experts on the law relating to the custody of children, takes the draft Convention under C (3) above into account: either can be implemented without difficulty both by States which are Contracting Parties to the other Convention and by States which are not.

The international tribunal provided for in the draft Convention is a non-permanent judicial body constituted within the framework of the Council of Europe. This tribunal has jurisdiction in cases where two or more decisions exist which are incompatible in their effects on the child.
In settling the dispute the welfare of the child is the prime consideration rather than the interests of persons claiming custody or any other parental right over the child. The tribunal provided for in the draft Convention is intended to deal mainly with questions of fact, particularly those connected with the child's welfare.
The application must be made to the international tribunal within a period of two months from the notice of the last national decision to the applicant. The applicant must institute the procedure before the international tribunal by giving notice to the relevant authority where the decision relied on was given. Once the international tribunal has jurisdiction any further proceedings taken to challenge the national decisions are suspended.
The international tribunal will be composed of practising professional judges and sessions will be held in Strasbourg or, in certain cases, elsewhere. It may carry out or request that enquiries be made with a view, in particular, to finding out the views of the child, of any parties or of any others persons.

Any party to the proceedings may submit written pleadings to the international tribunal and may also appear personally or by means of representatives at the hearing of the tribunal.

The fundamental principle underlying the draft Convention as a whole is that the tribunal shall not be bound by any national law and may make any order it considers best secures the interests of the child. Therefore the tribunal is able to disregard the traditional systems for settling conflicts of laws and determine the issue on broad equitable principles with the child's interests as its sole concern.

The competent authorities of each Contracting State have the right to take any necessary provisional measures in the interests of the child that are dictated by urgent need.
The decision rendered by the international tribunal must be recognised in the territory of all Contracting States and has the status of a national decision which is no longer open to ordinary appeal proceedings.

Projet de Convention européenne sur la reconnaissance et l'exécution des décisions en matière de garde des enfants et le rétablissement de la garde des enfants

Les Etats membres du Conseil de l'Europe, signataires de la présente Convention,

Reconnaissant que dans les Etats membres du Conseil de l'Europe la considération de l'intérêt de l'enfant est d'une importance décisive en matière de décisions concernant sa garde;

Considérant que l'institution de mesures destinées à faciliter la reconnaissance et l'exécution des décisions concernant la garde d'un enfant aura pour effet d'assurer une meilleure protection de l'intérêt des enfants;

Estimant souhaitable, dans ce but, de souligner que le droit de visite des parents est le corollaire normal du droit de garde;

Constatant le nombre croissant de cas où des enfants ont été déplacés sans droit à travers une frontière internationale et les difficultés rencontrées pour résoudre de manière adéquate les problèmes soulevés par ces cas;

Désireux d'introduire des dispositions appropriées permettant le rétablissement de la garde des enfants lorsque cette garde a été arbitrairement interrompue;

Convaincus de l'opportunité de prendre, à cet effet, des mesures adaptées aux différents besoins et aux différentes circonstances;

Désireux d'établir des relations de coopération judiciaire entre leurs autorités,

Sont convenus de ce qui suit:

TITRE I

Article 1

Pour les besoins de la présente Convention, on entend par:

– *enfant*: une personne, quelle que soit sa nationalité, pour autant qu'elle n'a pas encore atteint l'âge de seize ans et qu'elle n'a pas le droit de fixer elle-même sa résidence selon la loi de sa résidence habituelle ou de sa nationalité ou selon la loi interne de l'Etat requis;

– *autorité*: toute autorité judiciaire ou administrative;

– *décision relative à la garde*: toute décision d'une autorité dans la mesure où elle statue sur le soin de la personne de l'enfant, sur le droit de fixer sa résidence ou sur le droit de visite;

– *déplacement sans droit*: le déplacement d'un enfant à travers une frontière internationale en violation d'une décision relative à sa garde rendue dans un Etat contractant et exécutoire dans un tel Etat; est aussi considéré comme déplacement sans droit:

i le non-retour d'un enfant à travers une frontière internationale, à l'issue de la période d'exercice d'un droit de visite relatif à cet enfant ou à l'issue de tout autre séjour temporaire dans un territoire autre que celui dans lequel s'exerce la garde;

ii un déplacement déclaré ultérieurement comme illicite au sens de l'article 15.

Article 2

1 Chaque Etat contractant désignera une autorité centrale qui exercera les fonctions prévues dans la présente Convention.

Draft European Convention on recognition and enforcement of decisions concerning custody and on restoration of custody of children

The member States of the Council of Europe, signatory hereto,

Recognising that in the member States of the Council of Europe the welfare of the child is of overriding importance in reaching decisions concerning his custody;

Considering that the making of arrangements to ensure that decisions concerning the custody of a child can be more widely recognised and enforced will provide greater protection of the welfare of children;

Considering it desirable, with this end in view, to emphasise that the right of access of parents is a normal corollary to the right of custody;

Noting the increasing number of cases where children have been wrongfully removed across an international frontier and the difficulties of securing adequate solutions to the problems caused by such cases;

Desirous of making provision to enable the custody of children which has been arbitrarily interrupted to be restored;

Convinced of the desirability of making arrangements for this purpose answering to the different needs and differing circumstances;

Desiring to establish legal co-operation between their authorities,

Have agreed as follows:

PART I

Article 1

For the purposes of this Convention:

– *child*: means a person of any nationality so long as he is under 16 years of age and so long as he does not have the right to fix his own place of residence under the law of his habitual residence or the law of his nationality or the internal law of the State addressed;

– *authority*: means a judicial or administrative authority;

– *a decision relating to custody*: means a decision of an authority in so far as it relates to the care of the person of the child, the right to decide on the place of his residence or the right of access to him;

– *improper removal*: means the removal of a child across an international frontier in breach of a decision relating to his custody which has been given in a Contracting State and which is enforceable in such a State; improper removal also includes:

i the failure to return a child across an international frontier at the end of a period of access or at the end of any other temporary stay in a territory other than where the custody is exercised;

ii a removal which is declared improper in accordance with Article 15.

Article 2

1 Each Contracting State shall appoint a central authority to carry out the functions envisaged by this Convention.

2 Les Etats fédéraux et les Etats dans lesquels plusieurs systèmes de droit sont en vigueur ont la faculté de désigner plusieurs autorités centrales dont ils déterminent les compétences.

3 Toute désignation effectuée en application du présent article doit être notifiée au Secrétaire Général du Conseil de l'Europe.

Article 3

1 Les autorités centrales des Etats contractants ont pour tâche de coopérer entre elles et de promouvoir une concertation entre les autorités compétentes de leurs pays respectifs. Elles doivent agir avec toute la diligence nécessaire.

2 En vue de faciliter la mise en oeuvre de la présente Convention, les autorités centrales des Etats contractants:

a assurent la transmission des demandes de renseignements émanant des autorités compétentes et qui concernent des points de droit ou de fait relatifs à des procédures en cours;

b se communiquent réciproquement sur leur demande des renseignements concernant leur droit relatif à la garde des enfants et son évolution;

c se tiennent mutuellement informées des difficultés susceptibles de s'élever à l'occasion de l'application de la Convention et s'emploient, dans toute la mesure du possible, à lever les obstacles à son application.

Article 4

1 Toute personne qui a obtenu dans un Etat contractant une décision relative à la garde d'un enfant et qui désire obtenir dans un autre Etat contractant la reconnaissance ou l'exécution de cette décision peut s'adresser, à cette fin, par requête, à l'autorité centrale de tout Etat contractant.

2 La requête doit être accompagnée des documents mentionnés à l'article 14.

3 L'autorité centrale saisie, si elle est autre que l'autorité centrale de l'Etat requis, transmet les documents à cette dernière par voie directe et sans délai.

4 L'autorité centrale saisie peut refuser son intervention lorsqu'il est manifeste que les conditions requises par la présente Convention pour la reconnaissance ou l'exécution de la décision ne sont pas remplies.

5 L'autorité centrale saisie informe sans délai le demandeur des suites de sa demande.

Article 5

1 L'autorité centrale de l'Etat requis prend ou fait prendre dans les plus brefs délais toutes dispositions qu'elle juge appropriées pour saisir ses autorités compétentes, ainsi que pour:

a retrouver le lieu où se trouve l'enfant;

b prendre ou solliciter l'autorisation de prendre toutes les mesures provisoires nécessaires pour éviter que les intérêts de l'enfant ou du demandeur ne soient lésés;

c assurer la reconnaissance ou l'exécution de la décision;

d assurer la remise de l'enfant au demandeur lorsque l'exécution de la décision est accordée;

e informer l'autorité requérante des mesures prises et des suites données.

2 Chaque Etat contractant s'engage à n'exiger du demandeur aucun paiement pour toute mesure prise pour le compte de celui-ci en vertu du paragraphe 1 du présent article par l'autorité centrale de cet Etat, y compris, lorsque c'est le cas, les frais entraînés par la participation d'un avocat.

2 Federal States and States with more than one legal system shall be free to appoint more than one central authority and shall determine the extent of their competence.

3 The Secretary General of the Council of Europe shall be notified of any appointment under this Article.

Article 3

1 The central authorities of the Contracting States shall have the task to co-operate with each other and promote co-operation between the competent authorities in their respective countries. They shall act with all necessary dispatch.

2 With a view to facilitating the operation of this Convention, the central authorities of the Contracting States:

a shall deal with the transmission of requests for information coming from their competent authorities and which relate to legal or factual matters concerning proceedings which are taking place;

b shall provide each other on request with information on their law relating to the custody of children and any changes in this law;

c shall keep each other informed of any difficulties likely to arise in applying the Convention and, as far as possible, eliminate obstacles hindering its application.

Article 4

1 Any person who has obtained a decision relating to the custody of a child in a Contracting State and who wishes to have that decision recognised or enforced in another Contracting State may submit an application for that purpose to the central authority in any Contracting State.

2 The application shall be accompanied by the documents mentioned in Article 14.

3 The central authority receiving the application, if it is not the central authority in the State addressed, shall send the documents directly without delay to that central authority.

4 The central authority receiving the application may refuse to intervene where it is manifestly clear that the conditions for recognition or enforcement required by this Convention are not satisfied.

5 The central authority receiving the application shall keep the applicant informed without delay of the progress of his application.

Article 5

1 The central authority in the State addressed shall without delay take or ensure that there are taken, any appropriate steps to request its competent authorities:

a to discover the whereabouts of the child;

b to take, or seek approval for taking, any necessary provisional measures to avoid prejudice to the interests of the child or the applicant;

c to secure the recognition or enforcement of the decision;

d to ensure the delivery, where enforcement is granted, of the child to the applicant; and

e to inform the requesting authority of the measures taken and their results.

2 Each Contracting State undertakes not to claim any payment from an applicant in respect of any measures taken under paragraph 1 of this Article by the central authority of that State on the applicant's behalf, including where applicable the costs incurred by the employment of a lawyer.

3 Si la reconnaissance ou l'exécution est refusée et si l'autorité centrale de l'Etat requis estime devoir donner suite à la demande du requérant d'introduire dans cet Etat une action au fond, cette autorité mettra tout en oeuvre pour assurer la représentation du requérant dans cette procédure dans des conditions non moins favorables que celles dont peut bénéficier une personne qui est résidente et ressortissante de cet Etat et, à cet effet, elle pourra notamment saisir ses autorités compétentes.

Article 6

1 Sous réserve des arrangements particuliers conclus entre les autorités centrales intéressées et des dispositions du paragraphe 3 du présent article:

a les communications adressées à l'autorité centrale de l'Etat requis sont rédigées dans la langue ou dans l'une des langues officielles de l'Etat dont relève cette autorité ou accompagnées d'une traduction dans cette langue;

b l'autorité centrale de l'Etat requis doit néanmoins accepter les communications rédigées en langue française ou anglaise ou accompagnées d'une traduction dans l'une de ces langues.

2 Les communications émanant de l'autorité centrale de l'Etat requis, y compris les résultats des enquêtes effectuées, peuvent être rédigées dans la ou dans l'une des langues officielles de l'Etat dont relève cette autorité ou en français ou en anglais.

3 Tout Etat contractant peut exclure l'application en tout ou en partie des dispositions du paragraphe 1 *b* du présent article. Lorsqu'un Etat contractant a fait cette réserve tout autre Etat contractant peut également l'appliquer à l'égard de cet Etat.

Article 7

Pour les besoins de la présente Convention, aucune légalisation ni formalité analogue ne peut être exigée.

Article 8

1 En cas de déplacement sans droit, l'autorité centrale de l'Etat requis fera procéder immédiatement à la restitution de l'enfant:

a lorsqu'au moment de l'introduction de l'instance dans l'Etat où la décision a été rendue ou à la date du déplacement sans droit, si celui-ci a eu lieu antérieurement, l'enfant ainsi que ses parents avaient la seule nationalité de cet Etat et que l'enfant avait sa résidence habituelle sur le territoire dudit Etat et

b qu'une autorité centrale a été saisie de la demande de restitution dans un délai de six mois à partir du déplacement sans droit.

2 Si, conformément à la loi de l'Etat requis, il ne peut être satisfait aux prescriptions du paragraphe 1 du présent article sans l'intervention d'une autorité judiciaire, aucun des motifs de refus prévus dans la présente Convention ne s'appliquera dans la procédure judiciaire.

3 Si un accord, homologué par une autorité compétente, est intervenu entre la personne qui a la garde de l'enfant et une autre personne pour accorder à celle-ci le droit d'emmener l'enfant à l'étranger et qu'à l'expiration de la période convenue l'enfant n'a pas été restitué à la personne qui en a la garde, il sera procédé au rétablissement du droit de garde conformément aux paragraphes 1 alinéa *b* et 2 du présent article. Il en est de même en cas de décision de l'autorité compétente accordant ce même droit à une personne qui n'a pas la garde de l'enfant.

Article 9

1 Les décisions relatives à la garde rendues dans un Etat contractant sont reconnues et, lorsqu'elles sont exécutoires

3 Where recognition or enforcement is refused and if the central authority of the State addressed considers that it should carry out the request of the applicant to bring in that State proceedings on the substance of the case that authority shall use its best endeavours to secure the representation of the applicant in any such proceedings in a manner no less favourable than that available to a person who is resident in and a national of that State and to this effect, in particular, it may request action by its competent authorities.

Article 6

1 Unless there are particular agreements between the central authorities concerned and subject to the provisions of paragraph 3 of this Article:

a communications sent to the central authority of the State addressed shall be drawn up in the official language or in one of the official languages of the State of that authority or be accompanied by a translation into that language;

b the central authority of the State addressed shall nevertheless accept communications drawn up in English or in French or accompanied by a translation into one of these languages.

2 Communications emanating from a central authority of the State addressed, including the results of enquiries, may be drawn up in the official language or one of the official languages of the State of that authority or in English or French.

3 Any Contracting State may exclude wholly or partly the provisions of paragraph 1 *b* of this Article. When a Contracting State has made this reservation any other Contracting State may also apply the reservation with respect of that State.

Article 7

For the purposes of this Convention no legalisation or any like formality may be required.

Article 8

1 In the case of an improper removal, the central authority of the State addressed shall proceed forthwith to restore the custody of the child where:

a at the time of the institution of the proceedings in the State where the decision was given or at the time of the improper removal, if earlier, the child and his parents had as their sole nationality that of this State, and the child had his habitual residence in this State, and

b a request for restoration was made to a central authority within a period of six months from the date of the improper removal.

2 If, in accordance with the law of the State addressed, the authorities cannot comply with paragraph 1 of this Article without judicial authority none of the grounds of refusal specified in this Convention shall apply to the judicial proceedings.

3 Where there is an agreement officially confirmed by a competent authority between the person having the custody of the child and another person to allow this other person to take the child abroad and the child was not restored to the person having the custody at the end of the agreed period, proceedings for the restoration of the custody of the child shall be commenced in compliance with paragraphs 1 *b* and 2 of this Article. The same shall apply in the case of a decision of the competent authority granting the same right to a person who has not the custody of the child.

Article 9

1 A decision relating to custody given in a Contracting State shall be recognised in every other Contracting State

dans leur Etat d'origine, elles sont mises à exécution dans tout autre Etat contractant.

2 Tout Etat contractant appliquera à la reconnaissance et l'exécution d'une décision relative à la garde une procédure simple et rapide. A cette fin, il veillera à ce que la demande d'exequatur puisse être introduite sur simple requête.

Article 10

1 Les décisions sur le droit de visite et les dispositions des décisions relatives à la garde qui portent sur le droit de visite sont reconnues et mises à exécution dans les mêmes conditions que celles relatives à la garde.

2 Toutefois, l'autorité compétente de l'Etat requis peut fixer les modalités de la mise en oeuvre et de l'exercice du droit de visite compte tenu notamment des engagements pris par les parties à ce sujet.

3 Lorsqu'il n'a pas été statué sur le droit de visite ou lorsque la reconnaissance ou l'exécution de la décision relative à la garde est refusée, l'autorité centrale de l'Etat requis peut saisir ses autorités compétentes pour statuer sur le droit de visite.

Article 11

1 En cas de déplacement sans droit et si une autorité centrale a été saisie dans un délai de six mois à partir du déplacement, la reconnaissance et l'exécution ne peuvent être refusées que:

a si l'acte introductif d'instance ou un acte équivalent n'a pas, selon la loi de l'Etat d'origine, été signifié ou notifié au défendeur défaillant régulièrement et en temps utile pour qu'il puisse se défendre; toutefois, cette absence de signification ou de notification ne saurait constituer une cause de refus de reconnaissance ou d'exécution lorsque la signification ou la notification n'a pas eu lieu parce que le défendeur défaillant a dissimulé l'endroit où il se trouve à la personne qui a engagé l'instance dans l'Etat d'origine;

b si, lorsqu'il s'agit d'une décision rendue par défaut, la compétence de l'autorité qui l'a rendue n'est pas fondée:

i sur la résidence habituelle du défendeur, ou

ii sur la dernière résidence habituelle commune des parents de l'enfant pour autant que l'un d'eux y réside encore habituellement, ou

iii sur la résidence habituelle de l'enfant.

c si la décision est incompatible avec une décision relative à la garde qui est devenue exécutoire dans l'Etat requis avant le déplacement de l'enfant pour autant qu'au moment où celle-ci a été rendue, l'enfant ait séjourné pendant une plus longue partie de l'année écoulée dans l'Etat requis que dans l'Etat requérant.

2 En aucun cas la décision ne peut faire l'objet d'un examen au fond.

Article 12

Dans les cas autres que ceux visés aux articles 8 et 11:

1 La reconnaissance et l'exécution peuvent être refusées non seulement pour les motifs prévus à l'article 11 mais en outre:

a si les effets de la décision sont manifestement incompatibles avec les principes fondamentaux du droit régissant la famille et les enfants dans l'Etat requis;

b s'il est constaté qu'en raison de changements de circonstances incluant l'écoulement du temps mais excluant le seul changement de résidence de l'enfant à la suite d'un déplacement sans droit, il apparaît que les effets de la dé-

and, where it is enforceable in the State of origin, shall be made enforceable in every other Contracting State.

2 Each Contracting State shall accord to a decision relating to the custody of a child a simple and expeditious procedure for recognition and enforcement. To that end it shall ensure, in particular, that a request for recognition and enforcement may be lodged merely by application.

Article 10

1 Decisions relating to the right of access and provisions of decisions relating to custody which deal with the right of access shall be recognised and enforced in the same manner as decisions relating to custody.

2 However, the competent authority of the State addressed may fix the conditions for the implementation and exercise of the right of access taking into account, in particular, the undertakings made in this respect by the parties.

3 When no decision on the right of access has been taken or when recognition or enforcement of the decision relating to custody has been refused, the central authority of the State addressed may apply to its competent authorities for a decision on the right of access.

Article 11

1 In the event of an improper removal, and where an application has been made to a central authority within a period of six months from the date of that removal, recognition and enforcement may be refused only if:

a in the case of a decision given in default of appearance, the defendant was not duly served in accordance with the law of the State of origin with the document which instituted the proceedings or an equivalent document in sufficient time to enable him to arrange his defence; but absence of service may not be a ground for refusal of recognition or enforcement where such service was not effected because the defendant had concealed his location from the person who instituted the original proceedings in the State of origin;

b the decision was taken in the absence of the defendant by an authority which was not an authority in the State:

i of the habitual residence of the defendant, or

ii of the last common habitual residence of the child's parents, where at least one parent is still habitually resident, or

iii of the habitual residence of the child;

c there is in the States addressed a decision relating to custody which became enforceable in the State addressed before the removal of the child and the two decisions are mutually incompatible, provided that the time when it was rendered the child had spent a longer part of the preceding year in the State addressed than in the requesting State.

2 In no case may the substance of the foreign decision be examined.

Article 12

In cases other than those covered by Articles 8 and 11:

1 Recognition and enforcement may be refused not only on the grounds provided for in Article 11 but also if:

a the effect of the decision is manifestly incompatible with fundamental principles of the law relating to the family and children in the State addressed;

b it is found that by reason of a change in the circumstances, including the passage of time but not including of itself a change in the residence of the child following an improper removal, the effects of the original

cision d'origine ne sont manifestement plus conformes à l'intérêt de l'enfant;

c si, au moment de l'introduction de l'instance dans l'Etat d'origine:

i l'enfant avait la nationalité de l'Etat requis ou sa résidence habituelle dans cet Etat alors qu'aucun de ces liens de rattachement n'existait avec l'Etat d'origine;

ii l'enfant avait à la fois la nationalité de l'Etat d'origine et de l'Etat requis et sa résidence habituelle dans l'Etat requis;

d si la décision est incompatible avec une décision qui a été rendue:

i soit dans l'Etat requis, soit dans un Etat tiers tout en étant exécutoire dans l'Etat requis, et

ii à la suite d'une procédure engagée avant l'introduction de la demande de reconnaissance ou d'exécution,

et que le refus soit conforme à l'intérêt de l'enfant.

2 La procédure en reconnaissance ou en exécution peut être suspendue:

a lorsque la décision d'origine fait l'objet d'un recours ordinaire;

b lorsqu'une procédure concernant la garde de l'enfant, engagée avant que la procédure dans l'Etat d'origine n'ait été introduite, est pendante dans l'Etat requis;

c lorsqu'une autre décision relative à la garde de l'enfant fait l'objet d'une procédure d'exécution ou de toute autre procédure relative à la reconnaissance de cette décision.

Article 13

1 Avant de statuer sur l'application du paragraphe 1 *b* de l'article 12, l'autorité relevant de l'Etat requis:

a doit entendre ou faire entendre l'enfant, à moins qu'il n'y ait une impossibilité pratique, eu égard notamment à l'âge et à la capacité de discernement de celui-ci;

b peut demander que des enquêtes appropriées soient effectuées.

2 Les frais des enquêtes effectuées dans un Etat contractant sont à la charge de l'Etat dans lequel elles ont été effectuées.

3 Les demandes d'enquêtes et leurs résultats peuvent être adressés à l'autorité concernée par l'intermédiaire des autorités centrales.

decision are manifestly no longer in accordance with the interests of the child;

c at the time when the original proceedings were instituted in the State of origin:

i the child was a national of the State addressed or was habitually resident there and no such connection existed with the State of origin;

ii the child was a national both of the State of origin and of the State addressed and was habitually resident in the State addressed;

d if the decision is incompatible with a decision which was given:

i either in the State addressed, or in a third State but being enforceable in the State addressed, and

ii following proceedings begun before the introduction of the request for recognition or enforcement,

and where the refusal is in accordance with the interests of the child.

2 Proceedings for recognition or enforcement may be adjourned:

a where an ordinary form of review of the original decision has been commenced;

b where proceedings relating to the custody of the child, instituted before the proceedings in the State of origin were instituted, are pending in the State addressed;

c where another decision concerning the custody of the child is the subject of proceedings of any kind for recognition or enforcement.

Article 13

1 Before reaching a decision under paragraph 1 *b* of Article 12, the authority in the State addressed:

a shall hear the child or ensure that he is heard unless this is impracticable having regard in particular to his age and understanding;

b may request that appropriate enquiries be carried out.

2 The cost of enquiries in any Contracting State shall be met by the authorities of the State where they are carried out.

3 Requests for enquiries and the results of enquiries may be sent to the authority concerned through the central authorities.

TITRE II

Article 14

La demande tendant à la reconnaissance ou l'exécution dans un autre Etat contractant d'une décision relative à la garde doit être accompagnée:

a d'un document habilitant l'autorité centrale de l'Etat requis à agir au nom du requérant ou à désigner à cette fin un autre représentant;

b d'une expédition de la décision réunissant les conditions nécessaires à son authenticité;

c le cas échéant, de tout document de nature à établir que, selon la loi de l'Etat d'origine, l'acte introductif d'instance ou un acte équivalent a été régulièrement signifié ou notifié au défendeur défaillant;

d le cas échéant, de tout document de nature à établir que, selon la loi de l'Etat d'origine, la décision est exécutoire;

PART II

Article 14

Where recognition or enforcement of a decision relating to custody is sought in another Contracting State, the application shall be accompanied by:

a a document empowering the central authority of the State addressed to act on behalf of the applicant or to designate another representative to that end;

b a copy of the decision which satisfies the necessary conditions of authenticity;

c in the case of a decision given in default of appearance any document which establishes that, in accordance with the law of the State of origin, the defendant was duly served with the document which instituted the proceedings or an equivalent document;

d as the case may be, any document which establishes that in accordance with the law of the State of origin, the decision is enforceable;

e si possible, d'un exposé indiquant le lieu où pourrait se trouver l'enfant dans l'Etat requis;

f de propositions sur les modalités du rétablissement de la garde de l'enfant;

g le cas échéant, d'une traduction des documents mentionnés ci-dessus dans la langue fixée en vertu de l'article 6.

Article 15

1 Lorsqu'à la date à laquelle l'enfant est déplacé à travers une frontière internationale il n'existe pas de décision exécutoire sur sa garde rendu dans un Etat contractant, les dispositions de la présente Convention s'appliquent à toute décision ultérieure relative à la garde de cet enfant et déclarant le déplacement illicite, rendue dans un Etat contractant à la demande de toute personne intéressée.

2 Tout Etat contractant peut faire la réserve selon laquelle il n'est pas lié par les dispositions du paragraphe 1 du présent article. Les dispositions de la présente Convention ne s'appliquent pas aux décisions visées au paragraphe 1 du présent article qui ont été rendues dans un Etat contractant ayant fait cette réserve.

Article 16

1 Tout Etat contractant peut faire la réserve selon laquelle dans les cas prévus aux articles 8 et 11 ou à l'un de ces articles la reconnaissance et l'exécution des décisions relatives à la garde pourront être refusées pour les motifs prévus à l'article 12 ou pour certains d'entre eux.

2 La reconnaissance et l'exécution des décisions rendues dans un Etat contractant ayant fait la réserve prévue au paragraphe 1 du présent article pourront être refusées dans tout autre Etat contractant pour tout motif indiqué dans cette réserve.

Article 17

La présente Convention n'empêche pas qu'un autre instrument international liant l'Etat d'origine et l'Etat requis ou le droit non conventionnel de l'Etat requis soient invoqués pour obtenir la reconnaissance ou l'exécution d'une décision.

Article 18

1 La présente Convention ne déroge à aucun autre instrument international contenant des dispositions sur les matières régies par la Convention et auquel un Etat contractant est ou deviendra partie.

2 Lorsque deux ou plusieurs Etats contractants ont établi ou viennent à établir une législation uniforme dans le domaine de la garde des enfants ou un système particulier de reconnaissance ou d'exécution des décisions dans ce domaine, ils auront la faculté d'appliquer entre eux cette législation ou ce système à la place de la présente Convention ou de toute partie de celle-ci. Pour se prévaloir de cette disposition, ces Etats devront notifier leur décision au Secrétaire Général du Conseil de l'Europe. Toute modification ou révocation de cette décision doit également être notifiée.

TITRE III

Article 19

La présente Convention est ouverte à la signature des Etats membres du Conseil de l'Europe. Elle sera soumise à ratification, acceptation ou approbation. Les instruments de ratification, d'acceptation ou d'approbation seront déposés près le Secrétaire Général du Conseil de l'Europe.

Article 20

1 La présente Convention entrera en vigueur le premier jour du mois qui suit l'expiration d'une période de trois mois

e if possible, a statement indicating the whereabouts or likely whereabouts of the child in the State addressed;

f proposals as to how the custody of the child may be restored;

g as the case may be a translation of the documents mentioned above into the language as determined by Article 6.

Article 15

1 Where at the time of the removal of a child across an international frontier, there is no enforceable decision given by a Contracting State relating to his custody, the provisions of this Convention shall apply to any subsequent decision relating to the custody of that child and declaring the removal to be improper if it has been given in a Contracting State at the request of any interested person.

2 Any Contracting State may make a reservation that it shall not be bound by the provisions of paragraph 1 of this Article. The provisions of this Convention shall not apply to the decisions referred to under paragraph 1 of this Article which have been given in a Contracting State having made such a reservation.

Article 16

1 Any Contracting State may make a reservation that in cases covered by Articles 8 and 11 or one of these Articles, recognition and enforcement of decisions relating to custody may be refused for the grounds provided under Article 12 or for some of them.

2 Recognition and enforcement of decisions given in a Contracting State having made the reservation contained in paragraph 1 of this Article may be refused in any other Contracting State for any of the grounds contained in this reservation.

Article 17

This Convention shall not restrict the application of another international instrument in force between the State of origin and the State addressed or other law of the State addressed for the purposes of obtaining recognition or enforcement of a decision.

Article 18

1 This Convention shall not affect any other international instrument containing provisions on matters governed by the Convention to which a Contracting State is, or becomes, a party.

2 When two or more Contracting States have established uniform legislation in the field of custody of children or a particular system for recognition or enforcement of decisions in this field they shall be free to apply, between themselves, that legislation or system in place of this Convention or any part of it. In order to avail themselves of this provision, those States must notify their decision to the Secretary General of the Council of Europe. Any alteration or revocation of that decision must also be notified.

PART III

Article 19

This Convention shall be open for signature by the member States of the Council of Europe. It is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

Article 20

1 This Convention shall enter into force on the first day of the month following the expiration of a period of three

après la date à laquelle trois Etats membres du Conseil de l'Europe auront exprimé leur consentement à être liés par la Convention conformément aux dispositions de l'article 19.

2 Elle entrera en vigueur à l'égard de tout Etat membre qui exprimera ultérieurement son consentement à être lié par elle, le premier jour du mois qui suit l'expiration d'une période de trois mois après la date du dépôt de l'instrument de ratification, d'acceptation ou d'approbation.

Article 21

1 Après l'entrée en vigueur de la présente Convention, le Comité des Ministres du Conseil de l'Europe pourra inviter tout Etat non membre du Conseil à adhérer à la Convention par une décision prise à la majorité prévue à l'article 20 *d* du statut et à l'unanimité des représentants des parties ayant le droit de siéger au Comité.

2 Pour tout Etat adhérent, la Convention entrera en vigueur le premier jour du mois qui suit l'expiration d'une période de trois mois après la date du dépôt de l'instrument d'adhésion près le Secrétaire Général du Conseil de l'Europe.

Article 22

1 Tout Etat peut, au moment de la signature ou au moment du dépôt de son instrument de ratification, d'acceptation, d'approbation ou d'adhésion, désigner le ou les territoires auxquels s'appliquera la présente Convention.

2 Tout Etat peut, à tout autre moment par la suite, par une déclaration adressée au Secrétaire Général du Conseil de l'Europe, étendre l'application de la présente Convention à tout autre territoire désigné dans la déclaration. La Convention entrera en vigueur à l'égard de ce territoire le premier jour du mois qui suit l'expiration d'une période de trois mois après la date de réception de la déclaration par le Secrétaire Général.

3 Toute déclaration faite en vertu des deux paragraphes précédents pourra être retirée, en ce qui concerne tout territoire désigné dans cette déclaration, par notification adressée au Secrétaire Général. Le retrait prendra effet le premier jour du mois qui suit l'expiration d'une période de six mois après la date de réception de la notification par le Secrétaire Général.

Article 23

1 Au regard d'un Etat qui, en matière de garde des enfants, a deux ou plusieurs systèmes de droit d'application territoriale:

a toute référence au droit de l'Etat de la nationalité de la personne ou au droit de l'Etat de sa résidence habituelle doit être entendue comme une référence au système de droit déterminé par les règles en vigueur dans cet Etat ou, à défaut, au système avec lequel la personne intéressée a les liens les plus étroits;

b toute référence à la loi de l'Etat d'origine ou à la loi de l'Etat requis doit être entendue comme une référence à l'unité territoriale dans laquelle le tribunal d'origine ou le tribunal requis, selon le cas, se trouve situé;

c la référence à l'Etat d'origine dans l'article 9, paragraphe 1, doit être entendue comme une référence à l'unité territoriale dans laquelle la décision a été rendue.

2 Le paragraphe 1 *a* du présent article s'applique également *mutatis mutandis* aux Etats qui ont en matière de garde des enfants deux ou plusieurs systèmes de droit d'application personnelle.

months after the date on which three member States of the Council of Europe have expressed their consent to be bound by the Convention in accordance with the provisions of Article 19.

2 In respect of any member State which subsequently expresses its consent to be bound by it, the Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date of the deposit of the instrument of ratification, acceptance or approval.

Article 21

1 After the entry into force of this Convention, the Committee of Ministers of the Council of Europe may invite any non-member State to accede to this Convention, by a decision taken by the majority provided by Article 20 *d* of the Statute and by the unanimous vote of the representatives of the parties entitled to sit on the Committee.

2 In respect of any acceding State, the Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date on which that State shall have deposited its instrument of accession with the Secretary General of the Council of Europe.

Article 22

1 Any State may at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, specify the territory or territories to which this Convention shall apply.

2 Any State may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Convention to any other territory specified in the declaration. In respect of such territory the Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date of receipt by the Secretary General of such declaration.

3 Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn by a notification addressed to the Secretary General. The withdrawal shall become effective on the first day of the month following the expiration of a period of three months after the date of receipt by the Secretary General of such notification.

Article 23

1 In relation to a State which has in matters of custody two or more systems of law of territorial aplication:

a any reference to the law of the State of a person's nationality or to the law of a State of a person's habitual residence shall be construed as referring to the system of law designated by the rules in force in that State or, if there are no such rules, to the system of law with which the person concerned is most closely connected;

b any reference to the law of the State of origin or to the law of the State addressed shall be construed as a reference to the law of the territorial unit where the court of origin or the court addressed, as the case may be, is situated;

c the reference to the State of origin in Article 9, paragraph 1, shall be construed as a reference to the territorial unit where the decision was rendered.

2 Paragraph 1 *a* of this Article shall also apply *mutatis mutandis* to States which have in matters of custody two or more systems of law of personal application.

Article 24

1 Tout Etat peut, au moment de la signature ou au moment du dépôt de son instrument de ratification, d'acceptation, d'approbation ou d'adhésion, déclarer faire usage d'une ou plusieurs réserves figurant au paragraphe 3 de l'article 6, au paragraphe 2 de l'article 15 et à l'article 16 de la présente Convention. Aucune réserve n'est admise.

2 Tout Etat contractant qui a formulé une réserve en vertu du paragraphe précédent peut la retirer en tout ou en partie en adressant au Secrétaire Général du Conseil de l'Europe une notification qui prendra effet à la date de sa réception.

Article 25

A l'issue de la troisième année qui suit la date d'entrée en vigueur de la présente Convention et, à son initiative, à tout autre moment après cette date, le Secrétaire Général du Conseil de l'Europe invitera les représentants des autorités centrales désignées par les Etats contractants à se réunir en vue d'étudier et de faciliter le fonctionnement de la Convention. Tout Etat membre du Conseil de l'Europe qui n'est pas partie à la Convention pourra se faire représenter par un observateur. Les travaux de chacune de ces réunions feront l'objet d'un rapport qui sera adressé pour information au Comité des Ministres du Conseil de l'Europe.

Article 26

1 Tout Etat contractant peut, à tout moment, dénoncer la présente Convention en adressant une notification au Secrétaire Général du Conseil de l'Europe.

2 La dénonciation prendra effet le premier jour du mois qui suit l'expiration d'une période de six mois après la date de réception de la notification par le Secrétaire Général.

Article 27

Le Secrétaire Général du Conseil de l'Europe notifiera aux Etats membres du Conseil et à tout Etat ayant adhéré à la présente Convention:

a toute signature;

b le dépôt de tout instrument de ratification, d'acceptation, d'approbation ou d'adhésion;

c toute date d'entrée en vigueur de la présente Convention conformément à ses articles 20, 21 et 22;

d tout autre acte, notification ou communication ayant trait à la présente Convention.

En foi de quoi, les soussignés, dûment autorisés à cet effet, ont signé la présente Convention.

Fait à ....., le ....., en français et en anglais, les deux textes faisant également foi, en un seul exemplaire qui sera déposé dans les archives du Conseil de l'Europe. Le Secrétaire Général du Conseil de l'Europe en communiquera copie certifiée conforme à chacun des Etats membres du Conseil de l'Europe et à tout Etat invité à adhérer à la présente Convention.

Article 24

1 Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, declare that it avails itself of one or more of the reservations provided for in paragraph 3 of Article 6, paragraph 2 of Article 15 and Article 16 of this Convention. No other reservation may be made.

2 Any Contracting State which has made a reservation under the preceding paragraph may wholly or partly withdraw it by means of a notification addressed to the Secretary General of the Council of Europe, which shall take effect as from the date of its receipt.

Article 25

At the end of the third year following the date of the entry into force of this Convention and, at his own initiative, at any time after this date, the Secretary General of the Council of Europe shall invite the representatives of the central authorities appointed by the Contracting States to meet in order to study and to assist the functioning of the Convention. Any member State of the Council of Europe not being a party to the Convention may be represented by an observer. A report shall be prepared on the work of each of these meetings and forwarded to the Committee of Ministers of the Council of Europe for information.

Article 26

1 Any Contracting State may at any time denounce this Convention by means of a notification addressed to the Secretary General of the Council of Europe.

2 Such denunciation shall become effective on the first day of the month following the expiration of a period of six months after the date of receipt of the notification by the Secretary General.

Article 27

The Secretary General of the Council of Europe shall notify the member States of the Council and any State which acceded to this Convention, of:

a any signature;

b the deposit of any instrument of ratification, acceptance, approval or accession;

c any date of entry into force of this Convention in accordance with Articles 20, 21 and 22;

d any other act, notification or communication relating to this Convention.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at ....., the ....., in English and French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe and to any State invited to accede to this Convention.

Commission spéciale

Note du Bureau Permanent

Conformément à la tradition ne sont pas reproduits les Documents de travail et Procès-verbaux des séances de la Commission spéciale.
Bien que le Rapport de Mlle Elisa Pérez-Vera et les Observations des Gouvernements fassent parfois référence à de tels Documents et Procès-verbaux, ces citations, destinées aux experts gouvernementaux en vue de la préparation de la Session plénière, n'ont plus une grande importance pour le lecteur des Actes et documents et elles n'ont été maintenues dans le texte que pour signaler les endroits où le Rapporteur et les Gouvernements ont évoqué expressément les travaux de la Commission spéciale.

Notice by the Permanent Bureau

As in the past, the Working Documents and the Minutes of the Special Commission's meetings have not been reproduced in this volume.
Although Professor Pérez-Vera's Report and the Comments of the Governments refer to such Documents and Minutes, these citations, which were intented to assist the governmental experts in preparing for the Plenary Session, are not essential for the reader of the Acts and Documents; they have been retained in the text in order to indicate the places where the Rapporteur and the Governments made specific reference to the Special Commission's discussions.

Liste des participants à la Commission spéciale

List of participants in the Special Commission's meetings

La Commission spéciale a siégé du 12 au 21 mars 1979 et du 5 au 16 novembre 1979.

The Special Commission met from March 12 to 21, 1979 and from November 5 to 16, 1979.

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Conclusions des discussions de la Commission spéciale de mars 1979 sur le kidnapping légal

Document préliminaire No 5 de juin 1979

INTRODUCTION

La Commission spéciale sur l'enlèvement international d'un enfant par un de ses parents s'est réunie au Palais de la Paix, à La Haye, du 12 au 21 mars 1979. Elle avait comme base de travail le Document préliminaire No 1, *Questionnaire et Rapport sur l'enlèvement international d'un enfant par un de ses parents,* établi par M. C. A. Dyer du Bureau Permanent; le Document préliminaire No 2, *Réponses des Gouvernements au Questionnaire*; le Document préliminaire No 3, *Summary of findings on a questionnaire studied by the International Social Service*; le Document préliminaire No 4, *Observations du Secrétariat du Conseil de l'Europe,* avec en annexe le *projet de Convention européenne sur la reconnaissance et l'exécution des décisions en matière de garde des enfants et le rétablissement de la garde des enfants* (le «projet de Strasbourg»), établi par le Comité d'experts du Conseil de l'Europe sur le droit relatif aux enfants. Les présentes conclusions ont été rédigées par le Bureau Permanent de la Conférence de La Haye de droit international privé dans le but de réaliser une synthèse du résultat des discussions tenues lors de la Commission spéciale de mars 1979. Des titres ont été donnés aux différentes parties de ces Conclusions par souci de clarté.

Une proposition présentée au tout début des discussions tendait à prendre le projet de Strasbourg comme base de l'élaboration d'une future convention de la Conférence de La Haye. Mais, étant donné l'approche différente sur laquelle les travaux de la Conférence reposaient, travaux qui avaient été réalisés par des recherches tant légales que sociologiques effectuées par le personnel du Bureau Permanent, en collaboration avec d'autres organisations, sur le phénomène spécifique de l'enlèvement d'un enfant par l'un de ses parents, la réunion a estimé qu'il n'était pas souhaitable de prendre le projet de Strasbourg comme point de départ, bien qu'on ait reconnu que certaines solutions adoptées à Strasbourg pourraient utilement servir de modèle. De même, la Commission spéciale estima qu'il ne fallait pas prendre comme base de discussions la *Convention de La Haye du 5 octobre 1961 concernant la compétence des autorités et la loi applicable en matière de protection des mineurs* dans l'idée d'élaborer un protocole sur l'exécution des décisions portant sur la garde des enfants, en raison du fait que cette Convention ne tenait pas compte des caractéristiques particulières du phénomène du «kidnapping légal». Néanmoins, il fut reconnu que, dans la mesure du possible, il fallait éviter des incompatibilités avec cette Convention, et dans certains cas les dispositions de cette Convention qui prévoient une coopération administrative pourraient servir utilement de modèle pour le travail de la Commission spéciale.

Conclusions drawn from the discussions of the Special Commission of March 1979 on legal kidnapping

Preliminary Document No 5 of June 1979

INTRODUCTORY NOTE

The Special Commission on international child abduction by one parent met at the Peace Palace in The Hague from March 12 to 21, 1979. It had before it Preliminary Document No 1, *Questionnaire and Report on international child abduction by one parent,* prepared by Mr C. A. Dyer of the Permanent Bureau; Preliminary Document No 2, *Replies of the Governments to the Questionnaire*; Preliminary Document No 3, *Summary of findings on a Questionnaire studied by International Social Service*; Preliminary Document No 4, *Observations by the Secretariat of the Council of Europe,* with the *draft European Convention on recognition and enforcement of decisions relating to custody and on restoration of custody of children* (the 'Strasbourg Draft'), prepared by the Council of Europe's Committee on the law relating to children, attached as an annex. The following conclusions have been drawn up by the Permanent Bureau of the Hague Conference on private international law in order to provide a synthesis of the result of the discussions held by the Special Commission in March 1979. The headings have been supplied for purposes of orderly presentation of the Conclusions.

The proposal was made very early in the discussions that the Strasbourg Draft be taken as a basis for preparation of the Convention by the Hague Conference. Given the different basis for the Conference's work, which took as its starting point independent legal and sociological research done by its staff and by co-operating organisations on the specific phenomenon of child abduction by parents, the meeting did not find it desirable to take the Strasbourg Draft as its starting point, even though certain solutions incorporated in the Strasbourg Draft might be useful as models. Likewise, the Commission did not think that the *Hague Convention of 5 October 1961 Concerning the Powers of Authorities and the Law Applicable in respect of the Protection of Infants* should be taken as a starting point, with a view to preparation of a protocol on enforcement of custody decisions, because that Convention did not take into account the particular features of the 'legal kidnapping' phenomenon. However, the effort should be made if possible to avoid incompatibility with that Convention, and in some circumstances the provisions for administrative co-operation which it contains might provide useful lessons for the Commission's work.

I *La réalité du problème et les méthodes propres à le régler*

1 Le problème de l'enlèvement d'un enfant devient de plus en plus aigu et sa solution devrait être recherchée par une collaboration internationale.

2 Le cadre d'une telle collaboration internationale devrait être celui d'une convention indépendante, et non pas d'un protocole à la Convention de 1961 sur la protection des mineurs.

3 La future Convention ne doit pas poser de règles de compétence directe pour traiter de la garde de l'enfant; par contre, elle pourrait contenir des règles interdisant ou limitant la compétence de l'Etat où l'enfant a été amené après enlèvement de se prononcer sur la garde.

4 Concernant les cinq types d'enlèvements décrits dans la note explicative du Rapport Dyer, la Convention doit les couvrir *tous*. Le type d'enlèvement A, soit lorsque aucune décision judiciaire en matière de garde n'a encore été prononcée, est une catégorie importante qui n'est pas couverte par le projet de Strasbourg.

5 Dans le contexte de la reconnaissance d'un jugement sur la garde de l'enfant, il faut entendre par «décision» toute décision ou élément de décision qui porte sur le contrôle effectif de l'enfant et qui statue sur le droit de visite.

II *Possibilités de coopération administrative*

6 Tout Etat ratifiant la future Convention a l'obligation de créer au sein de son administration, une «Autorité centrale».

7 Les Autorités centrales doivent avoir le pouvoir de mettre tout en oeuvre pour localiser l'enfant et, de manière générale, établir la situation de fait d'un cas donné.

8 Les Autorités centrales doivent avoir le pouvoir de donner et/ou recevoir des informations *générales* sur la situation légale dans les pays concernés par l'enlèvement.

9 Pour être aussi efficace que possible, les Autorités centrales devraient avoir des pouvoirs *administratifs* très étendus (droit de notifier un acte, de procéder à une commission rogatoire, d'envoyer des copies de toute décision etc.).

10 Concernant les informations spécifiques, les Autorités centrales doivent avoir le pouvoir d'informer les parents sur:

a les actions déjà entamées;
b l'existence de jugements, interlocutoires ou finals;
c le contenu des règles éventuellement applicables;
d le choix d'un avocat.

11 Les Autorités centrales peuvent donner des renseignements sur les chances de réussite d'une action particulière, sans que la future Convention les oblige à le faire.

12 Les Autorités centrales doivent aider les parties à obtenir l'assistance judiciaire; de plus, les frais encourus par les autorités elles-mêmes devraient être gratuits.

13 Les Autorités centrales doivent avoir le pouvoir de prendre des mesures pour assurer le droit de visite au parent qui n'a pas la garde de l'enfant.

14 Les Autorités centrales doivent avoir le pouvoir d'assurer la reconnaissance et l'exécution d'une décision de justice et de vérifier que l'enfant a effectivement été rapatrié.

III *Dispositions limitant la compétence des tribunaux et autres autorités lorsque l'enfant est retenu à l'étranger*

15 Lorsqu'un enfant qui a sa résidence habituelle dans un Etat contractant («l'Etat d'origine») est retenu par une ou

I *Reality of the problem and methods for dealing with it*

1 The problem of child abduction is becoming more and more acute, and a solution should be sought through international co-operation.

2 The framework for such international co-operation should be set up by an independent convention, not by preparation of a protocol to the 1961 Convention on Protection of Infants.

3 The Convention to be drawn up should not contain rules directly governing jurisdiction to adjudicate in questions of child custody; it might, on the other hand, contain rules forbidding or limiting the exercise of jurisdiction, in the State to which the child has been taken following an abduction, to decide on questions of custody.

4 With regard to the five types of abduction described in the Explanatory Note to the Dyer Report, the Convention should cover *all* types. Type A, where no court order has been entered, is an important category which is not covered by the Strasbourg Draft.

5 In the context of recognition of custody orders, 'decision' should mean every decision or element of a decision relating to the actual control of a child, or to the right of access.

II *Channels for administrative co-operation*

6 Every State which ratifies the Convention should be obliged to create within its administration a 'Central Authority'.

7 The Central Authorities should have all powers to find and locate the child and, more generally, to establish the concrete factual situation.

8 The Central Authorities must be able to give or receive any *general* information on the legal situation in the countries involved in the abduction.

9 In order to be as effective as possible, the Central Authorities should have very broad *administrative* powers (*e.g.* the right to serve documents, to initiate a letter of request, to send copies of any decisions, etc.).

10 With regard to specific information, the Central Authorities should have the power to provide information to parents on the following matters:

a the initiation of legal proceedings;
b the making of court orders, both interlocutory and final;
c the general content of the law applicable to the case;
d the choice of counsel.

11 The Central Authorities might give information on the chances of success in particular proceedings, but the Convention should not oblige them to do so.

12 The Central Authorities should help the parties to obtain legal aid; moreover, the expenses of the Central Authorities themselves should be free of charge.

13 The Central Authorities should have the power to secure the rights of access of a parent who does not have custody of the child.

14 The Central Authorities should have the power to ensure the recognition and enforcement of a judicial decision and to make sure that the child will in fact be returned.

III *Rules limiting the exercise of jurisdiction by courts and other authorities when the child is retained abroad*

15 Where a child whose habitual residence has been in a Contracting State ('the State of origin') is being retained by

plusieurs personnes dans un autre Etat contractant («l'Etat requis») sans le consentement du gardien légal, un parent investi du droit de garde sur l'enfant (soit seul, soit conjointement) dans l'Etat d'origine doit pouvoir exiger le retour immédiat de l'enfant en s'adressant à l'Autorité centrale de l'Etat requis dans les six mois après [avoir appris] que l'enfant a été retenu.

16 La règle précédente s'applique également lorsque l'enfant a été enlevé par ruse ou force, ou lorsque l'enfant a quitté son Etat d'origine pour une visite temporaire ou un séjour, en accord avec une décision de justice portant sur le droit de visite ou avec une convention entre le gardien de l'enfant et un ou plusieurs parents.

17 Le tribunal de l'Etat requis peut refuser de renvoyer l'enfant si, selon lui, un tel renvoi serait grandement préjudiciable à l'intérêt de l'enfant.

18 Lorsque la requête a été présentée plus de six mois après le déplacement de l'enfant de son Etat d'origine, le tribunal ne se reconnaîtra compétent pour se prononcer sur le bien-fondé de tout droit de garde relatif à l'enfant ou de changement de garde, que s'il considère que l'enfant réside habituellement sur son territoire et que l'enfant y ait résidé effectivement au moins [un an], à moins que la compétence du tribunal soit nécessaire pour protéger l'enfant contre un grave danger physique. Aucune décision ne sera rendue avant que le tribunal de l'Etat requis ait communiqué avec l'Autorité centrale de l'Etat d'origine.

19 Les règles établies plus haut s'appliquent que le demandeur soit ou non au bénéfice d'une décision rendue dans l'Etat d'origine. Il peut s'agir d'une décision permanente ou temporaire sur la garde de l'enfant ou d'une décision déclarant l'enlèvement ou la rétention de l'enfant comme contraire à la loi. L'existence, la date ou le contenu d'une décision peuvent avoir une influence sur le fardeau de la preuve à apporter par le demandeur.

20 Il faudrait prévoir dans la Convention une réserve permettant aux tribunaux de réexaminer entièrement la situation de l'enfant en tenant compte de son intérêt en vue d'un changement de garde si, au terme de la loi de l'Etat d'origine, il n'était pas possible pour le tribunal de tenir compte de l'intérêt de l'enfant en se déterminant sur sa garde.

IV *Amélioration dans les procédures judiciaires*

21 Les cas portant sur une demande de restitution d'un enfant qui a été retenu hors de L'Etat d'origine doivent être traités par la procédure la plus rapide possible. Une telle procédure devrait être expressément prévue dans la Convention.

22 La possibilité d'adopter dans la Convention une formule type de demande de restitution d'un enfant, du genre de celle que l'on trouve dans la Convention de 1965 sur la notification ou de celle recommandée pour le fonctionnement de la Convention de 1970 sur l'obtention des preuves, doit être sérieusement considérée.

23 On pourrait également envisager un système d'enregistrement des décisions étrangères portant sur la garde des enfants.

24 Si le tribunal de l'Etat requis examine la question de savoir à quel degré l'enfant a établi des liens sociaux durables avec cet Etat, il doit obligatoirement communiquer avec les autorités de l'Etat d'origine, avant de prendre une décision sur cette question.

25 Dans des cas exceptionnels, le tribunal de l'Etat requis doit pouvoir demander aux autorités de l'Etat d'origine d'entreprendre toute démarche possible pour obtenir une décision judiciaire relative à l'enlèvement.

one or more persons in another Contracting State ('the State addressed') without the consent of the lawful custodian, a relative who exercised custody over the child (whether alone or jointly) in the State of origin shall be entitled to have the child returned immediately to his or her custody by applying to the Central Authority of the State addressed within six months after [learning that] the child has been so retained.

16 The foregoing rule applies equally where the child has been abducted by stealth or force and where the child has left his or her State of origin for a temporary visit or sojourn elsewhere, pursuant to a court order for access or by agreement between the custodian and one or more other relatives.

17 The court of the State addressed may decline to order the immediate return of the child if it finds that the result will be gravely prejudicial to the interests of the child.

18 Where the application has been made more than six months after the removal of the child from his or her State of origin, the court will assume jurisdiction to determine custody of the child or a change of custody on the merits only if it considers the child to be habitually resident within the territory of the State where the court sits and the child has actually been so resident for not less than [one year], unless its assumption of jurisdiction is necessary to protect the child from serious physical danger. No such decision will be taken until the court of the requested State has communicated with the Central Authority of the State of origin.

19 The rules set out above shall apply whether or not the applicant has obtained a decision in the State of origin. A decision could take the form of a permanent or temporary order for custody of the child or a declaratory judgment determining that the removal or retention of the child was wrongful. The existence, date or contents of any such decision might affect the burden of proof to be carried by the applicant.

20 A reservation should be permitted by the Convention under which the courts of the requested State might undertake a full consideration of the child's interests on the merits in order to determine a change in custody if, under the law of the State of origin, it was not possible for the court to take account of the interests of the child in determining custody.

IV *Improvements in judicial procedures*

21 Cases involving an application for return of a child who is being retained away from the State of origin should be resolved under the most expeditious procedures possible. These should be set out specifically in the Convention.

22 Preparation of model forms for requesting the return of a child, along the lines of those included in the 1965 Convention on Service of Process Abroad and that recommended for use under the 1970 Convention on Taking of Evidence Abroad, should be seriously considered.

23 The creation of a system for registration of foreign decisions in custody matters should also be considered.

24 If the court of the State addressed enquires into the question of whether a child has established effective social ties with its State, it should be obliged to communicate with the authorities of the State of origin before making a decision on this question.

25 In exceptional circumstances, the court of the State addressed should be able to ask the authorities of the State of origin to take such steps as may be practicable to obtain a judicial decision concerning the abduction.

V *Principes généraux*

26 Dans les questions de droit de garde et de droit de visite, l'intérêt et le bien-être de l'enfant sont de première importance.

27 Le droit de visite est un corollaire nécessaire au droit de garde.

28 L'enlèvement d'un enfant est contraire à son intérêt et à son bien-être.

29 La Convention ne devrait s'appliquer qu'à des enfants n'ayant pas dépassé l'âge de 16 ans. Cette limite d'âge pourrait être plus basse.

VI *Adhésion*

30 La Convention ne devrait être ni totalement ouverte, ni totalement fermée, mais adopter le système semblable à celui de l'article 31 de la *Convention concernant la reconnaissance et l'exécution de décisions relatives aux obligations alimentaires*, conclue le 2 octobre 1973. (En adoptant cette conclusion, les experts de la Commission spéciale n'avaient pas à l'esprit les modifications dans le système d'adhésion aux Traités de la Conférence de La Haye adoptées par la Quatrième commission lors de la Treizième session, modification dont il conviendra peut-être de tenir compte.)

V *General principles*

26 In questions of custody and access, the welfare of the child is of primary importance.

27 The right of access is a necessary corollary to that of custody.

28 Abduction of children is contrary to their interests and welfare.

29 The Convention should only apply to children who are not more than 16 years of age. This age limit might be set lower.

VI *Accession*

30 The Convention should neither be completely open nor completely closed, but should employ a system similar to that of article 31 of the *Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations.* (When they adopted this conclusion, the experts of the Special Commission dit not have in mind the changes in the system for accession to treaties which were adopted by the Fourth Commission at the Thirteenth Session, which changes should possibly be taken into account.)

Avant-projet de Convention adopté par la Commission spéciale et Rapport de Mlle Elisa Pérez-Vera

Document préliminaire No 6 de mai 1980

Avant-projet de Convention sur les aspects civils de l'enlèvement international d'enfants, adopté par la Commission spéciale le 16 novembre 1979

CHAPITRE I — CHAMP D'APPLICATION DE LA CONVENTION

Article premier

La présente Convention a pour objet:

a d'assurer le retour immédiat des enfants déplacés ou retenus illicitement dans tout Etat contractant, et

b d'assurer également dans tout Etat contractant la jouissance effective du droit de garde comme du droit de visite.

Article 2

Les Etats contractants prennent des mesures appropriées pour assurer, dans les limites de leur territoire, la réalisation des objectifs de la Convention. Ils doivent utiliser des procédures d'urgence.

Article 3

Le déplacement et le non-retour d'un enfant sont considérés comme illicites lorsqu'ils ont lieu en violation d'un droit de garde exercé effectivement par une personne [ou une institution], seule ou conjointement, et attribué par le droit de l'Etat de la résidence habituelle que l'enfant avait immédiatement avant son déplacement, soit de plein droit, soit par une décision judiciaire ou administrative, soit par un accord ayant force de loi dans cet Etat.

Article 4

La Convention s'applique à tout enfant âgé de moins de [16] ans, qui avait sa résidence habituelle dans un Etat contractant immédiatement avant toute atteinte aux droits de garde ou de visite.

Article 5

Au sens de la présente Convention:

a l'expression «droit de garde» signifie le droit portant sur les soins de la personne de l'enfant, et en particulier celui de décider de son lieu de résidence;

b l'expression «droit de visite» inclut notamment le droit d'emmener l'enfant, pour une période limitée, dans un lieu autre que celui de sa résidence habituelle.

CHAPITRE II — AUTORITÉS CENTRALES

Article 6

Chaque Etat contractant désigne une Autorité centrale chargée de satisfaire aux obligations qui lui sont imposées par la Convention.

Preliminary draft Convention adopted by the Special Commission and Report by Elisa Pérez-Vera

Preliminary Document No 6 of May 1980

Preliminary draft Convention on the civil aspects of international child abduction, adopted by the Special Commission on November 16th, 1979

CHAPTER I — SCOPE OF THE CONVENTION

Article 1

The objects of this Convention are —

a to secure the prompt return of children wrongfully removed to or retained in any Contracting State, and

b to secure in all Contracting States the effective enjoyment of the rights of custody and of access.

Article 2

Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. They shall use the most expeditious procedures available.

Article 3

The removal or the retention of a child is to be considered wrongful when it is in breach of rights of custody actually exercised by a person [or institution], either jointly or alone, based upon the law of the State in which the child was habitually resident immediately before the removal or retention, whether through operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having the force of law in that State.

Article 4

The Convention shall apply to any child under the age of [16] years who was habitually resident in a Contracting State immediately before any breach of custody or access rights.

Article 5

For the purposes of this Convention —

a 'rights of custody' are rights relating to the care of the person of the child, and in particular the right to determine the child's place of residence;

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

CHAPTER II — CENTRAL AUTHORITIES

Article 6

A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.

Un Etat fédéral ou un Etat dans lequel plusieurs systèmes de droit sont en vigueur est libre de désigner plus d'une Autorité centrale et de spécifier l'étendue territoriale des pouvoirs de chacune de ces autorités. L'Etat qui fait usage de cette faculté désigne l'Autorité centrale à laquelle les demandes peuvent être adressées en vue de leur transmission à l'Autorité centrale compétente dans cet Etat.

Article 7

Les Autorités centrales doivent coopérer entre elles et promouvoir une collaboration entre les autorités compétentes dans leurs Etats respectifs, pour assurer le retour immédiat des enfants et réaliser les autres objectifs de la présente Convention.

En particulier, soit directement, soit par l'intermédiaire d'autres autorités compétentes dans leurs Etats, elles doivent:

a tout mettre en oeuvre pour localiser un enfant déplacé ou retenu illicitement;

b prendre ou faire prendre toute mesure provisoire qui semble utile pour prévenir de nouveaux dangers pour l'enfant ou d'autres préjudices pour les parties concernées;

c échanger, si cela s'avère utile, des informations relatives à la situation sociale de l'enfant;

d prendre ou faire prendre toute mesure propre soit à assurer la remise volontaire de l'enfant, soit à faciliter une solution amiable;

e donner des informations de portée générale sur le contenu du droit dans leur Etat pour l'application de la Convention;

f introduire ou favoriser l'ouverture d'une procédure judiciaire ou administrative, afin d'obtenir le retour de l'enfant et, le cas échéant, de fixer ou de permettre l'exercice du droit de garde ou du droit de visite;

g accorder ou faciliter, le cas échéant, l'obtention de l'assistance judiciaire et juridique, y compris les services d'un avocat;

h mettre en oeuvre les procédures administratives nécessaires et appropriées, afin d'assurer le retour sans danger de l'enfant.

CHAPITRE III — RETOUR DE L'ENFANT

Article 8

Toute personne qui prétend que son droit de garde a été violé peut saisir, pour assurer le retour de l'enfant, soit l'Autorité centrale de la résidence habituelle de l'enfant, soit celle de tout autre Etat contractant.

La demande doit contenir:

a des détails portant sur l'identité du demandeur, de l'enfant et de la personne présumée avoir emmené ou retenu l'enfant;

b la date de naissance de l'enfant;

c les motifs sur lesquels se base le demandeur pour réclamer le retour de l'enfant;

d toutes informations disponibles concernant la localisation de l'enfant et l'identité de la personne présumée avoir l'enfant.

La demande peut être accompagnée ou complétée par:

e une copie certifiée conforme de toute décision utile ou de tout accord ayant force de loi;

f une attestation ou une déclaration sous affirmation émanant d'une autorité compétente de l'Etat de la résidence

Federal States and States with more than one system of law shall be free to appoint more than one Central Authority and to specify the territorial extent of their powers. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which applications may be addressed for transmission to the relevant Central Authority in that State.

Article 7

Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.

In particular, either directly or through other competent authorities in their States, they shall –

a take steps to discover the whereabouts of wrongfully removed or retained children;

b take or promote the taking of such provisional measures as may be necessary to prevent further harm to the child or further prejudice to interested parties;

c exchange, where appropriate, information relating to the social background of the child;

d take or cause to be taken all steps appropriate either to ensure the voluntary return of the child or to bring about an amicable resolution of the issues;

e provide information of a general character as to the law of their State relating to the application of the Convention;

f initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, where appropriate, the determination of issues relating to rights of custody and access;

g where appropriate, provide or facilitate the provision of legal aid and advice, including the services of legal counsel;

h provide such administrative arrangements as may be necessary and appropriate to achieve the safe return of the child.

CHAPTER III – RETURN OF CHILDREN

Article 8

Any person who claims that there has been a breach of his custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.

The application shall contain –

a details concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child;

b the date of birth of the child;

c the grounds on which the applicant's claim for return of the child is based;

d all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be.

The application may be accompanied or supplemented by –

e a certified copy of any relevant decision or any agreement having the force of law;

f a certificate or a sworn declaration emanating from a competent authority of the State of the child's habitual

habituelle de l'enfant, ou d'une personne qualifiée, concernant la teneur des dispositions législatives sur le droit de garde dans cet Etat;

g tout autre document utile.

Article 9

Avant l'ouverture de toute procédure judiciaire ou administrative, l'Autorité centrale de l'Etat où se trouve l'enfant prendra ou fera prendre toute mesure propre à assurer sa remise volontaire.

Article 10

Les autorités judiciaires ou administratives de tout Etat contractant doivent statuer d'urgence sur la remise de l'enfant.
Si ces autorités n'ont pas statué dans un délai de six semaines à partir de leur saisine, l'Autorité centrale de l'Etat requis doit en informer le demandeur et l'Autorité centrale de l'Etat requérant, en leur donnant les motifs. L'obligation imposée à l'Autorité centrale de l'Etat requis par ce paragraphe n'existe que lorsque cette Autorité a été informée de la demande.

Article 11

Lorsqu'il y a eu violation du droit de garde au sens de l'article 3 et qu'au moment de l'introduction de la demande une période de moins de six mois s'est écoulée à partir de la violation du droit de garde, les autorités judiciaires ou administratives de l'Etat où se trouve l'enfant ordonnent son retour immédiat.
Toutefois, lorsque la résidence de l'enfant était inconnue, la période de six mois visée au paragraphe précédent court dès la découverte de l'enfant, sans qu'elle puisse excéder un an à partir de la violation du droit de garde.

Article 12

Nonobstant les dispositions de l'article précédent, les autorités judiciaires ou administratives de l'Etat requis ne sont pas obligées d'ordonner le retour de l'enfant, lorsque la personne qui a déplacé ou retenu ce dernier établit que:

a à l'époque de la violation invoquée, le demandeur n'exerçait pas effectivement ou de bonne foi le droit de garde sur l'enfant; ou

b il existe un risque grave que le retour de l'enfant ne l'expose à un danger physique ou psychique, ou de toute autre manière ne le place dans une situation intolérable.

Les autorités judiciaires ou administratives peuvent aussi refuser le retour de l'enfant si elles constatent que celui-ci s'oppose à son retour et qu'il a atteint un âge et une maturité où il se révèle approprié de tenir compte de cette opinion.

Dans l'appréciation des circonstances visées dans cet article, les autorités judiciaires ou administratives doivent tenir compte des informations fournies par l'Autorité centrale de l'Etat de la résidence habituelle de l'enfant sur sa situation sociale.

Article 13

En se prononçant sur la demande visant au retour de l'enfant, les autorités judiciaires ou administratives tiendront compte du droit de l'Etat de la résidence habituelle avant son déplacement, tel que ce droit est défini à l'article 3.

Article 14

Les Autorités centrales, judiciaires ou administratives d'un Etat contractant peuvent demander aux autorités de l'Etat de la résidence habituelle de l'enfant de tout entreprendre pour obtenir une décision ou une attestation judiciaire constatant que l'enfant a été déplacé ou retenu et que ce déplace-

residence, or from a qualified person, concerning the contents of the law of that State with respect to custody rights;

g any other relevant document.

Article 9

Prior to the institution of legal proceedings, the Central Authority of the State where the child is to be found shall take or cause to be taken all appropriate measures in order to obtain the return of the child by consent.

Article 10

The judicial or administrative authorities of Contracting States shall act expeditiously on applications for the return of children.
If these judicial or administrative authorities have not reached a decision within six weeks after their receipt of the application, the Central Authority of the requested State shall so inform the applicant and the Central Authority of the requesting State, stating the reasons. The requirements imposed upon the Central Authority by this paragraph apply only where the Central Authority has been informed of the application.

Article 11

Where there has been a breach of custody rights in terms of article 3 and, at the date of the application to the judicial or administrative authority of the State where the child is located, a period of less than six months has elapsed from the date of the breach of custody rights, the authority shall order the return of the child forthwith.
However, where the residence of the child was unknown, the period of six months referred to in the previous paragraph shall run from the date of the discovery of the child, subject to the proviso that the total period shall not exceed one year from the date of the breach.

Article 12

Notwithstanding the provisions of the preceding article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person who has removed or retained the child establishes that –

a at the time of the alleged breach the applicant was not actually exercising the custody rights or acting in good faith; or

b there is a substantial risk that the return would expose the child to physical and psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authorities may also refuse the return of the child if they find that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.
In evaluating the circumstances referred to in this article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority of the child's habitual residence.

Article 13

In determining whether or not the child should be returned, the judicial or administrative authority shall have regard to the law of the State of the habitual residence of the child before the removal, as that law is specified in article 3.

Article 14

The Central, judicial or administrative authorities of a Contracting State may request the authorities of the State of the habitual residence of the child to take all practicable steps to obtain a decision or other determination relating to the fact that the child has been removed or retained and that

ment ou ce non-retour de l'enfant était illicite au sens de l'article 3 de cette Convention.

Article 15

Les dispositions de ce chapitre ne font pas obstacle au pouvoir des autorités judiciaires ou administratives d'ordonner le retour de l'enfant après l'expiration des délais prévus à l'article 11.

Article 16

Une décision sur le retour de l'enfant ne préjuge pas du fond du droit de garde.

CHAPITRE IV — DROIT DE VISITE

Article 17

Une demande visant à fixer ou à protéger l'exercice d'un droit de visite peut être adressée à l'Autorité centrale d'un Etat contractant selon les mêmes modalités qu'une demande visant au retour de l'enfant.
Les Autorités centrales sont liées par les obligations de coopération visées à l'article 7, pour assurer l'exercice paisible du droit de visite et l'accomplissement de toute condition à laquelle l'exercice de ce droit serait soumis, et pour que soient levés, dans toute la mesure du possible, les obstacles de nature à s'y opposer.
Les Autorités centrales, soit directement, soit par l'intermédiaire d'autorités compétentes dans leur Etat, peuvent entamer ou favoriser une procédure légale en vue de fixer le droit de visite et les conditions auxquelles l'exercice de ce droit peut être soumis.

CHAPITRE V — DISPOSITIONS GÉNÉRALES

Article 18

Aucune caution ni aucun dépôt, sous quelque dénomination que ce soit, ne peut être imposé [à une personne résidant habituellement dans un Etat contractant] comme condition préalable à l'ouverture d'une procédure judiciaire tombant dans le domaine de la Convention.

Article 19

Aucune légalisation ni aucune formalité similaire ne sera requise dans le contexte de la Convention.

Article 20

Toute demande ou toute communication, ainsi que tous autres documents, sont adressés à l'Autorité centrale de l'Etat requis dans leur langue originale, accompagnés d'une traduction dans la langue officielle ou l'une des langues officielles de cet Etat, ou, lorsque cela est difficilement réalisable, d'une traduction en français ou en anglais.
Toutefois, un Etat contractant peut s'opposer à l'utilisation soit du français, soit de l'anglais, en faisant la réserve prévue à l'article X.

Article 21

Les ressortissants d'un Etat contractant et les personnes qui résident habituellement dans cet Etat auront droit, pour tout ce qui concerne l'application de la Convention, à l'assistance judiciaire et juridique dans tout autre Etat contractant, comme s'ils étaient eux-mêmes ressortissants de cet autre Etat et y résidaient habituellement.

Article 22

Chaque Autorité centrale supportera ses propres frais en appliquant la Convention.
L'Autorité centrale et les autres autorités administratives

the child's removal or retention was wrongful within the meaning of article 3 of the Convention.

Article 15

The provisions of this Chapter do not limit the power of judicial or administrative authorities to order the return of the child after the expiration of the time-limits set out in article 11.

Article 16

A decision concerning the return of the child shall not be construed as one relating to the merits of custody rights.

CHAPTER IV — RIGHTS OF ACCESS

Article 17

An application for fixing or protecting the exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child.
The Central Authorities are bound by the obligations of co-operation which are set forth in article 7 to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject. The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights.
The Central Authorities, either directly or through their competent authorities, may initiate or assist in the institution of proceedings with a view to fixing or to protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject.

CHAPTER V — GENERAL PROVISIONS

Article 18

No security, bond or deposit, however described, shall be required [of a person habitually resident in a Contracting State] as a condition of the initiation of judicial proceedings falling within the scope of this Convention.

Article 19

No legalization or similar formality may be required in the context of the Convention.

Article 20

Any application, communication or other document addressed to the Central Authority of the requested State shall be in the original language, and shall be accompanied by a translation into the official language or one of the official languages of the requested State or, where that is not feasible, a translation into French or English.
However, a Contracting State may object to the use of either French or English, but not both, by making the reservation provided in article X.

Article 21

Nationals of the Contracting States and persons who are habitually resident in the territory of those States shall be entitled in matters concerned with the application of the Convention to legal aid and advice in any other Contracting State as if they themselves were nationals of and habitually resident in that State.

Article 22

Each Central Authority shall bear its own costs in applying the Convention.
Central Authorities and other administrative authorities of

des Etats contractants ne réclameront aucun remboursement de leurs frais en rapport avec les dispositions de cette Convention, mais peuvent:

a demander le remboursement de tous frais qui ne seraient pas couverts par le système d'assistance judiciaire et qui découleraient de l'intervention d'avocats ou d'avoués;

b demander le paiement des dépenses occasionnées par le rapatriement de l'enfant.

Article 23

Lorsqu'il est manifeste que les conditions requises par la Convention ne sont pas remplies ou que la demande n'est pas fondée, l'Autorité centrale n'est pas obligée d'accepter une telle demande. En ce cas, elle informe immédiatement de ses objections le demandeur ou l'Autorité centrale qui lui a transmis la demande.

Article 24

Toute Autorité centrale peut requérir que la demande soit accompagnée d'une autorisation lui donnant le pouvoir d'agir pour le compte du demandeur, ou de désigner une personne ou une institution habilitée à agir en son nom.

Article 25

La présente Convention ne fait pas obstacle à la faculté pour la personne dont le droit de garde ou de visite a été violé de s'adresser directement aux autorités judiciaires ou administratives des Etats contractants.

[Article 26

Toute demande soumise aux Autorités centrales des Etats contractants conformément aux dispositions de la présente Convention, ainsi que tout document ou information qui y serait annexé ou fourni par une Autorité centrale, seront recevables devant les tribunaux des Etats contractants.]

Article 27

Au regard d'un Etat qui connaît en matière de garde des enfants deux ou plusieurs systèmes de droit applicables dans des unités territoriales différentes:

a toute référence à la résidence habituelle dans cet Etat vise la résidende habituelle dans une unité territoriale de cet Etat;

b toute référence à la loi de l'Etat de la résidence habituelle vise la loi de l'unité territoriale dans laquelle l'enfant a sa résidence habituelle.

Article 28

Au regard d'un Etat contractant connaissant en matière de garde des enfants deux ou plusieurs systèmes de droit applicables à des catégories différentes de personnes, toute référence à la loi de cet Etat vise le système de droit désigné par le droit de celui-ci.

Article 29

Un Etat dans lequel différentes unités territoriales ont leurs propres règles de droit en matière de garde des enfants ne sera pas tenu d'appliquer la présente Convention lorsqu'un Etat dont le système de droit est unifié ne serait pas tenu de l'appliquer.

Article V

(Relations avec d'autres Conventions: à décider par la Quatorzième session.)

Article W

(Droit transitoire: à décider par la Quatorzième session.)

Contracting States shall not impose any charges in relation to applications submitted under this Convention but may –

a require the payment of any charges which are not met through the legal aid system and which arise from the employment of legal counsel;

b require the payment of the expenses incurred or to be incurred in repatriating the child.

Article 23

When it is manifest that the requirements of this Convention are not fulfilled or that the application is otherwise not well-founded, the Central Authority is not obliged to accept the application. In that case, the Central Authority shall forthwith inform the applicant or the Central Authority through which the application was submitted of its objections.

Article 24

A Central Authority may require that any application be accompanied by an authorization empowering it to act on behalf of the applicant, or to designate a person or institution so to act.

Article 25

This Convention shall not prevent any person whose custody or access rights have been breached applying directly to the judicial or administrative authorities of a Contracting State.

[Article 26

Any application submitted to the Central Authorities of the Contracting States in accordance with the terms of this Convention, together with documents and other information appended thereto or provided by a Central Authority, shall be admissible in the courts of the Contracting States.]

Article 27

In relation to a State which in matters of custody of children has two or more systems of law applicable in different territorial units –

a any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit of that State;

b any reference to the law of the State of habitual residence shall be construed as referring to the law of the territorial unit in that State where the child habitually resides.

Article 28

In relation to a State which in matters of custody of children has two or more systems of law applicable to different categories of persons, any reference to the law of that State shall be construed as referring to the legal system specified by the law of that State.

Article 29

A State within which different territorial units have their own rules of law in respect of custody of children shall not be bound to apply this Convention where a State with a unified system of law would not be bound to do so.

Article V

(Relations with other Conventions: to be decided by the Fourteenth Session.)

Article W

(Temporal application of the Convention: to be decided by the Fourteenth Session.)

Article X

(Réserve admise.)

Article Y (à insérer dans les clauses finales)

Un Etat contractant qui comprend deux ou plusieurs unités territoriales qui ont leurs propres règles de droit en matière de garde des enfants pourra, au moment de la signature, de la ratification, de l'acceptation, de l'approbation ou de l'adhésion, déclarer que la présente Convention s'étendra à toutes ces unités territoriales ou à une ou à plusieurs d'entre elles, et pourra à tout moment modifier cette déclaration en faisant une nouvelle déclaration.

Ces déclarations seront notifiées au Ministère des Affaires Etrangères du Royaume des Pays-Bas et indiqueront expressément les unités territoriales auxquelles la Convention s'applique.

Article X

(Reservation accepted.)

Article Y (to be included among the final clauses)

If a Contracting State has two or more territorial units which have their own rules of law in respect of custody of children, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention shall extend to all its territorial units or to one or more of them, and may modify its declaration by submitting another declaration at any time.

These declarations shall be notified to the Ministry for Foreign Affairs of the Kingdom of the Netherlands, and shall state expressly the territorial units to which this Convention applies.

Rapport de la Commission spéciale établi par Mlle Elisa Pérez-Vera

Introduction

I DÉLIMITATION DU SUJET

1 L'opinion publique et la communauté internationale se sentent de plus en plus concernées par la multiplicité des problèmes, tant humains que juridiques, que soulève l'utilisation de voies de fait pour créer des liens artificieux de compétence judiciaire internationale, en vue d'obtenir la garde des enfants. Pourtant, la définition juridique du sujet envisagé pose de graves difficultés étant donné, d'une part, l'absence d'un traitement spécifique de la question dans la plupart des droits internes et, d'autre part, la pluralité et diversité des situations considérées.

2 En conséquence, une approche analytique semble être la plus adéquate pour saisir l'essence d'une question dont l'expression en termes de droit court le risque de tomber ou bien dans le simplisme ou bien dans une excessive complexité. Comme point de départ de cette approche nous retiendrons seulement deux éléments présents dans toutes les situations qui nous concernent, de telle façon qu'il est légitime d'estimer qu'ils constituent le noyau irréductible du problème.

En premier lieu, dans toutes les hypothèses, il existe le déplacement d'un enfant hors de son milieu habituel, où il se trouvait à la charge d'une personne (ou d'une institution) qui exerçait sur lui un droit de garde légitime. Bien entendu, on doit assimiler à une telle situation le refus de réintégrer l'enfant à son milieu, après un séjour à l'étranger, avec le consentement de celui qui exerçait la garde sur sa personne. En effet, dans les deux cas la conséquence est la même: l'enfant a été soustrait de l'environnement familial et social dans lequel se déroulait sa vie.

En second lieu, la personne qui déplace l'enfant (ou qui est responsable du déplacement, quand l'action matérielle est exécutée par un tiers) a l'espoir d'obtenir des autorités du pays où l'enfant a été emmené le droit de garde sur la personne de celui-ci. Il s'agit donc de quelqu'un qui appartient au cercle familial de l'enfant dans un sens large, quoique, dans la plupart des cas, la personne en question soit un de ses parents; souvent cette personne essaiera d'obtenir qu'une décision judiciaire ou administrative de l'Etat de refuge légalise la situation de fait qu'elle vient de créer; mais il est aussi possible, si elle n'est pas sûre du sens de la décision, qu'elle choisisse de ne pas agir, croyant que les autorités territoriales de l'Etat de refuge, ignorant l'affaire, ne l'obligeront pas à renvoyer l'enfant.

Il s'en déduit que, malgré l'emploi par les «mass-media» d'expressions comme «*legal kidnapping*», «enlèvement d'enfants» ou «*secuestro de menores*», nous nous trouvons en présence d'une réalité radicalement différente de celle qui s'applique aux notions de *kidnapping*, enlèvement ou *secuestro*. Ainsi même si dans certaines législations les conduites envisagées peuvent soulever un problème pénal, il est évident que les efforts internationaux pour les combattre ne peuvent pas se dérouler par la voie du droit pénal (songeons,

Report of the Special Commission by Elisa Pérez-Vera

(TRANSLATION OF THE PERMANENT BUREAU)

Introduction

I SCOPE OF THE SUBJECT-MATTER

1 There is increasing concern in public opinion and the international community for the multiplicity of legal and human problems which derive from the wrongful practices in creating artificial links of international jurisdiction, with a view to obtaining child custody. Nonetheless, if we have to agree on a legal definition of the subject in question, we are faced with serious difficulties, considering, on the one hand, the absence of any specific treatment of it in most domestic laws and, on the other, the plurality and diversity of the situations which may come under consideration.

2 As a result, an analytical approach seems to be the most appropriate for getting into the gist of the matter in an area where legal terminology could become either too complex or too simple. As a basis for this approach, we shall consider just two elements which coexist in all the situations we have to face and which, in such a way, may be deemed to constitute the unalterable nucleus of the problem.

In the first place, and in all cases, we have the removal of a child away from the normal social environment in which he lived in the care of a custodian (or institution) who exercised over him a legal right of custody. Naturally, we must assimilate to this situation the case of a refusal to return the child after a sojourn abroad, where the sojourn has been made with the consent of the rightful custodian of the child's person. In both cases, the outcome is the same: the child has been removed from the social and family background which shaped his life.

Secondly, the person who removed the child (or is responsible for the removal, when the latter is effected by a third party) hopes to obtain the right of custody from the authorities of the country where the child has been taken. In this case, such a person belongs, in a broad sense, to the child's family circle, although he or she is often one of his parents; in general also this person will try to obtain from the State of refuge a judicial or administrative decision to legalize the factual situation he has created; but it is also possible that, fearing the outcome of the decision to be taken, that person might choose not to act at all, in the belief that the territorial authorities of the State of refuge, being unaware of the affair, will not commit him or her to returning the child.

We may deduce from all this that, notwithstanding the use by the 'mass media' of such expressions as 'legal kidnapping', '*enlèvement d'enfants*' or '*secuestro de menores*', we are dealing with a reality which is quite different from that which applies to the notions of kidnapping, *enlèvement* or *secuestro*. So, even though within some legal systems such conduct may give rise to penal problems, it is obvious that international efforts to combat it cannot progress by way of penal legislation (in this connection, we may give the

par exemple, à la faible utilité d'institutions comme l'extradition dans ce contexte).
En effet, dans les actions visées, il n'y a pas à la base d'intention criminelle et, en général, «l'enleveur» pense avoir des titres légitimes pour qu'on lui accorde la garde de l'enfant, supposant, en plus, que ces titres ont été, ou seront ignorés par une décision dictée par les autorités de la résidence habituelle de l'enfant. En fait, très souvent, dans le cas de mariages mixtes, la peur d'une décision automatiquement favorable au conjoint national de l'Etat de la résidence va jouer son rôle comme facteur déterminant du déplacement de l'enfant par l'autre conjoint.

3 Ainsi donc, le sujet qui nous occupe concerne en tout premier lieu la garde des enfants, c'est-à-dire qu'il faut l'envisager dans l'optique de la protection des mineurs. Il est bien connu que la protection des mineurs est une question qui a préoccupé traditionnellement la Conférence de La Haye de droit international privé. Deux Conventions témoignent de cet intérêt.
La première dans le temps – la Convention du 12 juin 1902 pour régler la tutelle des mineurs – avait comme objet la désignation de la loi applicable à cette institution concrète[1]. Elle a été remplacée dans les rapports entre les Etats contractants par une nouvelle Convention, conclue le 5 octobre 1961, «concernant la compétence des autorités et la loi applicable en matière de protection des mineurs»[2]. Comme le rappelait la Note sur le «*legal kidnapping*» établie par le Bureau Permanent en 1976[3], «cette Convention, après avoir établi le principe qu'un rapport d'autorité résultant de plein droit de la loi interne de l'Etat de la nationalité du mineur est reconnu dans tous les Etats contractants (article 3), confie aux autorités de la résidence habituelle du mineur le soin de prendre des mesures tendant à la protection de sa personne ou de ses biens (article premier). Ces autorités prennent les mesures prévues par leur loi interne (article 2). Toutefois, les autorités de l'Etat dont le mineur est ressortissant peuvent prendre en charge la protection du mineur après en avoir avisé les autorités de la résidence (article 4). Des dispositions spéciales visent le cas du déplacement de la résidence du mineur (article 5), dispositions qui garantissent que les mesures prises par une juridiction dureront jusqu'au moment de leur remplacement par une autre décision. Enfin, il est prévu que les mesures prises par les autorités compétentes sont reconnues dans tous les Etats contractants. Toutefois, la Convention s'abstient de poser des règles relatives à l'exécution internationale desdites mesures (article 7)».
Quoique le système prévu par la Convention essaie d'établir un équilibre entre la loi nationale et la loi du domicile, il n'a pas été considéré valable pour un grand nombre d'Etats membres de la Conférence, à juger par les ratifications qu'elle a reçues. D'ailleurs, la pratique montre que l'application de la Convention n'a pas empêché les enlèvements internationaux d'enfants dans les relations entre les Etats parties. Il faut chercher donc par d'autres chemins le moyen d'arrêter ou de diminuer des actions qui troublent à un si haut degré la vie des peuples.

II DE L'IMPORTANCE PRATIQUE D'UNE RÉGLEMENTATION

4 Il est certain que nous ne disposons pas de statistiques précises sur les enlèvements internationaux d'enfants qui se

[1] Makarov, *Recueil de textes concernant le droit international privé*, tome II, 2e éd., 1960, No II, p. 625 et s.
[2] *Cf.* Conférence de La Haye de d.i.p., *Actes et Documents de la Neuvième session*, tome IV, «Protection des mineurs». La Convention est entrée en vigueur dans les relations entre l'Allemagne, l'Autriche, la France, le Luxembourg, les Pays-Bas, le Portugal et la Suisse.
[3] Document préliminaire G de septembre 1976, Conférence de La Haye de d.i.p., *Actes et documents de la Treizième session*, tome I, «Matières diverses», p. 121-122.

example of the meagre service to be offered by procedures such as extradition).
In actual fact, at the start, there is no criminal intent in the contemplated actions, and, more generally, the 'abductor' thinks he has the right qualifications for obtaining the custody of the child; furthermore, he may suppose that those qualifications have been, or will be, ignored following a decision laid down by the authorities of the child's habitual residence. It is true that, in mixed marriages, the fear of a decision which would unconditionally favour the spouse who is a national of the State of residence, will very often play a decisive role in the removal of the child by the other spouse.

3 So, to sum up, the subject under question relates to the custody of children, which is to say that it must be viewed in terms of protection of minors. It is also well known that this question of protection has traditionally been a concern of the Hague Conference on private international law. Two Conventions are witnesses to this special concern.

The first in time, that of 12 June 1902 dealing with guardianship, had as its object the designation of the law applicable to that concrete institution[1]. In the relations between the Contracting States, it was replaced by a new Convention, concluded on 5 October 1961, 'concerning the powers of authorities and the law applicable in respect of the protection of infants'[2]. As we were reminded in the Note on 'legal kidnapping', established by the Permanent Bureau in 1976[3], 'that Convention, having established the principle that an authoritative relationship arising automatically from the internal law of the State of the minor's nationality is recognized in all the Contracting States (article 3), entrusts to the authorities of the minor's habitual residence the task of taking measures leading to the protection of his person or his property (article 1). These authorities take the measures provided by their internal law (article 2). Nevertheless, the authorities of the State of which the minor is a national may take over the protection of the minor after having informed the authorities of the residence (article 4). Some special provisions relate to the case of displacement of the minor's residence (article 5), provisions which guarantee that measures taken by a court will persist until the moment of their replacement by another decision. Lastly, it is provided that measures taken by the competent authorities are to be recognized in all the Contracting States. Nevertheless, the Convention does not lay down rules relating to the international enforcement of the said measures (article 7)'.

Although the system which is provided by the Convention tries to balance the law of nationality and the law of habitual residence, it has not been found valid by many Member States of the Conference, judging by the number of ratifications the latter has received. Moreover, the practice shows that the application of the Convention has not prevented the international abduction of children between the States Parties. So, we must seek by other routes a means to stop or attenuate actions which so greatly trouble people's lives.

II THE PRACTICAL IMPORTANCE OF A SET OF RULES

4 We know for certain that there are no reliable statistics on the international cases of child abduction which took

[1] Makarov, *Recueil de textes concernant le droit international privé*, Book II, 2nd edition, 1960, No II, p. 625 and following.
[2] *Cf.* The Hague Conference on private international law, *Acts and Documents of the Ninth Session*, Book IV, 'Protection of minors'. The Convention has entered into force in the relations between Austria, France, Germany, Luxemburg, the Netherlands, Portugal and Switzerland.
[3] Preliminary Document G, September 1976. The Hague Conference on private international law, *Acts and Documents of the Thirteenth Session*, Book I, 'Miscellaneous Matters', pp. 121-122.

sont produits au cours des dernières années, dans tous les Etats membres de la Conférence. Néanmoins, les réponses des gouvernements au Questionnaire établi par le Bureau Permanent[4] traduisent le sentinent généralisé que ces actes se sont multipliés depuis quelques années, sentiment qui est pleinement partagé par les commentateurs et l'opinion publique. D'ailleurs, cette impression (qui en elle-même peut être ressentie comme une donnée objective) est confirmée par les chiffres approximatifs apportés dans les réponses de certains gouvernements, notamment celles des Etats-Unis et de la France.

On pourrait écrire longuement sur les raisons d'une telle augmentation, mais nous serions presque toujours sur le plan des hypothèses. Donc, parmi les facteurs qui peuvent contribuer à expliquer l'importance accrue du phénomène qui nous occupe, nous ne retiendrons que le fait évident du nombre croissant de mariages mixtes, joint à l'amélioration des moyens de transport et à une certaine ouverture des frontières. Au contraire, nous n'oserons pas avancer quelles peuvent être les possibles motivations psychologiques des «enlèvements», domaine encore mal connu du juriste.

5 D'autre part, comme on l'a signalé auparavant, les conséquences douloureuses résultant des enlèvements d'enfants ont un grand retentissement sur une opinion publique sensible au drame que représentent des foyers détruits et une enfance déracinée et traumatisée. De plus, il y a une tendance dans beaucoup de pays – et cela ressort nettement des «mass media» – à penser que les décisions et les actions contraires aux intérêts d'un national sont dans ce domaine inspirées par une sorte d'animosité historique ou culturelle contre tous ses concitoyens. Par ce biais, les enlèvements internationaux d'enfants sont en plus une source de malaise dans les relations internationales.

6 Or, si la gravité du problème exige une réglementation urgente, il est clair que les actions unilatérales des Etats n'arriveront jamais à la résoudre; donc, la voie conventionnelle s'impose comme la seule possible pour affronter un sujet devant lequel la science juridique manque de solutions acquises.

III TRAVAUX DES ORGANISATIONS INTERNATIONALES EN CETTE MATIÈRE

La préoccupation qu'expriment les gouvernements devant le phénomène décrit s'est manifestée en divers «fors» internationaux[5]. Cependant, nous nous limiterons ici à faire état des travaux du Conseil de l'Europe en la matière, les seuls à notre connaissance qui soient allés jusqu'au bout.

A *Le Conseil de l'Europe*

7 C'est au Conseil de l'Europe que revient l'initiative de la recherche de nouvelles voies de coopération entre les Etats dans le domaine de la représentation légale et la garde des enfants. En effet, à la suite de la Conférence des Ministres européens de la Justice, tenue à Bâle du 15 au 18 mai 1972, le Conseil de l'Europe a travaillé sur deux projets de Conventions; l'un sur la reconnaissance et l'exécution des décisions en matière de garde; l'autre sur l'institution d'une instance internationale en vue de trancher la difficulté née de la coexistence de décisions contradictoires.

[4] *Réponses des Gouvernements au Questionnaire sur l'enlèvement international d'un enfant par un de ses parents* (Doc. prél. No 2, février 1979). 22 réponses témoignent de l'intérêt des Etats pour ce problème.

[5] *Cf. Questionnaire et Rapport sur l'enlèvement international d'un enfant par un de ses parents*, établi par M. Adair Dyer, Document préliminaire No 1 d'août 1978, p. 11 et 13. (Cité par la suite: «Rapport Dyer».)

place in recent years in all the Member States of the Conference. Nevertheless, the replies given by the governments to the Questionnaire established by the Permanent Bureau[4] well demonstrate the general feeling that those acts of abduction have multiplied in the last few years; that feeling is fully shared by the commentators and public opinion. In any case, this impression (which in itself may be viewed as an objective phenomenon) receives its support in the estimated figures given in the replies of some governments, particularly those of the United States and France.

We could write at length on the reasons for such an increase, but we would generally remain in the area of hypothesis. Certainly, amongst the factors which may contribute to a greater incidence of the phenomenon in question, we shall only mention the obvious increase in the number of mixed marriages, together with the improvement of transport facilities and the opening up of borders. On the contrary, we dare not advance ideas on the possible psychological motivations leading to 'abduction'; this remains an obscure domain for the jurist.

5 On the other hand, as previously mentioned,the painful consequences of child abduction create a great stir in public opinion, which is always much impressed by the drama of destroyed families and of children emotionally upset and uprooted. Furthermore, there is in many countries a tendency to think that the decisions and actions taken against the interests of a national are, in this area, inspired by a kind of historical or cultural animosity directed at all his fellow citizens; this clearly appears in the 'mass media'. Seen in this light, the international abduction of children is also a source of uneasiness in international relations.

6 Yet, if the seriousness of the problem strongly requires urgent action to deal with it, it is clear that unilateral action by the States will never succeed in finding solutions; therefore, the treaty route must be adopted as the only one which can encompass such a problem, when legal science lacks remedies.

III WORK OF THE INTERNATIONAL ORGANIZATIONS IN THIS MATTER

The concern which is expressed by the governments in respect of the described phenomenon manifested itself in various international fora[5]. We shall, however, limit ourselves to the relevant work by the Council of Europe, the only Organization which, to our knowledge, has reached a result.

A *The Council of Europe*

7 It was the Council of Europe that undertook the initiating of research into new ways of co-operation between States in the field of legal representation and child custody. As a matter of fact, after the Conference of the European Ministers of Justice, which took place in Basel from 15 to 18 May 1972, the Council of Europe worked on two draft Conventions: one on the recognition and enforcement of decisions in matters of child custody; the other on the creation of an international tribunal with the task of handling the problems which derive from the coexistence of incompatible decisions.

[4] *Replies of the Governments to the Questionnaire on child abduction by one parent* (Prel. Doc. No 2, February 1979). 22 replies demonstrate the concern of the States for that problem.

[5] *Cf. Questionnaire and Report on the international abduction of a child by one parent*, drawn up by Adair Dyer, Preliminary Document No 1 of August 1978, pp. 10 and 12. (Mentioned later as: 'Dyer Report'.)

8 Le texte de la «Convention européenne sur la reconnaissance et l'exécution des décisions en matière de garde des enfants et le rétablissement de la garde des enfants» a été adopté par le Comité des Ministres du Conseil de l'Europe le 30 novembre 1979. La Convention sera ouverte à la signature des Etats membres du Conseil de l'Europe à l'occasion de la XIIème Conférence des Ministres européens de la Justice, le 20 mai 1980, à Luxembourg[6].

9 En termes généraux, la Convention du Conseil de l'Europe essaie de couvrir la brèche laissée ouverte par la Convention de La Haye de 1961 dans la mesure où elle n'impose pas l'obligation d'exécuter les décisions étrangères relatives à la représentation légale et à la garde des mineurs. En ce sens, la nouvelle Convention européenne complète le système de la Convention de 1961 considérée par la Septième Conférence des Ministres européens de la Justice comme constituant «pour l'instant le meilleur compromis possible»[7].

10 Pour atteindre son but, la Convention du Conseil de l'Europe soumet les demandes de restitution d'un enfant à trois régimes différents (prévus, respectivement, dans les articles 8, 9 et 10), dépendant des liens des parties concernées avec l'Etat d'origine de la décision et du moment où l'une des Autorités centrales, désignées pour la mise en oeuvre de la Convention, a été saisie de l'affaire. Par ailleurs, si, à la date à laquelle l'enfant est déplacé à travers une frontière internationale, il n'existait pas de décision exécutive sur sa garde, la Convention s'appliquera «à toute décision ultérieure relative à la garde de cet enfant et déclarant le déplacement illicite, rendue dans un Etat contractant à la demande de toute personne intéressée» (article 12).

11 Malheureusement, la portée de la Convention se trouve considérablement affaiblie par les articles 17 et 18, qui permettent aux Etats de formuler des réserves tant à l'application des systèmes plus favorables à la restitution des enfants, contenus aux articles 8 et 9, qu'à celui de l'article 12, la seule disposition de la Convention qui envisage les décisions rendues *après* le déplacement illicite de l'enfant.

B *La Conférence de La Haye de droit international privé*

a La Décision de la Treizième session

12 Lors de la réunion de la Commission spéciale sur les matières diverses, qui s'est tenue à La Haye en janvier 1976 en vue de préparer les travaux de la Treizième session de la Conférence, certains experts ont évoqué le problème du «*legal kidnapping*». La Commission spéciale ayant décidé que le sujet devait être soumis à la considération de la Quatrième commission de la Conférence, le Bureau Permanent a établi une «Note sur le *legal kidnapping*»[8], qui offre une esquisse de la portée du problème à la lumière d'une politique conventionnelle vouée à établir une efficace protection des mineurs sur le plan des relations privées internationales.

13 A la Treizième session, la question a donné lieu à une discussion intéressante[9]. Elle nous a permis de connaître certaines des raisons qui ont amené les délégués à soutenir l'idée que la Conférence de La Haye devait s'occuper d'un sujet traité depuis des années au sein du Conseil de l'Europe. D'une part, les Etats membres des deux Organisations in-

8 The text of the 'European Convention on the recognition and enforcement of decisions concerning custody and on restoration of custody of children' has been adopted by the Council of Europe's Committee of Ministers on 30 November 1979. The Convention will be opened to signature by the Member States of the Council of Europe at the XIIth Conference of the European Ministers of Justice, to be held in Luxemburg on 20 May 1980[6].

9 In general terms, the Convention of the Council of Europe tries to cover the gap left by the Hague Convention of 1961 in so far as it does not set any obligation for the enforcement of the foreign orders relative to the legal representation and the custody of minors. To that end the new European Convention supplements the system of the 1961 Convention, which was regarded by the Seventh Conference of the European Ministers of Justice as constituting 'for the time being the best possible compromise'[7].

10 To fulfil its purpose, the Convention of the Council of Europe submits the requests for the restitution of a child to three different systems of legislation (as set out in articles 8, 9 and 10 respectively), such systems depending on the relations of the parties concerned to the State in which the decision was initiated, and provided the application was made to one of the Central Authorities designated for the implementation of the Convention. Furthermore, if at the time of removal of the child across an international frontier, there is no enforceable decision given relating to his custody, the Convention will apply 'to any subsequent decision, relating to the custody of that child and declaring the removal to be unlawful, given in a Contracting State at the request of any interested person' (article 12).

11 Unfortunately, articles 17 and 18 greatly weaken the scope of influence of the Convention; under such articles, the States may formulate reservations, both with respect to the application of the systems more favourable to the restitution of children, contained in articles 8 and 9, and to the application of article 12 which constitutes the only provision of the Convention dealing with decisions rendered after a child's improper removal.

B *The Hague Conference on private international law*

a The Decision of the Thirteenth Session

12 When the Special Commission on miscellaneous matters met at The Hague in January 1976 with a view to preparing the work of the Thirteenth Session of the Conference, a number of experts mentioned the problem of 'legal kidnapping'. The Special Commission having decided that the matter should be submitted to the Fourth Commission of the Conference for further consideration, the Permanent Bureau prepared a 'Note on legal kidnapping'[8] which outlined the scope of the problem in the light of a treaty policy having the task of instituting an effective protection of minors with regard to private international relations.

13 At the Thirteenth Session, the question led to an interesting discussion[9], the debate revealed some of the reasons which caused the delegates to maintain that the Hague Conference should deal with a subject which had already been under study for several years within the Council of Europe. In the first place, the Member States of these two

[6] Citée par la suite «Convention du Conseil de l'Europe».
[7] *Septième Conférence des Ministres européens de la Justice*, Bâle 15-18 mai 1972, CMJ/Concl. (72) 1, p. 6.
[8] Cité note 3 *supra*.
[9] Quatrième commission, Procès-verbal No 4, séance du 13 octobre 1976, *Actes et documents de la Treizième session*, tome I, «Matières diverses», p. 169-172.

[6] Subsequently cited as 'Convention of the Council of Europe'.
[7] *Seventh Conference of the European Ministers of Justice*, Basel 15-18 May 1972, CMJ/Concl. (72) 1, p. 6.
[8] Cited in Note 3 above.
[9] Fourth Commission, Summary No. 4, Session of 13 October 1976, *Acts and Documents of the Thirteenth Session*, Book I, 'Miscellaneous matters', pp. 169-172.

ternationales ne coïncident pas; donc, étant donné que la composition de la Conférence de La Haye est plus large, il était légitime d'essayer d'utiliser cette Organisation comme véhicule des solutions acquises au Conseil de l'Europe. D'autre part, on sent aussi chez plusieurs délégués l'envie de chercher de nouvelles voies de solution pour un problème qui semble défier les institutions classiques du droit international privé. Finalement, on est arrivé à un consensus quasi unanime sur l'opportunité de proposer à la Commission d'Etat néerlandaise d'inscrire à l'ordre du jour de la Quatorzième session le sujet du *legal kidnapping*. Ainsi, dans l'Acte final, partie C, l'élaboration d'une Convention sur le déplacement illégal d'enfants à l'étranger (*legal kidnapping*) fut retenue sous le numéro 3[10].

b Les travaux de la Commission spéciale

14 La Commission spéciale s'est réunie la première fois du 12 au 22 mars 1979; elle se choisit comme Président l'Expert du Royaume-Uni, le professeur Anton, comme Vice-président le doyen Leal, Expert du Canada et comme Rapporteur l'Expert de l'Espagne, le professeur Elisa Pérez-Vera. Pour guider ses travaux, elle disposait de l'excellent Rapport sur l'enlèvement international d'un enfant par un de ses parents, établi par M. Adair Dyer. En plus, la Commission spéciale bénéficiait de tous les renseignements fournis par les réponses des gouvernements au Questionnaire annexé au Rapport[11], le *Summary of findings on a Questionnaire studied by International Social Service*[12] et les Observations du Secrétariat du Conseil de l'Europe[13]. Sur cette base, la Commission spéciale a notamment discuté quelles étaient les situations de fait qui devaient retenir son attention, de l'utilité des conventions préexistantes et des méthodes susceptibles de réduire ou d'atténuer les problèmes soulevés par les enlèvements internationaux d'enfants. Pourtant, elle n'a pas pu se mettre d'accord sur des conclusions provisoires susceptibles d'être utilisées comme point de départ lors de la seconde réunion. En conséquence, les «Conclusions des discussions de la Commission spéciale de mars 1979 sur le kidnapping légal» ont été établies par le Bureau Permanent[14]. Ces Conclusions montrent que, malgré les nombreux points acquis par la Commission spéciale, elle n'avait pas eu le temps de décider de façon explicite sur la structure et l'objet définitif de la future Convention.

15 Cependant, les travaux de la seconde réunion ont été accélérés du fait de la présentation par le Bureau Permanent, avec l'approbation du Président et du Rapporteur, de l'esquisse d'un avant-projet de Convention sur l'enlèvement international d'un enfant par un de ses parents[15], qui a été admis à l'unanimité en tant que base de discussion.

Par ailleurs, la Commission spéciale est tombée assez rapidement d'accord sur l'utilité de recommander l'emploi d'une formule modèle de requête de rétablissement de la garde.
Au cours de cette réunion, la Commission spéciale tint seize séances plénières. Un Comité de rédaction et deux Comités *ad hoc* s'occupant, l'un des Etats à système juridique non unifié, l'autre de la formule modèle, se réunirent à de nombreuses reprises. Dans la séance de l'après-midi du 14 novembre la Commission a considéré que la formule

[10] *Actes et documents de la Treizième session*, tome I, «Matières diverses», *Acte final*, p. 36.
[11] Doc. prél. No 2.
[12] Doc. prél. No 3.
[13] Doc. prél. No 4, avec le Projet de Convention européenne en Annexe.
[14] Doc. prél. No 5 de juin 1979. (Cité par la suite: «Conclusions de mars 1979».)

[15] Doc. trav. No 11 du 5 novembre 1979, cité par la suite: «Esquisse d'avant-projet». Simultanément, la délégation française introduisait au Doc. trav. No 12 une autre esquisse d'avant-projet de Convention, avec une conception assez proche de celle maintenue au Doc. trav. No 11.

International Organizations are not the same; and, considering the greater number of participants at The Hague, it seemed justified to try to use the Conference as the vehicle for the solutions reached at the Council of Europe. Furthermore, we sense in many delegates a desire to seek new ways of solving a problem that appears to defy the traditional institutions of private international law. In the end, a practically unanimous agreement was reached with regard to the advisability of a proposal to the Netherlands Standing Government Committee to place the question of legal kidnapping on the agenda of the Fourteenth Session. So then, in Part C of the Final Act, the preparation of a Convention on legal kidnapping was listed under number 3[10].

b The work of the Special Commission

14 The Special Commission met from 12 to 22 March 1979 for the first time; it chose as its Chairman the Expert for the United Kingdom, Professor Anton, as its Vice-Chairman the Expert for Canada, Dean Leal, and, as its Rapporteur the Expert for Spain, Professor Pérez-Vera. As a starting point and guideline to its work it could avail itself of the excellent Report on international child abduction by one parent, drawn up by Adair Dyer. Furthermore, the Special Commission could use all the information provided in the replies of the governments to the Questionnaire, which accompanied the Report[11]; it could also use the Summary of findings on a Questionnaire studied by International Social Service[12] and the Observations of the Secretariat of the Council of Europe[13]. On this basis, the Special Commission primarily discussed the factual situations which required treatment; also considered the usefulness of the existing Conventions and the means by which the problems arising out of the international abduction of children could be reduced or attenuated. Nevertheless, the Commission dit not manage to find a consensus on the provisional conclusions which could serve as a starting point for the work of the second meeting. In consequence, the 'Conclusions drawn from the discussion of the Special Commission of March 1979 on legal kidnapping' were prepared by the Permanent Bureau[14]. These Conclusions demonstrate that, notwithstanding the numerous points of detail which were settled by the Special Commission, the latter had no time to agree explicitly and definitively on the structure and the purposes of the future Convention.

15 Nonetheless, the work of the second meeting was accelerated owing to the presentation by the Permanent Bureau, with the approval of the Chairman and Rapporteur, of the sketch of a preliminary draft Convention on international child abduction by one parent[15]; and full agreement was reached for this Draft to serve as a basis for discussion.
Moreover, the Special Commission quickly agreed on the necessity to recommend the use of a standard form for applications with regard to the restoration of custody.

In the course of that meeting, the Special Commission held sixteen plenary sessions, besides a drafting Committee and two *ad hoc* Committees, the one concerned with the States having non-unified legal systems and the other with the standard form, met on various occasions. In the afternoon session of 14 November, the Commission determined that

[10] *Acts and Documents of the Thirteenth Session*, Book I, 'Miscellaneous matters', *Final Act*, p. 36.
[11] Prel. Doc. No 2.
[12] Prel. Doc. No 3.
[13] Prel. Doc. No 4, with, as an annex, the European draft Convention.
[14] Prel. Doc. No 5 of June 1979. (Cited hereafter as: 'Conclusions of March 1979'.)
[15] Working Document No 11 of 5 November 1979, entitled later: 'Essay of Draft'. Together with Working Document No 12, the French delegation introduced another short version of a draft Convention with an almost similar conception to that maintained in Working Document No 11.

modèle soumise par le Comité *ad hoc* devait être raccourcie. Finalement, dans sa dernière séance, la Commission adopta le texte de l'avant-projet.

16 Le présent Rapport traitera dans une première partie des principes fondamentaux de l'avant-projet, de sa structure et de certains aspects non encore réglés. Une seconde partie sera consacrée à un commentaire par articles ou groupes d'articles.

Première partie – Remarques générales sur l'avant-projet de la Commission spéciale

I CARACTÈRE AUTONOME DE LA CONVENTION

17 Une des premières décisions de la Commission spéciale concerne le caractère autonome que doit avoir la Convention. La question a été soulevée au cours de la première réunion de la Commission spéciale en relation avec la possibilité d'orienter ses travaux vers l'élaboration d'un protocole à la Convention de La Haye du 5 octobre 1961 concernant la compétence des autorités et la loi applicable en matière de protection des mineurs. Les difficultés ressenties par plusieurs Etats pour ratifier la Convention de 1961, ainsi que la considération du fait que cette Convention ne tient pas compte des caractéristiques particulières du phénomène sociologique qu'on veut régler, sont des raisons qui ont décidé la Commission spéciale à élaborer une Convention indépendante. Néanmoins, cette indépendance ne devrait pas se traduire, dans la mesure du possible en incompatibilité.

18 Dans cette même optique, la Commission spéciale a estimé dès le début que, malgré son utilité, le projet de Convention européenne sur la reconnaissance et l'exécution des décisions en matière de garde des enfants et le rétablissement de la garde des enfants ne serait pas employé comme base de ses travaux. Au contraire, elle a gardé l'idée que d'autres approches au sujet des déplacements internationaux d'enfants étaient possibles. En fait, le développement de cette idée a conduit à l'élaboration d'un avant-projet de Convention qui, comme nous le verrons par la suite, ne porte pas sur le problème concret de la reconnaissance et l'exécution des décisions en matière de garde.

II NATURE DE LA CONVENTION

19 Le caractère révolutionnaire du système établi par la Convention justifie l'emploi d'une première approche négative pour établir quelle est sa nature. Avant tout, il ne s'agit pas d'une convention sur la loi applicable à la garde des enfants. En effet, quoique l'article 13 dispose que les autorités judiciaires ou administratives, qui connaissent d'une demande visant la restitution d'un enfant, «tiendront compte» du droit de l'Etat de sa résidence habituelle avant le déplacement, on est loin d'imposer son application; le droit en question n'étant pris en considération que pour établir le caractère illicite du déplacement.

20 En second lieu, comme on vient de le dire, la Convention n'est pas non plus une convention sur la reconnaissance et l'exécution des décisions en matière de garde. Sciemment on a évité cette option qui, pourtant, a provoqué de longs débats au sein de la première réunion de la Commission spéciale. Etant donné les conséquences sur le fond de la reconnaissance d'une décision étrangère, cette institution est normalement entourée de garanties et d'exceptions qui peuvent rallonger la procédure. Or, en cas de déplacement d'un enfant, le facteur temps acquiert une importance décisive. En effet, les troubles psychologiques que l'enfant

the standard form submitted by the *ad hoc* Committee should be shortened. Finally, at its last session, the Commission adopted the text of the Preliminary Draft.

16 This Report will deal, in its first part, with the underlying principles of the Draft, with its structure and with some aspects that remain to be decided on. The second part will be devoted to a commentary by articles or groups of articles.

First part – General remarks on the Preliminary Draft of the Special Commission

I AUTONOMOUS CHARACTER OF THE CONVENTION

17 One of the first decisions of the Special Commission relates to the autonomous character which the Convention should have. The matter was raised at the first meeting of the Special Commission in relation to the possibility of directing its work towards the preparation of a protocol to the Hague Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of infants. Because several States had met with serious difficulties concerning the ratification of the 1961 Convention, and considering the fact that this Convention does not take into account the specific nature of the sociological phenomenon which is now to be dealt with, the Special Commission decided on the preparation of an autonomous Convention. However, this autonomy should not, in so far as can be avoided, turn into incompatibility.

18 For the same reasons, the Special Commission thought from the outset that, notwithstanding its usefulness of application, the European draft Convention on the recognition and enforcement of decisions concerning custody, and on restoration of custody of children, would not serve as a basis for its work. On the contrary, it remained devoted to the idea that other approaches to the question of the international removal of children were possible. In actual fact, the development of that idea has led to the preparation of a draft Convention which, as we shall see later, does not deal with the factual problem of the recognition and enforcement of custody decisions.

II NATURE OF THE CONVENTION

19 The revolutionary character of the system which was set up by the Convention justifies the use first of a negative approach to establish the nature of that system. Above all, we are not dealing with a convention which relates to the law applicable in matters of child custody. Indeed, although article 13 states that courts or administrative authorities which have received a request for the restitution of a child shall 'have regard to' the law of the State of that child's habitual residence before the removal, this is far from imposing its application; that law only applies in this case to qualify as improper the nature of its removal.

20 In the second place and as was just said, the Convention is also not a convention relating to the recognition and enforcement of custody orders. This idea has intentionally been avoided although it gave rise to lengthy debates in the first meeting of the Special Commission. Considering the consequences, on the merits, of the recognition of a foreign order, that institution is generally surrounded with judicial safeguards and pleas in exceptions which may extend the proceedings. Now we know that the time factor acquires an overriding importance in cases of child removal. Indeed, the psychological confusion a child may experience following

peut subir à cause d'un tel déplacement pourraient se reproduire si la décision sur son retour était adoptée après un certain délai.

21 En troisième lieu, la Convention ne concerne pas les aspects des déplacements internationaux d'enfants éventuellement régis par le droit pénal. En relation avec ce point, la Commission s'est rapidement accordée pour décider que les régimes d'extradition ou de quasi-extradition – comme celui retenu par la Convention européenne sur le rapatriement des mineurs – n'étaient pas appropriés pour régler les situations considérées.
D'autre part, une proposition tendant à l'inclusion dans la Convention d'une disposition aux termes de laquelle rien n'empêcherait un Etat d'appliquer ses propres lois pénales internes, qui avait été acceptée en principe par une forte majorité, fut finalement ajournée[16]. En effet, étant donné que la Convention met l'accent sur le rétablissement de la garde et sur la nécessité d'assurer la jouissance effective des droits de garde et de visite, on peut se demander si l'inclusion d'une telle disposition (en plus d'être contraire à une ferme tradition de la Conférence de La Haye) ne rendrait pas extraordinairement difficile la coopération internationale dans ces matières.

22 Somme toute, nous sommes en présence d'une Convention qui cherche à éviter les déplacements internationaux d'enfants en instituant une étroite coopération entre les autorités judiciaires et administratives des Etats contractants, à travers des Autorités centrales désignées par chacun d'entre eux. Pour atteindre son but, la coopération prévue se déroulera à un double niveau: d'un côté, quand l'enfant a déjà été déplacé, cette coopération cherche à assurer son retour immédiat dans le milieu duquel il a été écarté, sauf dans des circonstances exceptionnelles et bien précises; d'un autre côté, la coopération a, en plus, un certain aspect préventif dans la mesure où elle essaie de garantir la jouissance effective des droits de garde et de visite, en faisant disparaître une des causes les plus fréquentes des déplacements d'enfants.

23 En ce qui concerne le premier point, il est intéressant avant tout de souligner quelles sont et la justification et la portée du retour de l'enfant que la Convention cherche à assurer. Pour justifier la nécessité de rétablir, en tant que possible, la situation qui a été altérée par le déplacement, il suffit de rappeler des arguments complémentaires, de nature très différente. *Primo*, il est dangereux de changer les conditions de vie de l'enfant par des actions non protégées par la loi, par conséquent sans la garantie d'un minimum de stabilité; donc, c'est dans l'intérêt de l'enfant qu'on doit lui éviter un processus d'adaptation peut-être inutile. *Secundo*, les droits et les expectatives de la personne dépossédée ne doivent pas être bafoués par de telles actions en l'obligeant souvent à reprendre l'enfant par la force. *Tertio*, maintenir la situation créée par la personne qui a déplacé l'enfant jusqu'à l'adoption d'une décision sur le fond du droit de garde serait avantager son action, en lui accordant, dans un certain sens, des effets juridiques.
Quant à la portée du retour que la Convention préconise, il faut mettre en relief qu'il ne règle pas, et ne cherche pas à régler, le problème de l'attribution du droit de garde. En effet, la discussion sur le fond pourra toujours être entamée devant les autorités compétentes de l'Etat de la résidence habituelle de l'enfant avant son déplacement; et cela, tant si

[16] V. Procès-verbal No 19.

such a removal could reappear if a restitution order were adopted after a certain time had elapsed.

21 In the third place, the Convention does not deal with the various aspects of international child abduction which may be governed by criminal legislation. In relation to this, the Commission quickly agreed that provisions for extradition or quasi-extradition, on the model of the system adopted by the European Convention on the repatriation of minors, were not adequate to deal with the situations in question.
Moreover, a proposal directed to the inclusion in the Convention of a provision stating that a State could always apply its own domestic penal legislation was adjourned in the end, although it had in principle been accepted by a strong majority[16]. Indeed, seeing that the Convention emphasizes the restoration of custody and the necessity to insure the full exercise of custody and visitation rights, one may ask whether inclusion of such a provision would not cause extraordinary difficulties for international co-operation in this field, with the added fact that it is not in keeping with the tradition of the Hague Conference.

22 Altogether, this Convention tries to avoid the international abduction of children by the institution of tight co-operation between the courts and administrative authorities of the Contracting States, through the operation of Central Authorities designated by each of them. To that end, the co-operation will operate in two ways: on one side, where the child has already been removed, this co-opration seeks to obtain his immediate return into his original environment, save in exceptional and specific circumstances; on the other, the co-operation also has some preventive power in so far as it tries to guarantee the effective enjoyment of the custody and access rights, while eliminating one of the most frequent reasons for child removal.

23 With regard to the first point, it is interesting to emphasize both the justification of the child's return and the import of such return, which the Convention seeks to obtain. To justify the need for a restoration, if possible, of the situation which was altered by the removal, a simple reminder of the complementary, but very different, arguments will be sufficient. *Firstly*, it is dangerous to change the conditions of a child's life by actions which are not protected by law and, consequently, not able to guarantee a minimum of stability; therefore, a process of adaptation, which could prove useless to the child, must be avoided in his interest. *Secondly*, the rights and expectations of the deprived custodian must not be scoffed at by such actions, which would often lead him or her to regain the child by force. *Thirdly*, to maintain the situation created by the abductor until a new order on custodial rights was adopted on the merits would in the end benefit that person by, in a certain sense, granting him or her some legal effects.
As to the import of the return which is favoured by the Convention, we should point out that it does not settle, or seek to settle, the question of custodial rights. In actual fact, the argument on the merits may always be made brought before the competent authorities where the child habitually resided before his removal; and this can be done in two

[16] See Summary No 19.

le déplacement a eu lieu avant qu'une décision sur la garde ait été rendue – c'est-à-dire quand le droit de garde violé s'exerçait *ex lege* – que si un tel déplacement s'est produit en violation d'une décision préexistante. Il s'agit donc de protéger une situation effective et légitime, en décourageant les potentiels «enleveurs» par la voie la plus directe: priver son action de toute conséquence, et pratique et juridique.

24 En rapport avec la coopération des autorités des Etats contractants en vue de prévenir les déplacements internationaux d'enfants, la Convention a adopté un point de vue réaliste. La Commission spéciale est persuadée qu'il y aura toujours des personnes qui se considéreront injustement privées de leurs droits et qu'en conséquence elles essaieront de se faire justice elles-mêmes. Il est pourtant vrai aussi que, dans un grand nombre de cas, les parents d'un enfant seront moins désespérés si on leur permet de maintenir des contacts réguliers avec l'enfant, dont la garde a été confiée à une autre personne. Dans cette optique, et persuadée que le droit de visite est un corollaire nécessaire du droit de garde, la Commission spéciale a étendu l'obligation des Autorités centrales de coopérer en vue d'assurer l'exercice paisible d'un tel droit de visite (article 17).
D'ailleurs, la coopération sur ce point peut être envisagée dans une perspective différente, dès lors qu'elle s'efforce aussi à éviter que l'exercice du droit de visite devienne l'occasion choisie pour déplacer ou retenir l'enfant.

25 Pour compléter ces considérations sur la nature de la Convention, il ne nous reste plus qu'à insister sur son caractère complémentaire et d'urgence. Caractère d'urgence, puisqu'elle cherche à apporter une solution rapide, immédiate, aux situations considérées. Caractère complémentaire, dans la mesure où ses dispositions n'essaient pas de régler le problème du fond du droit de garde. En effet, cela implique, d'une part, l'inévitable coexistence de la Convention avec les règles sur la loi applicable et la reconnaissance et l'exécution des décisions étrangères, quelles soient de source interne ou conventionnelle; d'autre part, le texte même de la Convention prévoit que son application ne fera pas obstacle à la faculté des particuliers de s'adresser directement aux autorités judiciaires ou administratives des Etats contractants (article 25).

cases: either if the removal took place before a custodial order was rendered, that is to say, when the violated custodial right was exercised *ex lege,* or if such a removal was effected in breach of an existing order. So, the idea is to protect an effective and lawful situation by discouraging, in the most direct way, the potential 'kidnappers', *i.e.* by depriving their action of any positive gain, be it practical or legal.

24 In respect of the co-operation to be carried on among the authorities of the Contracting States in relation to the prevention of international child abduction, the Convention has adopted a realistic approach. The Special Commission had the conviction that there would always be people who would see themselves unjustly deprived of their rights and who, in consequence, would have recourse to self-help. However, it is also true that, in a great number of cases, a child's parent will be less desperate if permitted to maintain regular contacts with the child whose custody has been given to another person. With the same perspective, and confident that the access right constitutes an indispensable corollary to the custody right, the Special Commission extended the obligation for co-operation on the part of the Central Authorities, with a view to insuring the peaceful exercise of access rights (article 17).
Moreover, the co-operation on this point may be envisaged in a different perspective, when it seeks to prevent the exercise of the access right from becoming a chosen opportunity for the removal or retention of the child.

25 To complete these considerations on the nature of the Convention, all that remains is to stress its complementary and emergency aspects. Its nature is one of emergency because it seeks a speedy and immediate solution to the cases involved. Its nature is also complementary in that its provisions do not try to settle the question of custodial rights on the merits. Indeed, this implies, on one side, the inevitable coexistence of the Convention with the rules on the applicable law and on the recognition and enforcement of foreign decisions, whether their sources be in the internal law or in treaties; on the other, the text itself of the Convention provides that it will not prevent an individual from applying directly to the judicial or administrative authorities of a Contracting State (article 25).

III TECHNIQUES UTILISÉES PAR LA CONVENTION

A *Les Autorités centrales*

26 Les techniques utilisées se trouvent en étroite relation avec la nature et les buts de la Convention. Or, puisque la Convention, comme nous venons de le voir, prétend être avant tout un instrument pour la coopération entre les autorités judiciaires et administratives des Etats contractants, la Commission spéciale a dû choisir entre les avantages de la coopération directe entre lesdites autorités et ceux qui sont propres à la création des Autorités centrales dans chaque Etat contractant, en vue de coordonner et de canaliser la coopération voulue. La Commission spéciale est tombée rapidement d'accord sur l'opportunité de la deuxième alternative. Donc, la Convention est bâtie dans une large mesure autour de l'intervention et des compétences des Autorités centrales.

27 Etant donné les profondes différences existantes dans l'organisation interne des Etats membres de la Conférence, la Convention ne précise point quelles doivent être la structure et la capacité d'agir des Autorités centrales, deux aspects qui seront nécessairement régis par la loi interne de chaque Etat contractant. L'acceptation de cette prémisse a mené la Commission spéciale à souligner que les

III TECHNIQUES USED BY THE CONVENTION

A *The Central Authorities*

26 The techniques employed are closely tied to the nature and objects of the Convention. But as the Convention, in connection with what we have just seen, purports to be, above all, an instrument for co-operation between the judicial and administrative authorities of the Contracting States, the Special Commission had to choose either the advantages of direct co-operation between those authorities or those which would derive from the creation in each Contracting State of a Central Authority having the task of co-ordinating and channelling the intended co-operation. The Special Commission quickly agreed on the desirability of the second alternative. So, the Convention is built for the most part around the intervention and the powers of the Central Authorities.

27 Considering the fundamental differences existing in the internal organization of the Member States of the Conference, the Convention does not determine the structure and the capabilities of the Central Authorities, two aspects which the domestic legislation of each Contracting State will have to govern. The acceptance of this premiss led the Special Commission to specify that the duties imposed upon

obligations, que l'avant-projet de Convention impose aux Autorités centrales, pourront être accomplies soit par elles-mêmes directement, soit par l'intermédiaire d'autres autorités compétentes dans leurs Etats (article 7). Il est évident, par exemple, que la localisation d'un enfant peut requérir l'intervention de la police; de même, l'adoption de mesures provisoires ou l'introduction de procédures judiciaires sur des rapports privés peuvent tomber hors des compétences susceptibles d'être dévolues aux autorités administratives par certaines lois internes. Néanmoins, dans tous les cas, l'Autorité centrale reste le destinataire des obligations que la Convention lui impose, en tant que «moteur» de la coopération voulue pour lutter contre les déplacements illicites d'enfants. D'autre part, c'est de nouveau pour tenir compte des particularités des différents systèmes juridiques que la Commission spéciale a admis que l'Autorité centrale pourra requérir que la demande qui lui est adressée soit accompagnée d'une autorisation lui permettant d'agir au nom du demandeur (article 24).

28 Par ailleurs, l'avant-projet de Convention, en suivant une tradition bien établie de la Conférence de La Haye[17], dispose que les Etats fédéraux ainsi que les Etats plurilégislatifs sont libres de désigner plus d'une Autorité centrale. Pourtant, les problèmes constatés dans l'application pratique des conventions qui prévoient l'existence de plusieurs Autorités centrales sur le territoire d'un seul Etat ainsi que, très particulièrement, les caractéristiques spéciales de la matière objet du présent avant-projet, ont décidé la Commission spéciale à faire un pas en avant vers une «hiérarchisation» minimale des Autorités centrales dans ces Etats. En effet, en nous limitant au deuxième point, si la personne qui a déplacé ou retenu un enfant se sert de l'extrême facilité des communications à l'intérieur d'un Etat, le demandeur ou l'Autorité centrale de l'Etat requérant pourraient être forcés à répéter plusieurs fois leur demande en vue d'obtenir le retour de l'enfant; mieux encore, il existe la possibilité que, même en sachant que l'enfant se trouve dans un Etat contractant, on ne sache point quelle est l'unité territoriale de sa résidence.

29 Pour donner une solution à ces situations et à d'autres similaires, l'avant-projet de Convention prévoit que les Etats qui désignent plus d'une Autorité centrale, désigneront simultanément «l'Autorité centrale à laquelle les demandes peuvent être adressées en vue de leur transmission à l'Autorité centrale compétente dans cet Etat» (article 6). La question est importante, étant donné que la Convention limite, dans le temps, l'obligation imposée aux autorités judiciaires et administratives de l'Etat requis, en ce qui concerne le retour immédiat de l'enfant[18]; donc, une erreur dans l'élection de l'Autorité centrale requise peut avoir des conséquences décisives pour les prétentions des parties. Or, pour éviter qu'un facteur non prévu à la Convention modifie son application normale, il faudra que cette sorte de «super Autorité centrale», envisagée à l'article 6, prenne une position active. En effet, puisqu'elle devra agir en tant que canal de communication entre d'une part, l'Autorité centrale de son propre Etat qui est compétente dans chaque cas d'espèce, et d'autre part, les Autorités centrales des autres Etats contractants ou bien les demandeurs eux-mêmes, elle se verra forcée à faire un choix: ou bien procéder à la localisation de l'enfant pour pouvoir transmettre l'affaire à l'Autorité centrale adéquate, ou bien transmettre une copie de la demande à toutes les Autorités

the Central Authorities by the draft Convention might be discharged either directly by themselves or through other competent authorities in their States (article 7). For example, it is obvious that the police forces may be needed to find the whereabouts of a child; in the same way, the adoption of provisional measures or the institution of legal proceedings involving private relationships can fall outside the powers which may be vested in administrative authorities under certain internal laws. Nevertheless, in all cases, the Central Authority remains the receiving institution for the obligations which the Convention imposes upon it, and it is so by virtue of its role as 'operator' of the co-operation which is expected to combat the wrongful removal of children. On the other hand, and in order again to take account of the particularities of the various legal systems, the Special Commission agreed that the Central Authority will have the possibility to request that the application which is made to it be accompanied by an authorization, to act on the applicant's behalf (article 24).

28 Furthermore, in keeping with a well established tradition of the Hague Conference[17], the draft Convention provides that the Federal States as well as the States with more than one system of law are free to appoint more than one Central Authority. Nonetheless, the problems revealed in the practical application of the conventions which provide for the existence of several Central Authorities in the territory of one single State, together with, in particular, the specific nature of the object of this Draft, caused the Special Commission to move towards a minimal 'hierarchization' of the Central Authorities in those States. Indeed, if we keep to the second point and consider the situation of a person who has removed or retained a child and who makes use of the great facilities provided in the State by the means of transport, the applicant or the Central Authority of the requesting State could well be made to renew its request several times with a view to obtaining the return of the child; even more, we may know the identity of the Contracting State which harbours the child but not the territorial unit of his residence.

29 To provide a solution to these types of situations and similar ones, the draft Convention holds that the States which appoint more than one Central Authority will simultaneously designate 'the Central Authority to which applications may be addressed for transmission to the relevant Central Authority in that State' (article 6). The question is important, considering that the Convention limits in time the obligation which concerns the immediate return of the child and which is imposed upon the courts and administrative authorities of the State addressed[18]; thus, an error in the designation of the Central Authority which is addressed can have serious consequences for the claims of the parties. Now, in order to prevent any one element not provided by the Convention from changing its normal application, it will be necessary that such a 'super Central Authority', as is envisaged in article 6, take an active position. As it will, in effect, act as a communication channel between, on the one hand, the Central Authority of its own State which is competent in each specific case and, on the other, the Central Authorities of the other Contracting States or the applicants themselves, it will have to make a choice; either it will proceed to find the whereabouts of the child with a view to a transmission of the affair to the proper Central Authority, or it will transmit a copy of the request to

[17] Par exemple, v. l'article 18, troisième alinéa de la Convention relative à la signification et la notification à l'étranger des actes judiciaires et extrajudiciaires en matière civile ou commerciale, du 15 novembre 1965. *Id.*, les articles 24 et 25 de la Convention sur l'obtention des preuves à l'étranger en matière civile ou commerciale, du 18 mars 1970.

[18] *Cf. infra* commentaire de l'article 11 de l'avant-projet de Convention.

[17] For example, see article 18 of the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, signed 15 November 1965; see also articles 24 and 25 of the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or commercial Matters.

[18] See below: commentary on article 11 of the preliminary draft Convention.

centrales de l'Etat, ce qui provoquera une inévitable multiplication des services bureaucratiques. Mais il n'y a pas de doute qu'une telle Autorité centrale va jouer un rôle fondamental dans l'application de la Convention quant aux rapports qui affectent les Etats plurilégislatifs.

B *L'intervention d'autres autorités internes*

30 Comme nous l'avons déjà souligné, la Convention se présente comme un instrument de coopération entre les Etats contractants pour lutter contre les enlèvements internationaux d'enfants et garantir la jouissance effective tant du droit de garde que du droit de visite. Pour mettre en oeuvre cette coopération, la Convention prévoit la coopération des Autorités centrales mentionnées plus haut; mais l'obligation de coopérer est beaucoup plus large. Toutes les autorités compétentes en matière de garde ou de protection des mineurs sont, en principe, tenues de collaborer dans cet effort conjoint contre les déplacements illicites d'enfants. Cependant, l'avant-projet de Convention s'occupe seulement et avec un intérêt tout spécial de l'activité dans ce domaine des «autorités judiciaires ou administratives». Il s'agit évidemment des autorités chargées à l'intérieur de chaque Etat des questions concernant la garde des enfants ou, en général, de la protection des mineurs. La référence aux autorités administratives étant justifiée par le fait que, dans certains Etats membres de la Conférence, cette tâche est confiée à des autorités d'une telle nature, en contraste avec la plupart des systèmes juridiques où cette tâche appartient aux autorités judiciaires.

31 Quant à la raison d'être de l'intervention de ces autorités dans le mécanisme de la Convention, elle est claire. La Commission spéciale a voulu que les décisions sur le retour de l'enfant et l'exercice du droit de visite qui concernent les relations privées internationales, soient entourées de garanties identiques à celles relatives aux décisions similaires affectant les relations purement internes. D'ailleurs, sur ce point, l'avant-projet de Convention s'est limité à recueillir une exigence de sécurité juridique consacrée dans ce domaine par tous les droits internes. En effet, quoique les décisions sur le retour des enfants ne préjugent pas du fond du droit de garde (v. article 16), elles vont influencer outre mesure sur la vie de ces enfants; l'adoption de telles décisions, pour prendre une responsabilité similaire, doit obligatoirement se faire par les autorités qui sont normalement compétentes selon le droit interne.

C *La formule modèle des demandes introduites devant les Autorités centrales*

32 Comme nous l'avons déjà avancé, lors de sa seconde réunion, la Commission spéciale a reconnu l'utilité d'inclure, comme annexe à la Convention, une formule modèle pour les demandes introduites devant les Autorités centrales. En même temps, il a été décidé qu'une telle formule ne devrait pas avoir un caractère obligatoire, mais simplement de recommandation[19]. En effet, étant donné l'absence d'expérience internationale préalable dans le domaine couvert par la Convention, on peut songer qu'après quelques années, l'application pratique des dispositions conventionnelles amène à conseiller l'introduction de certaines modifications dans la formule à adopter par la

[19] Procès-verbaux Nos 21 et 22. V. en plus les Doc. trav. No 14 (Proposition de la délégation suisse) et No 16 (*Proposal of the United States delegation*).

all the Central Authorities of the State, an operation which must necessarily involve a considerable number of bureaucratic services. But there is no doubt that such a Central Authority will play an essential part in the application of the Convention with regard to the relations touching the States which have more than one system of law.

B *The intervention of other internal authorities*

30 As we stated earlier, the Convention appears as an instrument of co-operation between the Contracting States in the fight against international child abduction and also as an instrument for insuring the effective enjoyment of custody as well as the access rights. To exercise this co-operation, the Convention provides for the participation of the Central Authorities mentioned above; but the duty to co-operate goes much further. All the authorities which are competent in respect of the custody or the protection of minors have, in principle, the obligation to collaborate in this joint effort to combat the abduction of children. However, in this field, the draft Convention provides only, and with a very special interest, for the activities of the 'judicial and administrative authorities'. Obviously, it concerns the authorities whose duties within each state relate to the problems of child custody or, more generally, to the question of child protection. The reference to administrative authorities is justified by the fact that, in some Member States of the Conference, those duties are assumed by authorities of this type, as opposed to most legal systems and States in which that task is entrusted to the courts.

31 The intervention of those authorities within the framework and machinery of the Convention clearly finds justification. The Special Commission intended that decisions on the restitution of children and the exercise of access rights which concern international private relations receive guarantees identical to those offered with regard to similar orders concerning purely national relations. In addition, the draft Convention has on this point simply met a demand for legal security which is established on the matter by all the domestic systems of legislation. As, in fact, the decisions concerning the return of children are not construed as relating to the merits of custody rights (see article 16), they will have an extreme influence on the life of those children; to take a similar responsibility, the adoption of such decisions must, of necessity, be effected by the authorities which are normally competent under the internal legislation.

C *The standard form for applications submitted to the Central Authorities*

32 As we mentioned earlier, the Special Commission recognized, at its second meeting, the need to include a standard form as an annex to the Convention, such a form applying to the requests submitted to the Central Authorities. At the same time, it was decided that such a form would not be obligatory in nature, but only a recommendation[19]. Indeed, considering the lack of international experience in the area of the Convention, we may rightly think that, after a few years, the practical application of the treaty provisions will show the advisability of making changes in the form which is adopted by the Fourteenth Session of the Conference. Now, it seems best not to submit a revision of

[19] Summaries Nos 21 and 22. See also Working Documents Nos 14 (*Proposition de la délégation suisse*) and 16 (Proposal of the United States delegation).

Quatorzième session de la Conférence. Or, il semble préférable de ne pas soumettre une éventuelle révision de l'annexe aux formalités qu'exigerait le droit international public pour la révision des traités internationaux.
D'autre part, étant donné la nature non contraignante de la formule modèle, l'avant-projet de Convention contient une énumération des données que doit contenir obligatoirement toute demande adressée à une Autorité centrale.

33 Par ailleurs, deux aspects de la question ont été renvoyés à la Quatorzième session. L'un se réfère à l'instrument dans lequel la formule modèle devra être incorporée – sur ce point, au sein de la Commission s'est dégagée une tendance favorable à son inclusion dans une déclaration conjointe des Etats contractants[20]. L'autre concerne le contenu même de la formule modèle; en effet, le texte soumis par le Comité *ad hoc* qui s'est occupé du problème a été considéré par la Commission spéciale comme ayant été rédigé très minutieusement[21].

D *Rôle accordé à l'intérêt de l'enfant*

34 En lisant le texte de l'avant-projet de Convention, on pourrait avoir le sentiment que le principe qui prône la prise en considération de l'intérêt des enfants dans la régulation d'un problème dont ils sont les premières victimes a été absent des débats de la Commission spéciale. En effet, l'expression acquise «intérêt de l'enfant» ne se retrouve dans aucun article du texte proposé. Pourtant, il faut souligner que dans les Conclusions de la Commission spéciale de mars 1979 des références à l'intérêt de l'enfant apparaissent à deux reprises, et cela justement parmi les principes généraux retenus par la Commission. Ainsi, dans ces Conclusions, on lit d'une part, que «dans les questions de droit de garde et de droit de visite, l'intérêt et le bien-être de l'enfant sont de première importance»; et d'autre part que «l'enlèvement d'un enfant est contraire à son intérêt et à son bien-être»[22].

35 Les deux paragraphes cités reflètent assez clairement quel a été le point de vue accepté par la majorité des experts de la Commission spéciale sur cette question. Avant tout, il est évident que les efforts faits par la Conférence de La Haye en vue de lutter contre les enlèvements internationaux des enfants sont inspirés par l'envie de protéger l'intérêt des enfants. Or, parmi les manifestations les plus objectives de ce qui constitue *l'intérêt* de l'enfant se trouve leur droit à ne pas être déplacés ou retenus au nom de droits plus ou moins discutables sur sa personne. En ce sens, il nous semble opportun de rappeler la Recommandation 874 (1979) de l'Assemblée Parlementaire du Conseil de l'Europe où on peut lire, comme premier principe général, que «les enfants ne doivent plus être considérés comme la propriété de leurs parents, mais être reconnus comme des individus avec leurs droits et leurs besoins propres»[23].

36 En second lieu, c'est en invoquant l'intérêt de l'enfant que souvent, dans le passé, les jurisdictions internes ont accordé finalement la garde en litige à la personne qui avait déplacé ou retenu sans droit l'enfant. Parfois cette décision a pu être la plus juste; cependant, nous ne pouvons pas ignorer que l'emploi par des autorités internes d'une telle notion court le risque de traduire des manifestations du particularisme culturel, social, etc. d'une communauté nationale donnée, donc, au fond, d'exprimer des jugements de valeur subjectifs en ce qui concerne l'autre communauté nationale d'où l'enfant vient d'être arraché. C'est pour éviter

[20] Notamment Procès-verbal No 22.
[21] Procès-verbal No 32. Le projet de la formule, partiellement revue par les soins du Bureau Permanent, est annexé au présent Rapport.
[22] Doc. prél. No 5, p. 10, No 26 et No 28.
[23] Assemblée Parlementaire du Conseil de l'Europe, 31ème Session ordinaire, «Recommandation relative à une Charte européenne des droits de l'enfant». Texte adopté le 4 octobre 1979.

the annex to the formalities which are required by the public international law for the revision of international treaties.

On the other hand, in view of the non-obligatory nature of the standard form, the draft Convention contains an enumeration of all the elements which must appear in any application submitted to a Central Authority.

33 Moreover, two aspects of the question have been deferred for examination at the Fourteenth Session. One refers to the instrument into which the model form will have to fit on this point, the Commission showed a trend favourable toward its inclusion in a joint declaration of the Contracting States[20]; the other refers to the contents of the form, for the Special Commission considered that the text submitted by the *ad hoc* Committee on the problem was much too detailed[21].

D *The place given to the interests of the child*

34 When reading the text of the preliminary draft Convention, we may feel that the principle calling for consideration of the children's welfare, in dealing with a problem of which they are the primary victims, was absent from the debates of the Special Commission. As a matter of fact, the agreed-on expression 'interest of the child' does not appear at all in the proposed text. Nevertheless, we must say that in the Conclusions of the Special Commission of March 1979 references to the child's interests appear on two occasions, and this precisely as one of the general principles which were accepted by the Commission. Thus, we may read in these Conclusions that 'in questions of custody and access the welfare of the child is of primary importance' and that 'abduction of children is contrary to their interests and welfare'[22].

35 The two paragraphs mentioned reflect clearly enough the viewpoint accepted by most experts of the Special Commission on this question. Above all, it is obvious that the efforts made by the Hague Conference with a view to combat the international abduction of children are inspired by a desire to protect the interests of such children. Now, among the most objective aspects of that general *interest* of the child, there is the right not to be removed or retained in the name of a more or less questionable right over his person. With this in mind, it seems appropriate to recall Recommendation 874 (1979) of the Parliamentary Assembly of the Council of Europe, in which we read, as the first general principle, that 'children must no longer be regarded as parents' property, but must be recognized as individuals with their own rights and needs'[23].

36 Secondly, the domestic jurisdictions have often in the past granted the custody in litigation to the person who has unlawfully removed or retained the child, and this in the name of the child's interest. Often too, this decision seemed the best one to take, but we cannot ignore the fact that when internal authorities think in such a way they run the risk of expressing a particularism, be it cultural, social or other, of a certain national community, thus, really, making a very subjective judgment on the other national community from which the child has been pulled. In order to avoid such pitfalls, the Special Commission has tried to find a suitable

[20] See Summary No 22.
[21] Summary No 32. The draft form, edited somewhat by the Permanent Bureau, is attached as an annex to this Report.
[22] Prel. Doc. No 5, p. 11, No 26 and No 28.
[23] Parliamentary Assembly of the Council of Europe, 31st Ordinary Session, 'Recommendation on a European Charter on the Rights of the Child'. Text adopted on 4 October 1979.

de tels dangers que la Commission spéciale a cherché à préciser exactement quelle est l'expression de l'intérêt de l'enfant qui pourra servir de base pour refuser le rétablissement de la garde violée auparavant[24].
Néanmoins, le principe inspirateur de l'intérêt de l'enfant pourrait éventuellement être inscrit au préambule de la Convention.

formula to express the child's interest which might serve as a basis for refusing the restoration of the violated custody[24].

Nevertheless, the underlying principle of the child's interest might in the future appear in the preamble of the Convention.

IV CHAMP D'APPLICATION DE LA CONVENTION

A *Champ d'application* ratione materiae

37 La délimitation du champ d'application de la Convention *ratione materiae* a été une question particulièrement délicate. L'absence d'une définition juridique acquise du phénomène qu'on veut combattre se reflétait déjà, tant dans le Questionnaire que dans le Rapport établis par le Bureau Permanent[25], par l'énumération de cinq types de situations considérées comme des «enlèvements d'enfants». Lors de sa première réunion, la Commission spéciale est tombée rapidement d'accord sur le fait qu'il convenait de retenir comme objet de ses travaux les quatre catégories où il existait, avant le déplacement de l'enfant, une décision concernant sa garde. L'accord favorable à l'inclusion dans le champ d'application de la Convention de la situation décrite dans le paragraphe A du Questionnaire ci-dessus mentionné s'est avéré beaucoup plus laborieux (c'est-à-dire, quand l'enfant a été déplacé avant qu'une décision en matière de garde n'ait encore été prononcée). Le doute initial est compréhensible dès lors qu'il se manifestait à un moment où les débats de la Commission spéciale semblaient s'orienter vers la reconnaissance et l'exécution des décisions étrangères. Dans cette optique, il était difficile d'aller plus loin que la Convention du Conseil de l'Europe – donc de déclarer applicable la Convention aux décisions obtenues après le déplacement de l'enfant[26]. Ainsi, ce n'est qu'à partir du moment où cette approche a changé, que la Commission spéciale a décidé que la future Convention devrait couvrir tant les situations créées par le déplacement d'un enfant *avant* l'adoption de toute décision sur sa garde, que les situations créées par les déplacements qui se produisent *après* une telle décision[27]. En conséquence, l'avant-projet envisage, en principe, tout déplacement d'un enfant non protégé par la loi, en violation d'une garde exercée *de facto*.

38 Quant à la caractérisation des «enlèvements» d'enfants en raison des personnes qui en sont responsables, la Commission spéciale n'a pas hésité à supprimer toute allusion à «un de ses parents»[28]. L'idée de famille étant plus ou moins large selon les différentes conceptions sociales, on a cru préférable de ne pas limiter le champ d'application de la Convention au cas où le déplacement de l'enfant est l'oeuvre du père ou de la mère. Donc, la Convention est appelée à s'appliquer dès lors que l'enlèvement ne tombe pas dans le domaine du droit pénal.

39 D'autre part, la Commission spéciale s'est manifestée clairement en faveur d'étendre l'application de la Convention au cas où l'enfant a été confié à une institution publique. Néanmoins, dix experts ont estimé qu'il suffisait qu'une mention en ce sens soit faite dans le Rapport[29]. En conséquence, la référence aux institutions publiques apparaît dans l'avant-projet toujours entre crochets. Certainement, selon la plupart des droits internes, une institution publique n'est jamais titulaire d'un droit de garde *stricto*

IV SCOPE OF APPLICATION OF THE CONVENTION

A *Scope of application* ratione materiae

37 The delimitation of the scope of application of the Convention *ratione materiae* has been a very delicate question. The absence of any established legal definition of the phenomenon which is to be fought was reflected already in the Questionnaire, as well as in the Report drawn up by the Permanent Bureau[25], in which five types of factual situations were viewed as cases of 'child abductions'. At its first meeting, the Special Commission quickly agreed on the advisability of retaining, as subjects of its work, the four categories which involved the existence of a custodial order prior to the child's removal. To reach agreement on the inclusion, in the scope of application of the Convention, of the situation described in paragraph A of the above-mentioned Questionnaire, turned out to be much too difficult; in other words, this the case of a child having been removed in the absence of any custodial order. The initial doubts were understandable at a time when the debates of the Special Commission seemed to be directed to the recognition and enforcement of foreign orders. Along that line, it was difficult to go further than the Convention of the Council of Europe and, consequently, to declare the Convention applicable to decisions reached after the removal of the child[26]. So, when a change of approach was made, the Special Commission decided that the future Convention should cover both types of situations, that created by the removal of a child *prior to* the adoption of any custodial order, and that created by the removal being effected *following* such a decision[27]. In consequence, the Draft covers, in principle, any removal of a child which is not protected by law, in breach of custody exercised *de facto*.

38 As to the characterization of child 'abductions', with a view to the persons responsible for them, the Special Commission did not hesitate to cut out any allusion to 'one of his parents'[28]. The concept of a family being more or less extended depending on the various special views of it, it was preferred not to limit the scope of application of the Convention to cases where the removal was effected by the father or mother. So, the Convention is intended to apply whenever the removal does not come under penal legislation.

39 Moreover, the Special Commission clearly manifested its desire to extend the application of the Convention to the cases of children in the custody of public institutions. Nonetheless, ten experts thought that a simple mention of this in the Report was sufficient[29]. In consequence, the reference to public institutions always appears in square brackets in the Draft. Certainly, under most domestic laws, a public institution never has a custodial right, strictly speaking, but, as the Convention contemplates primarily actual

[24] *Infra*, commentaire de l'article 12, alinéa premier, *b* de l'avant-projet.
[25] Questionnaire et Rapport Dyer. Note explicative du Questionnaire et Rapport *supra*, p. 21.
[26] Article 12 de la Convention européenne sur la reconnaissance et l'exécution des décisions en matière de garde des enfants et le rétablissement de la garde des enfants.
[27] Procès-verbaux Nos 5 et 12.
[28] Procès-verbal No 19.
[29] Procès-verbal No 29.

[24] See below, commentary on article 12, first paragraph, *b* of the Draft.
[25] Questionnaire and Dyer Report. Explanatory Note on the Questionnaire and Report *supra*, p. 21.
[26] Article 12 of the European Convention on recognition and enforcement of decisions concerning custody and on restoration of custody of children.
[27] Summaries Nos 5 and 12.
[28] Summary No 19.
[29] Summary No 29.

sensu, mais puisque la Convention envisage surtout des situations effectives, il serait surprenant en 1980 que le rôle des institutions publiques soit ignoré. D'ailleurs, étant donné que les autorités internes qui doivent appliquer la Convention ne disposent pas normalement du Rapport, le silence de la Convention peut se traduire en des décisions contradictoires sur ce point. Donc, il serait souhaitable qu'au cours de la Quatorzième session de la Conférence les crochets soient enlevés, afin qu'il résulte du texte même de la Convention que les situations visées rentrent dans son champ d'application.

B *Champ d'application* ratione personae

40 Les enfants protégés par l'avant-projet sont ceux qui, ayant moins de 16 ans, avaient leur résidence habituelle dans un Etat contractant immédiatement avant toute atteinte aux droits de garde ou de visite (article 4). D'autres Conventions de La Haye contiennent une définition plus large du concept «enfant»[30]. Cependant, la Commission spéciale a estimé qu'une personne de plus de 16 ans – même si elle n'a pas atteint la majorité selon la loi interne de sa résidence habituelle ou de sa loi nationale – a en général une volonté propre qui pourra difficilement être ignorée par l'un ou l'autre de ses parents. Pourtant la question reste ouverte, dès lors qu'une forte minorité d'experts se sont manifestés en faveur de l'abaissement de l'âge de 16 ans[31].

41 Par ailleurs, la possibilité accordée aux autorités, qui doivent décider du retour de l'enfant, de prendre en considération l'opinion de celui-ci, quand elles estiment que l'enfant a atteint un âge et une maturité appropriés (article 12), pourrait alléger les soucis des experts dont la législation interne reconnaît le droit de fixer sa résidence à des enfants de moins de 16 ans. Il se peut que, si la Quatorzième session de la Conférence retient l'âge limite de 16 ans, les autorités de ces pays considéront que l'opinion de l'enfant est toujours déterminante si cet enfant a l'âge fixé par la loi pour choisir son lieu de résidence. Mais une telle conséquence semble préférable à un abaissement général de cet âge, qui interdirait l'application de la Convention à des cas que beaucoup d'Etats voudraient couvrir.

42 Quant à l'exigence de la résidence habituelle dans un Etat contractant, il faut se souvenir que nous sommes en présence d'une convention de coopération entre autorités et qu'elle ne peut dès lors atteindre toute son efficacité que si l'enfant a été déplacé du territoire d'un Etat contractant dans le territoire d'un autre Etat contractant. En effet, le dialogue entre Autorités centrales, sur lequel se construit l'avant-projet, n'est possible que dans le cas où un interlocuteur valable existe dans les divers Etats impliqués.

C *Caractère international des cas d'espèces réglés*

43 Il est évident que le système établi dans l'avant-projet n'est pas applicable aux situations purement internes; une telle déduction ressort d'ailleurs clairement de l'article 29. Or, le caractère international provient, dans le sujet qui nous occupe, d'une situation de fait, à savoir concrètement de la dispersion entre différents pays des membres d'une famille. Donc, une situation purement interne lors de sa naissance peut tomber dans le champ d'application de la Convention par le fait, par exemple, qu'un des membres de la famille s'est déplacé à l'étranger avec l'enfant ou du désir d'exercer un droit de visite dans un autre pays. Par contre, la différence de nationalité entre les personnes concernées ne

[30] Par exemple: Convention sur la loi applicable aux obligations alimentaires envers les enfants, du 24 octobre 1956 (article premier); Convention concernant la reconnaissance et l'exécution des décisions en matière d'obligations alimentaires envers les enfants, du 15 avril 1958 (article premier); Convention concernant la compétence des autorités et la loi applicable en matière de protection des mineurs, du 5 octobre 1961 (article 12); Convention concernant la compétence des autorités, la loi applicable et la reconnaissance des décisions en matière d'adoption, du 15 novembre 1965 (article premier).

[31] Procès-verbaux Nos 19 et 29.

situations, it would be surprising if the role played by public institutions were ignored in 1980. In any case, considering that the internal authorities who must apply the Convention do not ordinarily have access to the Report, the silence of the Convention might, on this point, lead to contradictory decisions. So, it would be better if the square brackets were removed at the Fourteenth Session of the Conference, so that, from the text itself of the Convention, the situations in question could enter into its range of application.

B *Scope of application* ratione personae

40 The Draft applies to the children under the age of 16 who were normally resident in a Contracting State immediately before any breach of custody or access rights (article 4). Other Hague Conventions contain a broader definition of the 'child' concept[30]. However, the Special Commission thought that a person over the age of 16 – even if he has not reached the age of full legal capacity under the internal law of his nationality or of the State of his habitual residence – has in general a will of his own which cannot be ignored by either of the parents. Nevertheless, the question remains open, since a strong minority of experts have shown that they favour lowering that age of 16 years[31].

41 Moreover, the opportunity given to the authorities which have to decide on the child's return to take account of his views, when he is deemed to have attained an adequate age and degree of maturity, could alleviate the work of the experts whose internal laws recognize the right of children under 16 to decide upon the location of their residence. The Fourteenth Session of the Conference will, perhaps, retain the age limit of 16 years and, in such a case, the authorities of these countries will always consider that the opinion of the child is of the greatest importance if that child has reached the legal age for fixing his place of residence. But such a consequence seems preferable to a general lowering of that age, which would impede the application of the Convention to situations which many States want to cover.

42 As for the requirement of habitual residence in a Contracting State, it should be remembered that we are dealing with a convention on co-operation between authorities, and such convention, therefore, can only reach full effectiveness if the child has been removed from the territory of one Contracting State into the territory of another Contracting State. Indeed, a dialogue between the Central Authorities on which the whole Draft depends, is only possible where reliable interlocutors exist in the various States concerned.

C *International character of the cases covered*

43 It is obvious that the system established in the Draft is not applicable to purely internal situations; article 29 clearly refers to this. Now, the international nature of the problem derives here from a factual situation; that is to say, in concrete terms, from the dispersal of the various family members in different countries. So, a situation which is purely internal at the outset may fall within the scope of application of the Convention if, for example, one of the family members has removed abroad with the child, or there is the desire to exercise an access right in another country. On the contrary, different nationalities among the persons concerned do not

[30] For example: Convention of 24 October 1956 on the law applicable to the maintenance obligations in respect of children (article 1); Convention of 15 April 1958 on the recognition and enforcement of decisions relating to maintenance obligations in respect of children (article 1); Convention of 5 October 1961 on the powers of authorities and the law applicable in matters of protection of infants (article 12); Convention of 15 November 1965 on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions (article 1).

[31] Summaries Nos 19 and 29.

férence de nationalités des personnes concernées n'implique pas nécessairement que nous soyons devant un cas d'espèce international auquel la Convention doive s'appliquer.

V DE QUELQUES QUESTIONS DE TERMINOLOGIE

44 Quoique la Conférence de La Haye traditionnellement évite, dans la mesure du possible, les définitions des termes utilisés dans les Conventions, l'avant-projet en contient certaines. C'est le cas des notions de droit de garde et de visite. Pourtant, il existe un aspect qui concerne la terminologie de l'avant-projet qui mérite un bref commentaire. Il s'agit de l'absence de concordance entre la terminologie qui apparaît dans le titre de cet avant-projet et celle qui est utilisée dans son texte. L'explication est que la majorité des experts a voulu éviter les connotations pénales que le terme «enlèvement» a dans la plupart des législations internes[32]; c'est la raison pour laquelle ce terme n'est pas utilisé dans le texte de l'avant-projet. Pourtant, on a cru souhaitable de retenir ce terme «enlèvement» dans le titre de la Convention, étant donné son emploi habituel par les «mass media» et l'opinion publique. Néanmoins, pour éviter toute équivoque, le même titre précise que l'objet de la Convention est seulement de régler les «aspects civils» du phénomène visé[33]. Si tout au long de ce Rapport nous employons de temps en temps des expressions comme «enlèvement» et «enleveur», c'est qu'elles permettent parfois une rédaction plus aisée; donc, il ne faut pas y voir de contradiction avec les décisions prises par la Commission spéciale.

VI QUESTIONS NON RÉGLÉES DANS L'AVANT-PROJET

A *Champ d'application dans le temps*

45 L'avant-projet ne contient pas de règle sur ce point, mais le texte définitif devra sans doute définir avec précision les situations dans lesquelles la Convention s'applique. D'ailleurs, étant donné que le double objet de la Convention s'est traduit dans l'avant-projet par des régulations de portée différente, il serait sans doute approprié que la Convention consacre sur ce point plusieurs principes. En effet, d'une part les dispositions en vue d'assurer le retour immédiat de l'enfant se trouvent limitées par le délai *maximum* d'un an à partir de la violation du droit de garde, d'après les termes de l'article 11; il semble donc que la Convention ne pourra s'appliquer dans chaque Etat contractant qu'aux déplacements d'enfants qui se sont produits après la date de son entrée en vigueur, ainsi qu'à ceux qui ont eu lieu avant cette date, à condition que le délai d'un an ne soit pas encore écoulé.

46 En revanche, rien ne devrait s'opposer à l'application des dispositions conventionnelles concernant le droit de visite, abstraction faite du moment où un tel droit a été refusé. Finalement, on peut envisager aussi l'éventualité de reconnaître aux Etats contractants la faculté de déclarer possible l'application rétroactive de la Convention en rapport avec la disposition contenue dans l'article 15 de l'avant-projet.

B *Relations avec d'autres conventions*

47 La Convention sur les aspects civils de l'enlèvement international d'enfants est conçue dans l'avant-projet pré-

[32] Procès-verbal No 18.
[33] Procès-verbal No 31.

necessarily imply that we are dealing with a special case at the international level and that the Convention has to apply.

V A FEW PROBLEMS OF TERMINOLOGY

44 The Draft contains a few definitions of the terms which are used in the Convention, although the Hague Conference has traditionally – and as much as possible – tried to avoid them. This is the case with the concepts of custody and access rights. There is, however, an aspect of the terminology of the Draft which calls for attention and a short commentary. It concerns the lack of concordance between the terminology which appears in the title of the Draft and the one which is used in its text. The explanation lies with the experts who, in their great majority, have tried to avoid the criminal connotations that the term 'abduction' has in most internal laws[32]; this is why such a term is not used in the text of the Draft. On the other hand, it seemed best to retain the term 'abduction' in the title of the Convention, considering its frequent use by the 'mass media' and by the public. Nevertheless, in order to avoid any ambiguity, the same title specifies that the object of the Convention only deals with the 'civil aspects' of the phenomenon in question[33]. Regardless of the fact that all through this Report we occasionally employ such expressions as 'kidnapping', 'abduction' and 'abductor', their use allows simply for easier drafting, and there is no need to see in this a contradiction with the decisions of the Special Commission.

VI QUESTIONS NOT DEALT WITH IN THE DRAFT

A *Scope of application in time*

45 The Draft does not contain any rule on this point, but the final text will certainly have to delimit with precision the situations in which the Convention applies. Moreover, considering that the dual purpose of the Convention is reflected in the Draft by rules of different scope, it would no doubt be appropriate for the Convention to devote several principles to this point. Indeed, on one hand, the provisions which insure the enforcement of the child's immediate return are limited to a *maximum* of one year from the time when the custodial right was violated, under the terms of article 11; it would then appear that the Convention will only, in each Contracting State, apply to removals of children which took place after the date of its entry into force, as well as those which took place before that date, provided that the period of one year had not elapsed.

46 On the other hand, there should be no obstacle to the application of treaty provisions with regard to access rights except for the time of refusal of such rights. Finally, we may also contemplate the possibility of granting to the Contracting States a special option to declare the advisability, under the provisions of article 15 of the Draft, of a retrospective application of the Convention.

B *Relations with other conventions*

47 The Convention on the civil aspects of international child abduction is conceived, in the Draft prepared by the

[32] Summary No 18.
[33] Summary No 31.

paré par la Commission spéciale comme un instrument qui doit apporter une solution d'urgence en vue d'éviter la consolidation juridique de situations initialement illicites. Donc, dans la mesure où elle n'essaie pas de trancher sur le fond les droits des parties, la Convention doit être en principe compatible avec les autres conventions concernant la loi applicable ou la reconnaissance et l'exécution des décisions en matière de garde des enfants. Néanmoins, une telle compatibilité ne peut s'obtenir qu'en assurant l'application prioritaire de ses dispositions. En effet, c'est après le retour de l'enfant à sa résidence habituelle que devraient être soulevées, devant les tribunaux compétents, les questions relatives au droit de garde. Or, pour atteindre ce but, il faudra que les dispositions de la Convention sur le retour des enfants l'emportent sur celles de toute autre convention concernant la garde des enfants, y compris la Convention de La Haye du 5 octobre 1961 concernant la compétence des autorités et la loi applicable en matière de protection des mineurs.

48 D'autre part, la Convention devrait dire expressément qu'elle n'interdit pas l'usage d'autres procédures conventionnelles ou prévues par la loi interne de tout Etat contractant, qui puissent faciliter le retour d'un enfant enlevé illicitement.

C *Clauses finales*

49 Il n'appartenait pas à la Commission spéciale d'élaborer les clauses finales de la Convention. Il s'agit d'une question qui, à chaque session de la Conférence, fait l'objet d'un examen uniforme pour tous les projets de conventions qu'elle adopte. Cependant, nous devons signaler que, lors de sa première réunion, la Commission spéciale s'est montrée favorable à une convention semi-ouverte, dans la même optique que d'autres Conventions de La Haye qui impliquent une coopération d'autorités internes[34]. Si une telle idée est adoptée à la Quatorzième session, tout Etat pourra adhérer à la Convention, mais l'adhésion n'aura d'effet que dans les rapports entre l'Etat adhérent et les Etats contractants qui n'auront pas élevé d'objection à son encontre dans un certain délai. Cette solution permettrait de maintenir l'équilibre nécessaire entre le désir d'universalisme et la conviction qu'un système de coopération est efficace lorsqu'il existe entre les parties un degré suffisant de confiance mutuelle.

50 Les dispositions sur les Etats non unifiés des articles 27 et 28 ne constituent pas des clauses finales, puisqu'elles sont nécessaires pour l'application même de la Convention, lorsque l'enfant en cause avait sa résidence habituelle dans un de ces Etats. D'autre part, l'article 29 se limite à exclure du champ d'application de la Convention, en rapport avec les Etats non unifiés, les questions qui ne seraient pas considérées comme internationales par les Etats à système de droit unifié.

51 Exceptionnellement, la Commission spéciale a rédigé une clause finale concernant les modalités que peuvent suivre les Etats non unifiés pour devenir Parties à la Convention. Elle apparaît dans l'article Y qui reproduit la disposition incluse à cet égard dans les Conventions adoptées à la Treizième session de la Conférence[35].

[34] L'exemple retenu comme modèle possible a été l'article 31 de la Convention concernant la reconnaissance et l'exécution de décisions relatives aux obligations alimentaires du 2 octobre 1973. *Cf.* Doc. prél. No 5 *supra*, p. 165, No 30.

[35] Par exemple, article 25 de la Convention sur la loi applicable aux régimes matrimoniaux.

Special Commission, to be an emergency instrument designed to avoid legal consolidation of initially wrongful situations. So, in so far as it does not try to decide on the merits of the rights of the parties, the Convention must be, in principle compatible with the other conventions relating to the applicable law or to the recognition and enforcement of custodial orders. Nevertheless, such compatibility can only be obtained by a priority application of its provisions. Indeed, the questions relating to the custodial right should only be brought before the competent courts when the child has actually been returned to his habitual residence. But, to fulfil such a purpose, the provisions of the Convention on the return of children will have to override those of any other convention on child custody, including the Hague Convention of 5 October 1961 on the powers of authorities and the law applicable in matters of protection of infants.

48 Furthermore, the Convention should be explicit and state that it admits of the use of other treaty procedures or procedures prescribed by the internal law of any Contracting State, if they can facilitate the restitution of an abducted child.

C *Final clauses*

49 It was not the task of the Special Commission to draft the final clauses of the Convention. This question receives, at every Session of the Conference, a uniform treatment for all the draft conventions adopted by such Session. Nonetheless, we must emphasize the fact that, at its first meeting, the Special Commission appeared to favour a semi-open convention, in the same light as other Hague Conventions which imply co-operation among the internal authorities[34]. If such an idea is adopted within the framework of the Fourteenth Session, any State will have the opportunity to accede to the Convention, but the accession will take effect only in the relations between the acceding State and the Contracting States that have raised no objection to it within a certain period of time. This remedy could permit the maintenance of a necessary balance between the desire for universality and the conviction that a system of co-operation is only effective when there is between the parties a sufficient degree of mutual trust.

50 The provisions on the juridically non-unified States, under articles 27 and 28, do not constitute final clauses, since they are even needed for the application of the Convention, when the child under consideration had his habitual residence in one of those States. Moreover, article 29 only excludes from the scope of application of the Convention, in relation to such non-unified States, the questions which could not be regarded as international by the States with a unified system of law.

51 Exceptionally, the Special Commission drafted a final clause on the approaches which may be followed by the juridically non-unified States if they wish to become parties to the Convention. Such a clause appears in article Y, which reproduces the provision included for that end in the Conventions which were adopted at the Thirteenth Session of the Conference[35].

[34] The example retained as a possible standard was article 31 of the Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations, signed 2 October 1973. See Prel. Doc. No 5 *supra*, p. 165, No 30.

[35] For example, article 25 of the Convention on the Law Applicable to Matrimonial Property Regimes.

CHAPITRE PREMIER – CHAMP D'APPLICATION DE LA CONVENTION

Article premier

52 Cet article définit, en deux parties séparées, quels sont les objectifs de la Convention. Cela démontre que l'absence de parallélisme entre le titre et le contenu de l'avant-projet ne se limite pas aux questions de terminologie; celles-ci existent et nous avons essayé auparavant d'en expliquer les raisons[36]. Mais en plus il faut accepter que le titre choisi ne réponde que partiellement au contenu de la Convention; en effet, tandis que celle-ci s'occupe de certains aspects du droit de visite, le titre de l'avant-projet se réfère exclusivement aux aspects civils qui découlent des enlèvements internationaux d'enfants. Le problème est sans doute mineur, étant donné qu'en général les titres des conventions sont dépourvus de signification juridique précise. D'ailleurs, l'allusion exclusive aux enlèvements d'enfants a le mérite de mettre en relief quelle a été la grande préoccupation de la Conférence en inscrivant à son ordre du jour le sujet en question. En plus, il faut reconnaître que les termes employés dans le titre, malgré leur défaut de rigueur juridique, ont un pouvoir évocateur certain et plein de force.

Lettre a

53 La matière visée par ce sous-alinéa a été déjà longuement présentée. En résumé, il s'agit d'une conduite qui altère les rapports familiaux, en utilisant un enfant, transformé par ce fait en instrument et principale victime de la situation. Pour combattre ce phénomène, la Convention se propose avant tout d'assurer le retour immédiat des enfants déplacés ou retenus illicitement. Dans toute la mesure du possible, les termes utilisés sont neutres, c'est-à-dire qu'ils n'ont pas un contenu juridique exact; comme on a insisté à plusieurs reprises au cours de la seconde réunion de la Commission spéciale, le but était de délimiter une situation de fait dans laquelle le seul élément qui doit être défini par le droit est la notion de ce qui est illicite. Cette tâche-ci est abordée dans l'avant-projet à l'article 3, auquel il faut se référer nécessairement pour saisir la portée de l'objet de la Convention contenu dans ce sous-alinéa.

54 Mais quelques précisions sur le libellé de ce sous-alinéa sont nécessaires. En premier lieu, la référence aux enfants «retenus» illicitement entend couvrir les cas où l'enfant se trouvant dans un lieu autre que celui de sa résidence habituelle – avec le consentement de la personne qui exerçait normalement sa garde – n'est pas renvoyé par la personne avec laquelle il séjournait. C'est la situation type qui se produit quand le déplacement de l'enfant est la conséquence d'un exercice abusif du droit de visite.

55 En second lieu, il convient d'insister sur l'idée que le texte proposé ne limite pas au père et à la mère la possibilité de devenir les sujets actifs de telles actions qui peuvent être l'oeuvre d'un parent plus ou moins lointain, de l'un des parents adoptifs, etc. Au contraire, nous ne croyons pas qu'on puisse inclure dans cette catégorie les institutions publiques. En effet, les droits sur l'enfant que peut invoquer une institution publique découlent normalement d'une décision administrative prise sur la base des lois de droit public,

[36] Voir *supra*, No 44.

FIRST CHAPTER – SCOPE OF APPLICATION OF THE CONVENTION

Article 1

52 Such article defines, in two different parts, the objects of the Convention. This shows that the lack of a parallelism between the title and the content of the Draft is not restricted to questions of terminology; these exist, and we have tried earlier to give the reasons for their existence[36]. But also, we must admit that the chosen title answers only in part to the content of the Convention; effectively, while the Convention deals with some aspects of access rights, the title of the Draft refers exclusively to the civil aspects of international child abduction. The problem is no doubt a minor one, seeing that in general the titles of conventions are free to any specific legal significance. Moreover, the exclusive reference to child abduction has the merit to emphasize the major preoccupation of the Conference in putting on the agenda of the day the subject under question. In addition, we must agree that the terms used in the title, despite their lack of legal exactness, have a real power of evocation.

Sub-paragraph a

53 The matter referred to in this sub-paragraph has already been presented at length. To sum up, it deals with types of conduct which alter family relationships through the use of a child who thus becomes the instrument and the main victim of the situation. As a corrective to the problem, the Convention wishes above all to insure the immediate return of removed children or of children wrongfully retained. As far as possible, the terms employed are neutral, that is to say that they have no precise legal content; as was insisted on several occasions during the second meeting of the Special Commission, the object was to set limits on a factual situation in which the only element to be defined by the law is the concept of wrongfulness. This task is mentioned in article 3 of the Draft, and the reference must, of necessity, be made to understand the scope of the object pursued by the Convention and contained in this paragraph.

54 However, a few precisions on the wording of this paragraph are necessary. In the first place, the reference to wrongfully 'retained' children tends to cover the case of a child who is in a different place from that of his habitual residence, with the consent of the rightful custodian, and who has not been returned by the non-custodial parent; this is the typical situation where the removal of a child is the direct consequence of an improper exercise of the access right.

55 Secondly, we must insist on the idea that the proposed text contemplates the possibility of people, other than the father and mother, to become the active subjects in such actions, for example a more or less distant relative or one of the adoptive parents, etc. On the contrary, we do not think that the public institutions can be included here, because the rights which may be claimed by a public institution are usually established by an administrative decision taken on the basis of rules of public law, that is to say, by provisions

[36] See above, No 44.

c'est-à-dire de dispositions qui, en principe, sont d'application territoriale[37]; donc, s'il est déjà difficile d'imaginer une institution publique déplaçant, par la force ou par la ruse, un enfant d'un pays étranger dans son propre pays, la qualification d'une telle conduite ne saurait justifier un traitement identique aux actions envisagées dans la Convention. Cependant, il se peut qu'un parent dont l'enfant a été confié à une institution publique étrangère prétende à l'application de la Convention aux fins d'obtenir la jouissance effective de son droit de garde sur celui-ci. A mon avis, du fait que les institutions publiques exercent en principe leurs compétences, abstraction faite de l'éventuelle existence d'un droit de garde[38] une telle prétention ne devrait pas être considérée comme comprise dans le champ d'application de la Convention. Or, puisque aucun des problèmes évoqués n'a été discuté par la Commission spéciale, il semble souhaitable que la Quatorzième session de la Conférence prenne une position à leur égard.

56 Troisièmement, le texte de l'avant-projet précise que les enfants dont il essaie d'assurer le retour sont ceux qui ont été déplacés ou retenus «dans tout Etat contractant». Une telle précision peut s'interpréter comme signifiant que les Etats contractants doivent s'inspirer des dispositions conventionnelles pour éviter que leurs territoires deviennent des lieux de refuge d'éventuels «enleveurs». Or, si nous mettons en rapport cette délimitation de l'objet de la Convention avec la disposition de l'article 4 de l'avant-projet relative à son champ d'application *ratione personae* – plus particulièrement quand elle retient comme élément essentiel la résidence habituelle de l'enfant dans un des Etats contractants avant son déplacement illicite – il faut conclure que, quoique sans avoir adopté une décision à cet égard, la Commission spéciale a été consciente que, par la nature même des choses, le système prévu paraît ne pouvoir être valable qu'entre Etats contractants[39].

Lettre b

57 L'autre objectif de la Convention, exprimé dans ce sous-alinéa, cherche à obtenir des Etats contractants la plus grande protection des droits de garde et de visite. Dans une certaine optique, il pourrait refléter la confiance que la Commission spéciale met dans la garantie de ces droits, comme mesure préventive en vue d'éviter les déplacements internationaux d'enfants. Cependant, cet objectif «avoué» par la Convention n'a pas été suffisamment développé dans le texte de l'avant-projet; peut-être parce que les experts ont cru préférable de ne pas rentrer dans un domaine où l'accord sur des points concrets exigerait sans doute un nouvel effort d'unification internationale. Donc, à part l'obligation générale des Etats, exprimée dans l'article 2, il n'y a que l'article 17, concernant le droit de visite, qui puisse être considéré comme une suite à ce sous-alinéa.

Sur la hiérarchie des objectifs de la Convention

58 Il est presque impossible d'établir une hiérarchisation entre deux objectifs qui plongent leurs racines dans une même préoccupation. En effet, faciliter le retour de l'enfant ou prendre les mesures nécessaires pour empêcher que l'enfant soit déplacé revient en définitive au même. Or, si nous regardons le contenu de l'avant-projet, il est évident que l'aspect que la Commission spéciale a entendu régler en profondeur est celui du retour de l'enfant. Il s'agit évidemment de situations plus urgentes et douloureuses, circons-

[37] Voir, entre autres, Lalive, «Sur l'application de droit public étranger», *Annuaire Suisse de Droit international*, Vol. XXVII, 1971. Miaja de la Muela, «*Derecho público extranjero y tráfico internacional*», *Revista española de Derecho internacional* 1972. Eeck, «*Peremptory Norms and Private International Law*», *Recueil des Cours de l'Académie de droit international* 1973, Vol. II.

[38] Voir, sur ce point, Cour internationale de Justice, Arrêt du 28 novembre 1958, Affaire relative à l'application de la Convention de 1902 pour régler la tutelle des mineurs, *Recueil des Arrêts*, 1958, p. 55 et s.

[39] Voir *supra* No 42.

which, in principle, have a territorial application[37]; so, if it is difficult to imagine a public institution removing, by force or cunning, a child from a foreign country into its own, the characterization of such an action could not justify treatment identical to that of the acts which come under the provisions of the Convention. However, it is possible that a parent whose child has been entrusted to the care of a foreign public institution might assert the application of the Convention with a view to obtaining the effective enjoyment of his custodial rights over that child. In my opinion, seeing that the public institutions, as a rule, exercise their powers regardless of the possible existence of a custody right[38], such a claim could not be included in the scope of application of the Convention; and, as none of the problems mentioned have been discussed by the Special Commission, it would be advisable that the Fourteenth Session of the Conference take a legal stand on such problems.

56 Thirdly, the text of the Draft specifies that the children whose return it seeks to protect are those who have been removed or retained 'in any Contracting State'. Such a precision may be interpreted as meaning that the Contracting States must draw their inspiration from the treaty provisions in order to avoid the possibility of their territories becoming places of refuge for would be 'abductors'. Now, if we relate this definition of the object of the Convention to the draft provision which, in article 4, deals with the scope of application *ratione personae* of such Convention – and, more particularly, when this provision retains as an essential element the child's habitual residence in one of the Contracting States before his wrongful removal – we must come to the conclusion that, without adopting a relevant decision on that score, the Special Commission was fully conscious that, from the nature of things, the system which is envisaged cannot apparently be suitable outside the Contracting States[39].

Sub-paragraph b

57 The other object of the Convention, as set out in this sub-paragraph, seeks to obtain from the Contracting States the widest protection of custody and access rights. In a way, it could reflect the confidence that the Special Commission placed in the protection of those rights as a preventive measure against international child abduction. Nonetheless, this 'avowed' object of the Convention has not been sufficiently developed in the text of the Draft; this may be because the experts preferred to keep out of an area where agreement on factual points of application would no doubt require a new effort at international unification. Thus, except for the general obligations of the States, only article 17 relating to access rights may be seen as following up on this sub-paragraph.

The hierarchy of the objectives of the Convention

58 It is practically impossible to establish a hierarchization between two objects which sink their roots in the same concern. Indeed, to facilitate the return of the child or to take the necessary measures to prevent him from being removed amounts to the same thing. Now, if we look at the content of the Draft, it is obvious that the problem of the child's restitution is the one aspect which the Special Commission intended to deal with in depth. Of course, such a question deals with the more painful and urgent situations,

[37] See, *inter alia*, Lalive, '*Sur l'application de droit public étranger*', *Annuaire Suisse de Droit international*, Vol. XXVII, 1971. Miaja de la Muela, '*Derecho público extranjero y tráfico internacional*', *Revista española de Derecho internacional*, 1972. Eeck, 'Peremptory Norms and Private International Law', *Recueil des Cours de l'Académie de droit international*, 1973, Vol. II.

[38] See, on this point, International Court of Justice, Decree of 28 November 1958, Matter concerning the application of the Convention of 1902 dealing with guardianship, *Reports of Judgments*, 1958, p. 55 ff.

[39] See above No 42.

tance qui justifie leur traitement prioritaire et qui procure en plus sur le plan des principes, une certaine priorité à l'objectif qui recherche le retour de l'enfant. Donc, quoique en théorie les deux objectifs doivent être placés au même niveau, en pratique c'est ce désir d'assurer le retour immédiat de l'enfant déplacé illicitement qui a prévalu dans les travaux de la Commission spéciale.

Article 2

59 A la rigueur, ou pourrait se demander s'il est vraiment utile d'inclure dans la Convention une obligation de portée aussi générale que celle contenue dans l'article 2. En effet, tout Etat, du moment qu'il devient partie à une convention, est obligé de prendre les mesures que ladite convention établit pour atteindre ses objectifs; donc, en ce sens, la disposition n'ajouterait rien aux obligations conventionnelles des Etats. D'autre part, si cette disposition va plus loin et demande aux Etats d'adopter des mesures non prévues dans la Convention, elle pourrait être considérée comme un simple voeu, du moment que, vu son indétermination, il n'y a pas moyen de constater qu'elle sera observée par les Etats. Pourtant, l'idée à la base de cet article a été soutenue par la quasi-unanimité des experts qui, au cours des débats, ont mis en relief quels étaient les buts poursuivis par l'article 2. Il s'agirait, avant tout, d'encourager les Etats contractants à s'inspirer de la Convention pour résoudre les situations similaires à celles dont elle s'occupe, mais qui ne rentrent pas dans son champ d'application (une idée qui prendra un sens spécial, par exemple, quand l'Etat envisagera une modification de sa législation interne en la matière). Deuxièmement, la dernière phrase de l'article soulignerait l'importance accordée à l'utilisation de procédures rapides dans les affaires concernant les droits de garde ou de visite. Au contraire, la Commission spéciale a rejeté expressément l'idée que cette disposition impose aux Etats l'obligation d'adopter dans leur loi interne de nouvelles procédures; donc, on peut soutenir qu'elle se limite à demander aux Etats contractants qu'ils utilisent, dans les litiges concernant la matière objet de la Convention, les procédures les plus rapides connues par son propre droit (d'ailleurs, une obligation semblable, adressée cette fois aux autorités judiciaires ou administratives compétentes, se retrouve dans l'article 10, alinéa premier).

Article 3

60 Malgré l'intérêt de la Commission spéciale pour élaborer une convention axée sur la violation d'une garde effective, il est évident qu'on ne peut parler de violation, du point de vue juridique, que si une telle garde se trouvait protégée, au moins, par l'apparence d'un titre valable. Donc, cet article, dans la mesure où il indique d'après quel système juridique il faut apprécier que la garde violée s'exerçait sous la protection de la loi, constitue une disposition clé de l'avant-projet. Le principe de base est que l'existence de la garde devra être appréciée selon le droit de l'Etat de la résidence habituelle de l'enfant avant son déplacement. Nous ne nous arrêterons pas ici sur le concept de la résidence habituelle; il s'agit, en effet, d'une notion familière à la Conférence de La Haye, où elle est comprise comme notion de pur fait, différente notamment de celle de domicile. Pendant les travaux de la Commission spéciale, le choix en faveur du droit de la résidence habituelle de l'enfant a été à peine contesté. En réalité, les arguments qui ont déterminé qu'on lui accorde un rôle prééminent en son temps en matière de protection des mineurs, comme dans la Convention de La Haye de 1961, n'ont fait que se consolider ultérieurement. D'ailleurs, en ce qui concerne l'aspect concret dont s'occupe la Convention, il faut reconnaître que c'est le droit de l'Etat où se trouve l'enfant – c'est-à-dire, le droit du territoire où s'exerçait la garde – qui est le mieux

an aspect which fully justifies its treatment of priority and which further provides, on the level of principle, a certain priority to the objective of seeking the child's return. So then, in practical terms, the prevailing element in the work of the Special Commission was the desire to secure the immediate return of the abducted child, although on a more theoretical basis both objectives have to be placed on the same level.

Article 2

59 Strictly speaking, we could ask ourselves if it is really necessary to include in the Convention an obligation having such a general scope as that contained in article 2. Indeed, any State, from the time when it becomes a party to a convention, has the duty to take the measures that such a convention provides in order to reach its objectives; so in this connection, the provision would add nothing to the treaty obligations of the States. Moreover, if such a provision goes further and requires from the States that they take measures which are not included in the Convention, it might be viewed as a simple wish provided that, being undetermined, there is no way to control its observance by such States. However, the idea which underlies this article was sustained almost unanimously by the experts who, during the debates, emphasized the objects which it pursues. Above all, the article means that the Contracting States should be encouraged to go by the Convention when they have to deal with situations which are identical to those normally included in such a convention but which, nonetheless, do not enter its scope of application (this idea will take a special meaning when, for example, the State comes to change its internal legislation on the matter). Secondly, the last sentence of the article underlines the importance given to the use of speedy proceedings when dealing with custody or access rights. On the contrary, the Special Commission has quite explicitly rejected the idea that such a provision impose upon the States the obligation to adopt new measures within its internal law. Consequently, we may argue that the Convention simply requires from a Contracting State that it proceed in the quickest way possible under its own laws when dealing with issues on the matters within the objects of the Convention (in fact, a similar obligation, this time imposed upon the competent courts or administrative authorities, appears in article 10, paragraph 1).

Article 3

60 Notwithstanding the concern of the Special Commission to prepare a convention centred on the violation of factual custody, it obviously remains that one can only talk of violation of custody, in legal terms, in the case where such custody has at least the protection of an apparently valid title. In consequence, this article constitutes a key provision of the Draft, in so far as it indicates the judicial system which can determine the exercise of a violated custodial right as being prescribed by law. The basic principle is that the existence of custody rights must be determined in accordance with the national laws of the State where the child had his habitual residence before his removal. However, we will not stop here to define the concept of 'habitual residence'; it is, in fact, a familiar notion of the Hague Conference, where it is understood as a purely factual concept, to be differentiated especially from that of the 'domicile'. During the discussions of the Special Commission, the choice in favour of the law of the child's 'habitual residence' was not challenged. In actual fact, the arguments which prevailed and gave that law at one time a major role in matters of child protection, as was the case with the 1961 Hague Convention, have subsequently received much support. Besides, as far as the concrete aspect of the Convention is concerned, we must recognize that the law of the State where the child lives – in other words, the

placé pour déterminer si la garde violée par un déplacement de l'enfant était protégée par la loi.

61 Quelques mots encore avant d'examiner le contenu de la notion «droit de la résidence habituelle de l'enfant», sur les personnes qui peuvent devenir «sujets passifs» d'un enlèvement d'enfants. Comme nous l'avons souligné plus haut[40], la référence aux institutions publiques figure entre crochets dans l'avant-projet. Pour les raisons exposées ailleurs, nous croyons souhaitable que la Convention inclue dans son champ d'application les éventuels enlèvements réalisés en violation de la garde effectivement exercée par une institution publique. Or, puisque dans la plupart des systèmes juridiques, les institutions publiques ne sont pas titulaires du droit de garde, il serait peut-être préférable de parler de la garde exercée, plutôt que «d'un droit de garde» que, comme nous venons de le dire, normalement les institutions publiques n'auront pas. D'ailleurs, l'adoption d'une telle suggestion ne changerait en rien la nature juridique de la notion de garde, du moment que la même disposition exige par la suite que la garde soit attribuée par un système juridique déterminé.

62 En général, les Conventions de La Haye élaborées à partir de 1955 en matière de loi applicable contiennent des règles de conflit qui soumettent le sujet traité à une loi interne déterminée. Dans ce cas-là, le terme «loi» doit être compris dans son sens le plus large, incluant tant les règles écrites et coutumières que les précisions apportées par leur interprétation jurisprudentielle. Quant à l'adjectif «interne», son utilisation signifie qu'on prétend exclure toute référence aux règles de conflit de la loi désignée. Pourtant, en connaissance de cause, l'avant-projet a abandonné la formule traditionnelle pour parler du «droit de l'Etat de la résidence». L'intention ne peut être que d'élargir davantage l'éventail des dispositions qui doivent être prises en considération dans ce contexte; d'ailleurs, les travaux de la Commission spéciale confirment cette interprétation.
En effet, puisque la Convention ne porte pas sur la loi applicable et que le droit désigné intervient exclusivement pour qualifier comme légitime une garde qui s'exerçait *de facto*, la Commission spéciale n'a pas eu peur du jeu possible du renvoi. Ainsi, elle a rejeté, avec une seule voix en faveur, une proposition tendant à limiter à la loi interne la référence faite dans cet article au droit de la résidence[41]. La solution adoptée implique, par exemple, que le déplacement par son père français d'un enfant naturel ayant sa résidence habituelle en Espagne où il habitait avec sa mère, étant tous les deux aussi de nationalité française, devra être considéré comme illicite au sens de la Convention, d'après la règle de conflit espagnole en matière de garde et quoique l'application de la loi interne espagnole conduise vraisemblablement à une autre solution.

63 Par ailleurs, la protection que la Convention octroie à la garde *ex lege* s'étend en plus aux situations de garde conjointe. Il ne pouvait en être autrement à une époque où les législations internes introduisent progressivement cette modalité de garde des enfants, comme la plus adaptée au principe général de la non-discrimination à raison du sexe. Dans l'optique adoptée par l'avant-projet, cela signifie que le déplacement d'un enfant par un des titulaires de la garde conjointe, sans le consentement de l'autre titulaire, est illicite. Caractère illicite qui proviendrait dans ce cas concret non d'une action contraire à la loi, mais du fait qu'une telle

[40] Voir *supra* No 39.
[41] Procès-verbal No 29.

law of the territory where the custody is exercised – is in a better position to determine whether or not the custody violated by a removal was protected by law.

61 Let us say a few words more, before we approach the content of the notion which relates to the law of the State in which the child was habitually resident, about the persons who are likely to become 'passive subjects' in abduction cases. As we mentioned earlier[40], the reference to public institutions appears within square brackets in the Draft. For the reasons previously given we think that the Convention should include in its scope of application the possibility of a removal being effected in violation of custody rights actually exercised by a public institution. But, seeing that under most legal systems the public institutions are not entitled to the right of custody, it may be more advisable to talk of an 'exercised custody', as opposed to a 'right of custody'; we recall that such a right cannot normally belong to the public institutions. Moreover, the acceptance of this point will change nothing in the legal nature of the custody concept, as the same provision requires subsequently that the custody be granted under a specific legal system.

62 In general, the Hague Conventions prepared since 1955 in regard to applicable law, have contained conflict rules which subject the question under study to a particular internal law. In that event, the term 'law' must be understood in its broadest sense, as including the written and customary rules, as well as such refinements as their judicial interpretations may furnish. As to the adjective 'internal', its use signifies that the intention is to exclude any reference to the conflict-of-law rules of the law designated. However, and on good grounds, the Draft has left out the more traditional formula to replace it by the 'right of the State in which the child was habitually resident'. The intention can only be to further enlarge the range of the provisions which ought to be taken into account in this context. Moreover, the work of the Special Commission confirms this interpretation.
Actually, since the Convention does not deal with the applicable law and since the law designated applies exclusively to characterize as lawful a custody which is exercised *de facto*, the Special Commission has not been afraid of the possible use of *renvoi*. Thus, it rejected, with only one vote in favour, a proposal to limit to the internal law the reference to the law of residence, made in this article[41]. The remedy adopted implies, for example, that the removal by his French father of a child born out of wedlock who normally resides and lives in Spain with his mother – both mother and son being also French nationals – would be regarded by the Convention as wrongful according to the Spanish conflict rule on custody, although the application of the Spanish internal law would probably lead to a different result.

63 Moreover, the protection which the Convention accords to custody *ex lege* extends also to the situations of joint custody. It could not be different at a time when internal legislation is more and more introducing this approach to child custody as the best adapted to the general principle of a non-discrimination with regard to sex. Under the approach taken by the Draft, this means that a child's removal is unlawful, if it is effected by one of the two rightful custodians without the consent of the other; in this factual situation, the removal derives its 'unlawful' nature from the fact that the act ignores the rights of the other

[40] See above No 39.
[41] Summary No 29.

action aurait ignoré les droits de l'autre parent, également protégé par la loi, et aurait interrompu son exercice normal. La véritable nature de la Convention se met plus clairement en relief dans ces situations: elle ne cherche pas à établir à qui appartiendra dans le futur la garde de l'enfant, simplement elle essaie d'éviter qu'une décision ultérieure à cet égard puisse être influencée par un changement des circonstances introduit unilatéralement par une des parties.

64 Selon le texte de l'article 3, le droit de la résidence habituelle de l'enfant doit protéger, en plus du droit de garde qu'un de ses parents possède de plein droit (*ex lege*), l'attribution de la garde octroyée par une décision judiciaire ou administrative. Sur ce point, la proposition contenue dans le Document de travail No 11[42] n'envisageait que les décisions rendues par les tribunaux de l'Etat de la résidence. Cependant, une opinion plus généreuse s'est dégagée rapidement au sein de la Commission spéciale; finalement une telle restriction a été rejetée à l'unanimité[43]. La décision adoptée semble sans doute appropriée, surtout si l'on considère les conséquences pratiques de la proposition initiale; en effet, elle aurait obligé le gardien d'un enfant à obtenir de nouvelles décisions sur la garde dans les divers pays où ils auraient pu résider.

Mais, du moment où la Commission spéciale a admis que toute décision sur la garde doit être considérée comme titre légitime, le fait de savoir si on devait exiger qu'elle soit reconnue dans l'Etat de la résidence a été soulevé. Le problème est complexe. Du point de vue théorique, il est certain que l'incorporation dans un système juridique de décisions étrangères ne se produit qu'après leur reconnaissance, selon des modalités qui varient foncièrement d'un Etat à un autre. Or, dans la pratique, la reconnaissance d'une décision étrangère exigera souvent une procédure longue et onéreuse. Il se peut donc que la personne qui a la garde de l'enfant en vertu d'une décision prononcée dans l'Etat X, si elle s'établit avec l'enfant dans un autre pays, ne songera pas à recommencer un nouveau procès pour obtenir la reconnaissance d'une telle décision dans l'Etat de sa nouvelle résidence habituelle. En réalité, aucun expert n'a soutenu la nécessité que la décision étrangère en cause ait été formellement reconnue dans l'Etat de la résidence; cependant, on avancé l'idée que, tout au moins, il faudrait que la décision soit *susceptible d'être reconnue* dans cet Etat. Mais, puisque la reconnaissance d'une décision étrangère implique l'exercice d'un certain pouvoir discrétionnaire, cette proposition ne peut pas signifier qu'une décision étrangère ne pourra être invoquée, aux fins de la Convention, que s'il existe la certitude qu'elle sera reconnue dans l'Etat de la résidence, puisqu'une telle certitude n'existe qu'au moment où la décision a été formellement reconnue. Ainsi, ce qu'envisageait cette proposition était la nécessité que la décision étrangère présente les caractéristiques exigées par le droit de cet Etat pour pouvoir déclencher une procédure d'homologation ou de reconnaissance. Or, cet aspect se trouve couvert dans la rédaction actuelle de l'article 3 qui exige que la décision de garde soit qualifiée comme telle d'après le droit de l'Etat de la résidence habituelle de l'enfant. En définitive, l'approche adoptée par l'avant-projet sur ce point est que l'existence d'une décision sur la garde de l'enfant, jointe à l'exercice effectif de cette garde, doivent suffire aux autorités tant de l'Etat de la résidence que de l'Etat du refuge pour établir le caractère

[42] «Esquisse d'un avant-projet de convention . . .», No 1*b*, *in fine*.
[43] Procès-verbal No 29.

parent who is also protected by law, and the fact that it has interrupted the normal exercise of that other parent's custody; the removal is not 'unlawful' in terms of the act being contrary to law. The true nature of the Convention comes out more clearly in such cases: it does not seek to establish who will in the future have the custody of the child, but it simply tries to avoid that a later decision on such a matter be influenced by a change of circumstances brought about by only one of the parties concerned.

64 Under the text of article 3, the law of the child's habitual residence must protect, in addition to the custody right normally exercised *ex lege* by one of the parents, the award of custody by a judicial or administrative order. On this point, the clause contained in Working Document No 11[42] envisaged only the decisions rendered by the courts of the State of residence. However, a more generous opinion quickly emerged within the Special Commission; finally, such a restriction has been unanimously rejected[43]. The decision which was adopted seems no doubt appropriate, above all if we think of the practical consequences the initial proposal could have had; indeed, that proposal would have compelled the custodian of a child to apply for new custody decisions in the various countries where they might reside.

Nevertheless, since the Special Commission admitted that any custody order must be regarded as a proper legal title, the question has been raised of knowing whether or not we should insist on its recognition within the State of residence. This is a complex problem. From a theoretical standpoint, it is true that the introduction into a legal system of foreign decisions may only come after their recognition, in accordance with a set of requirements which vary greatly from one State to another; but, in practice, the recognition of a foreign decision will often require lengthy and costly proceedings. It is possible, therefore, that the person who is the rightful custodian, pursuant to an order given in State X, will not contemplate, if he goes to another country with the child, the institution of new proceedings with a view to obtaining the recognition of such an order within the State of his new habitual residence. In actual fact, no one expert has emphasized the need for a valid foreign order to be formally recognized in the State of residence; however, the idea was put forward that, at least, the decision should be *liable to recognition* in such a State. But, since the recognition of a foreign order implies the exercise of a certain discretionary power, this proposal cannot mean that a foreign decision could only be invoked, for the purposes of the Convention, if there is the certainty that such a decision will be recognized in the State of residence, as certainty can only exist at the time of a formal recognition of the decision. So then, what was envisaged by this proposition was the need for the foreign order to present the characteristics required by the law of that State for the purpose of introducing a procedure of *homologation* or recognition. Now, this aspect is covered in the present text of article 3 which insists that such a custody order be characterized as such under the law of the State of the child's habitual residence. In the end, what the approach of the Draft has tried to show here is the fact that the existence of a custody decision relating to the child, combined with the effective exercise of custody, must suffice for both the authorities of the State of habitual residence and those of the State of refuge, for the purpose of establishing the lawful nature of the custody and, con-

[42] 'Sketch of a preliminary draft of a convention . . .', No 1*b*, *in fine*.
[43] Summary No 29.

légitime de la garde et, par conséquent, la nature illicite du déplacement qui l'a interrompu.
D'autre part, l'avant-projet ne contient pas une définition de ce qu'il faut entendre par «décision» dans le contexte de la Convention. L'omission est logique puisqu'on a abandonné la voie des conventions de reconnaissance et d'exécution des décisions étrangères en matière de garde; néanmoins, chaque fois que le terme «décision» est utilisé dans l'avant-projet, il doit être interprété à la lumière de la conclusion provisoirement acquise au cours de la première réunion de la Commission spéciale, d'après laquelle le mot «décision» se réfère à «toute décision ou élément de décision qui porte sur le contrôle effectif de l'enfant ou qui statue sur le droit de visite»[44].

65 Finalement, l'article 3 de l'avant-projet entend que le déplacement est illicite quand il est contraire à un accord «ayant force de loi dans cet Etat». C'est un point qui mérite plusieurs précisions. D'abord, il s'agit de savoir ce qu'est un accord au sens de la Convention. D'après les débats de la Commission spéciale, les accords envisagés sont de simples transactions privées entre parties au sujet de la garde des enfants. Néanmoins, plusieurs experts ont insisté sur la nécessité que la conclusion de tels accords ait lieu en présence d'une autorité publique. Comme voie de compromis, la Commission spéciale est tombée d'accord sur la formule utilisée à l'article 3, que nous avons reproduite ci-dessus entre guillemets. Or, «avoir force de loi» signifie avant tout qu'un accord privé sur la garde des enfants soit possible et puisse servir de base à une prétention juridique devant les autorités compétentes, selon le droit de l'Etat qui doit qualifier la situation; c'est-à-dire, dans le contexte de l'avant-projet, selon le droit de l'Etat de la résidence habituelle de l'enfant. Mais, étant donné le sens large que la notion «droit de l'Etat» a reçu dans ce même article 3, la force de loi des accords pourra être constatée, soit d'après la loi interne de cet Etat, soit d'après la loi désignée par ses règles de conflit. De même, en ce qui concerne la garde attribuée de plein droit, le choix entre les deux branches de l'alternative appartient aux autorités de l'Etat concerné, quoique l'esprit de la Convention semble incliner pour celle qui, dans chaque cas d'espèce, légitime la garde effectivement exercée. D'autre part, l'avant-projet ne précise point les conditions de fond ou de forme que ces accords doivent remplir; elles changeront donc selon la teneur du droit impliqué.

Par ailleurs, pour comprendre les raisons qui ont poussé la Commission spéciale à accepter sans discussion l'extension de la compétence du droit de l'Etat de la résidence à un point étroitement lié aux conceptions de base du régime de la famille, il faut encore insister sur la portée limitée de la Convention. En effet puisque son objet est de protéger les situations effectives et légitimes qui se développent sur le territoire de chaque Etat contractant, il est normal que le droit de cet Etat détermine quelles sont ces situations, avec priorité même sur les éventuelles qualifications différentes de la loi de la nationalité ou du domicile des parties.

L'avant-projet ne parle pas des personnes qui peuvent conclure ces accords. Pourtant, on doit entendre qu'il s'agira nécessairement de personnes physiques (en excluant les institutions publiques) qui prétendent avoir droit à la garde d'un enfant. D'autre part, il semble indispensable que l'ac-

[44] Doc. prél. No 5 *supra*, p. 163, No 5.

sequently, the unlawful nature of the removal which interrupted such relations.
Moreover, the Draft does not contain any definition as to what should be understood by the word 'decision' in the context of the Convention. The omission is logical, since we have ruled out the path of a convention relating to the recognition and enforcement of foreign decisions on custody; nonetheless, every time the term 'decision' is used in the Draft, it must be interpreted in the light of the conclusion provisionally adopted at the first meeting of the Special Commission, which states that the word 'decision' refers to 'every decision or element of a decision relating to the actual control of a child, or to the right of access'[44].

65 Finally, in article 3 of the Draft the removal of a child is understood to be 'wrongful' if it is contrary to an agreement 'having the force of law in that State'. This is a point which requires some explanation. First of all, we need to know what is meant by an 'agreement' in the terms of the Convention. If we refer to the debates of the Special Commission, the contemplated agreements are simple private transactions between parties on child custody. Nonetheless, several experts have insisted on the need for these to be concluded before a public authority. As a compromise, the Special Commission agreed on the formula used in article 3, and which we have reproduced above in inverted commas; however, the phrase 'having the force of law' means, above all, that a private agreement on child custody is possible and may serve as a basis for a legal claim before the competent authorities, in accordance with the law of the State which has to determine the situation – in other words, in the context of the Draft, in accordance with the law of the State in which the child habitually resides. But considering the broad interpretation which was given to the phrase 'law of the State' in this same article 3, the force of law of the agreements may be established, either in accordance with the internal law of that State, or in accordance with the law designated by its conflict rules. In the same way, with regard to the custody granted by operation of law, the choice between the two alternatives belongs to the authorities of the State concerned, although the spirit of the Convention seems to lean towards that which, in each case, favours the custody which is actually exercised. On the other hand, the Draft does not specify the conditions of form or substance, which must be met by these agreements; so, such conditions will change in accordance with the content of the law involved.
Moreover, if we are to understand the reasons which led the Special Commission to accept without discussion an extension of the competence of the law of the State of residence to an aspect which is strongly connected with the basic conceptions of the family, we must again insist on the limited scope of the Convention. Indeed, since the task of the Convention is to protect the factual and lawful situations which develop on the territory of each Contracting State, it seems normal that the law of that State determine which are such situations and, preemptively, even the various possible characterizations of the law of nationality or of residence of the parties.
The Draft does not say anything about the persons who may enter into these agreements. However, we must understand that these include, necessarily, the physical persons (thus excluding public institutions) who claim the right of custody over a child. Furthermore, it seems indispensable that the

[44] Prel. Doc. No 5 *supra*, p. 163, No 5.

cord confie la garde, seule ou conjointement, à la personne dépossédée par le déplacement ou le non-retour illicites de l'enfant. Etant donné que la garde visée par la Convention est celle qui est effectivement exercée, si la personne qui avait la garde est remplacée par un tiers, l'accord conclu par la première ne pourra pas être invoqué par celui-ci. Bien entendu, nous ne voulons pas dire que l'exercice de la garde exige obligatoirement la cohabitation ininterrompue de l'enfant avec son gardien (pensons aux séjours d'études ou de vacances); mais il est nécessaire que ce dernier conserve toujours à sa charge les soins de la personne de l'enfant.

Article 4

66 Comme nous l'avons déjà souligné[45], l'âge limite pour l'application de la Convention est une question qui reste ouverte dans l'avant-projet. Il est vrai qu'une majorité d'experts s'est manifestée en faveur de 16 ans comme âge limite; cependant, les arguments opposés par ceux qui étaient favorables à fixer un âge plus jeune ont amené la Commission spéciale à retenir ce chiffre entre crochets, en attendant qu'une décision définitive à cet égard soit prise au cours de la Quatorzième session de la Conférence. Pourtant, le problème à résoudre par la Conférence de 1980 en ce qui concerne le champ d'application *ratione personae* de la Convention se réduit à la détermination de l'âge, du moment que la Commission spéciale a rejeté, avec une seule voix contre, l'idée d'adopter une définition de l'«enfant» dans la ligne de celle contenue à l'article premier *a* de la Convention du Conseil de l'Europe. La décision acquise semble adéquate, car elle permet une délimitation précise du champ d'application de la Convention, en évitant son conditionnement par la prise en considération de jusqu'à trois lois éventuellement différentes; de plus, elle empêche le danger inhérent à l'approche choisie par la Convention européenne, danger qui consiste dans le fait que les pays dont les législations reconnaissent aux mineurs le droit de fixer leur résidence à un âge comparativement plus jeune, puissent devenir les Etats de refuge, dans certains cas, de déplacements d'enfants.
D'ailleurs, nous devons garder présent à l'esprit que l'âge qui sera finalement retenu dans cet article fixera le champ d'application de toute la Convention, y compris les dispositions sur le droit de visite. En plus, il ne faudrait pas oublier que l'âge de l'enfant, joint à d'autres éléments, est aussi un des facteurs qui peut justifier une décision de l'autorité requise refusant le retour de l'enfant.

67 Quel que soit l'âge finalement retenu à l'article 4, il est nécessaire de déterminer le moment où un tel âge va être déterminant pour interdire l'application ultérieure de la Convention. La question est spécialement complexe en ce qui concerne le retour de l'enfant. Sur ce point, on peut considérer en théorie plusieurs alternatives qui vont depuis l'application de la Convention à tous les déplacements d'enfants qui au moment de la violation de la garde avaient moins de l'âge limite, jusqu'à considérer qu'aucune action ou décision basées sur les dispositions conventionnelles peuvent être adoptées à l'égard d'un enfant qui a atteint cet âge. Enfin, comme solution intermédiaire, on pourrait soutenir l'applicabilité de la Convention aux demandes introduites devant les autorités judiciaires ou administratives quand l'enfant n'avait pas dépassé l'âge limite. Or, en considérant les motifs qui ont conseillé la limitation d'âge

[45] Voir *supra* No 40.

agreement entrust the custody, unilaterally or jointly, to the person who is deprived either by the wrongful removal or the failure to return the child. Considering that the custody which is covered by the Convention is that which is actually exercised, if the custodian is replaced by a third party, the agreement which was concluded by the former person will not be the basis for a claim by the second. Naturally, we do not imply that the exercise of the custody should necessarily require the uninterrupted cohabitation of the child with his custodian (we think of study and holiday sojourns); but the latter must always take responsibility for the care of the child's person.

Article 4

66 As previously mentioned[45], the age limit for the application of the Convention is an open question in the Draft, although most experts have manifested their preference for a maximum age of 16 years. However, the arguments which were put forward by those who favoured a lowering of that age limit led the Special Commission to maintain this figure in square brackets until a final decision is taken during the Fourteenth Session of the Conference. Nevertheless, the problem to be settled at the 1980 Conference, with regard to the scope of application *ratione personae* of the Convention, is limited to the determination of the age limit, since the Special Commission rejected, with only one vote against, the idea of adopting a definition of the 'child' along the lines of article 1*a* of the Convention of the Council of Europe. The decision taken seems adequate, because it allows a specific delimitation of the scope of application of the Convention, avoiding placing conditions on it which would require taking up to three possibly different laws into account. The decision also precludes the danger which is inherent to the approach chosen by the European Convention, a danger which consists in the fact that the countries whose laws recognize to minors under 16 the right to fix their residence, may become States of refuge in certain cases of child removal.

In addition, we must keep in mind that the age which will finally be retained in this article will decide the scope of application of the whole Convention, including the provisions on access rights. Furthermore, we must not forget that the age of the child, combined with other elements, is also one of the various factors which may justify the decision by the addressed authority to refuse the return of the child.

67 Whatever the age finally retained in article 4, we need to determine the time when such an age will prevail for suspending the subsequent application of the Convention. The question has a special complexity when dealing with the child's return. On this point, several alternatives may be envisaged in theory; they go from the application of the Convention to any removal which involves a breach of custody of a child who is under the age limit, to the consideration that no action or decision based on treaty provisions may be adopted with regard to a child who has reached that limit. Finally, as an intermediate remedy, we could insist on the applicability of the Convention to the requests introduced before the courts or administrative authorities, when the child does not exceed the age limit. Now, the Special Commission has chosen the most restrictive option, after considering the motivations which demanded the

[45] See above No 40.

des «mineurs» protégés par la Convention – notamment la conviction qu'à partir d'un certain âge l'enfant a une volonté propre que les parents ou les autorités ne peuvent pas ignorer –, la Commission spéciale a choisi l'option la plus restrictive[46]. En conséquence, la Convention ne sera pas appliquée à un enfant après son (seizième) anniversaire, abstraction faite de l'âge qu'il avait tant au moment de la violation de la garde que quand les autorités judiciaires ou administratives ont été saisies de l'affaire.

68 Une autre restriction du champ d'application *ratione personae* de la Convention apparaît dans l'avant-projet, lorsqu'il exige que la résidence habituelle de l'enfant soit dans un Etat contractant «immédiatement avant toute atteinte aux droits de garde ou de visite». Or, si nous mettons en relation cette précision avec celle qui limite l'objet de la Convention aux situations qui se produisent dans les Etats contractants (article premier), il faut conclure que la Convention essaie simplement de régler les relations entre Etats contractants. En effet, l'idée d'une convention «universaliste» est difficile à soutenir en dehors du contexte des conventions en matière de loi applicable. Cependant, certains experts ont estimé que cette optique réduisait excessivement le champ d'application de la Convention; mais des raisons surtout d'ordre pratique ont décidé la Commission spéciale à adopter le texte de l'avant-projet à une large majorité. Pour appuyer la solution retenue, nous devons rappeler que les systèmes prévus, tant en vue du retour des enfants que pour assurer l'exercice paisible du droit de visite, exigent la coopération des Autorités centrales; une coopération basée sur des droits et des devoirs réciproques. Par ailleurs, quoique la Convention atteigne la plénitude de ses objectifs seulement entre les Etats contractants, rien ne doit empêcher l'Autorité centrale de chacun de ces Etats de s'inspirer des dispositions conventionnelles pour traiter d'autres situations similaires. A notre avis, c'est dans ce sens que l'article 2 examiné ci-dessus doit être compris. Il s'agit donc d'un problème de fond qui ne peut pas être résolu par une clause d'adhésion plus ou moins large, étant donné qu'il existera toujours un Etat non-partie à la Convention.

Article 5

69 En suivant une tradition bien établie de la Conférence de La Haye, l'avant-projet définit uniquement deux notions fondamentales, dont une interprétation incorrecte risquerait de compromettre les objectifs de la Convention.
Pour les besoins de la Convention, l'expression «droit de garde» se réfère seulement au droit portant sur les soins de la personne de l'enfant, sans tenir compte des possibles mécanismes de protection de leurs biens. Il s'agit donc d'une notion plus restreinte que celle de «protection des mineurs»[47]; de plus, dans les cas où il existerait un partage des compétences sur ce point (situation peu habituelle), l'avant-projet précise qu'on doit tenir compte en particulier du droit de décider du lieu de résidence de l'enfant. Par conséquent, chaque fois que le droit de l'Etat de la résidence habituelle de l'enfant – y compris son système de droit international privé –, considère que c'est celui-ci qui peut fixer sa résidence, l'autorité requise pourra, ou bien refuser l'application de la Convention en estimant qu'il n'existe pas de droit de garde à protéger, ou bien – ce qui semble plus proche de l'esprit d'une convention qui prétend protéger les enfants – accorder un rôle décisif à l'opinion de l'enfant

[46] Procès-verbal No 29.
[47] Voir, par exemple, la Convention concernant la compétence des autorités et la loi applicable en matière de protection des mineurs, du 5 octobre 1961.

limitation of those 'minors' who are protected by the Convention – mainly the conviction that from a certain age the child has a will of his own which cannot be ignored by his parents or the authorities[46]. In consequence, the Convention will not apply to a child after his sixteenth birthday, without regard to his age at the time of the breach of custody or at the time of the application before the courts or administrative authorities.

68 Another restriction on the scope of application *ratione personae* of the Convention appears in the Draft, when the latter requires that the child's habitual residence be in a Contracting State 'immediately before any breach of custody or access rights'. Now, if we relate this provision to that which limits the object of the Convention to the situations occurring in the Contracting States (article 1) we must conclude that the Convention simply tries to settle the relations between the Contracting States. Indeed, the idea of a 'universalistic' convention is difficult to sustain outside the context of the conventions in matters of applicable law. However, some experts have estimated that this approach greatly limited the scope of application of the Convention; but reasons of a mainly practical nature persuaded the Special Commission to adopt unanimously the text of the Draft. To support the solution retained, we must recall that the sytems envisaged, which concern the return of children as well as the enforcement of the peaceful exercise of the access right, require the co-operation of the Central Authorities, a co-operation which is based upon reciprocal rights and duties. Moreover, although the Convention only fulfils its objectives between the Contracting States, nothing can prevent the Central Authority of each of those States to draw inspiration from the treaty provisions when dealing with similar situations. In our view, article 2, as studied above, must be understood in this light. Consequently, as there will always be a State which is not a party to the Convention, this is a basic problem that cannot be settled by a more or less broad accession clause.

Article 5

69 By following a well established tradition of the Hague Conference, the Draft only defines two fundamental concepts, and a false interpretation of those concepts could impede the objects of the Convention.
For the requirements of the Convention, the phrase 'rights of custody' refers only to those rights which involve all aspects of the care of the child's person, leaving aside the possible mechanisms for protection with regard to his property. So, it is a more restrictive concept than the one which relates to the 'protection of minors'[47]; furthermore, when there is a sharing of the powers on this point (an unusual situation), the Draft specifies that we must particularly take into account the right to decide on the place of residence of the child. In consequence, whenever the laws of the State of habitual residence of the child, including that State's system of private international law, indicate that the child is able to fix his residence, the addressed authority will have the possibility of either refusing the application of the Convention if the latter considers that there is no custody right to protect, or else – and this is more suited to the spirit of a convention which is intended for the protection of

[46] Summary No 29.
[47] See, for example, the Convention of 5 October 1961 on the powers of authorities and the law applicable in matters of protection of infants.

pour décider sur son retour ou son non-retour.

D'autre part, quoique dans cet article rien ne soit dit sur la possibilité que la garde soit exercée par son titulaire seul ou conjointement, il est évident que l'alternative est envisagée. En effet, une règle classique du droit des traités exige que l'interprétation de ses termes soit faite dans son contexte et en prenant en considération l'objet et le but du traité[48]; or, la teneur de l'article 3 de l'avant-projet ne laisse pas de doutes sur l'inclusion de la garde conjointe parmi les situations que la Convention entend protéger.

70 En réalité, l'avant-projet n'inclut pas une définition du droit de visite. La Commission spéciale a cru préférable de ne pas aborder une tâche qui, en plus de s'avérer difficile, n'était pas essentielle aux fins de la Convention. Donc, la lettre *b* de l'article 5 se limite à signaler que le droit de visite «inclut notamment le droit d'emmener l'enfant, pour une période limitée, dans un lieu autre que celui de sa résidence habituelle». Evidemment l'intention de la Commission spéciale n'a pas été d'exclure toutes les autres modalités du droit de visite; plus simplement elle a voulu souligner que cette notion s'étend aussi au droit dit d'hébergement, manifestation du droit de visite que la personne qui a la garde de l'enfant redoute. De plus, étant donné que cette norme explicative ne qualifie point ce «lieu autre» où l'enfant peut être emmené, il faut conclure que le droit de visite, selon sa conception dans l'avant-projet, inclut également le droit de visite transfrontière. D'ailleurs, cette interprétation n'a pas trouvé d'opposition au sein de la Commission spéciale.
Au contraire, la Commission spéciale a rejeté à une large majorité une proposition tendant à limiter au père et à la mère la possibilité de réclamer un droit de visite. Quant à la possibilité d'introduire une réserve dans le sens de la proposition rejetée, la Commission spéciale ne s'est pas prononcée, la question des réserves ayant été tacitement ajournée. Ainsi, dans le stade actuel des travaux, quoique l'avant-projet n'apporte qu'une seule précision sur la portée du droit de visite, il est acquis que cette notion est utilisée dans son sens le plus large.

CHAPITRE II — AUTORITÉS CENTRALES

Article 6

71 Cette disposition a été déjà longuement commentée[49]. En relation avec la détermination des Etats qui pourront désigner plus d'une Autorité centrale, la question des «Etats régionaux» a été évoquée. Pourtant, l'opinion qui semble avoir prévalu au sein de la Commission spéciale est que l'élément décisif à cet égard est l'existence de plusieurs systèmes de droit en matière de garde, à l'intérieur d'un même Etat. Donc, l'application décentralisée d'un seul système juridique n'autorise pas en principe les Etats à désigner plusieurs Autorités centrales, ce que le texte de l'avant-projet semble contredire par sa référence expresse à un «Etat fédéral».

Article 7

72 Cet article résume quel est le rôle des Autorités centrales dans la mise en oeuvre du système instauré par la Convention. L'article est structuré en deux alinéas, dont le

[48] Dans ce sens, l'article 31, alinéa premier de la Convention de Vienne sur le droit des traités, du 23 mai 1969.
[49] Voir *supra* Nos 26 à 29.

children — giving a decisive importance to the child's opinion for deciding his return or non-return.
On the other hand, although nothing is said in this article on the possibility of the custodial right being exercised, either jointly or unilaterally, by its rightful holder, it is obvious that such an alternative is envisaged. In fact, a traditional rule of treaty law requires that the interpretation of the treaty's terms be made in its context and taking the objects and purpose of the treaty into consideration[48]; now, the content of article 3 of the Draft leaves no doubt as to the inclusion of the joint custody among the situations which the Convention intends to provide and protect.

70 In reality, the Draft does not include a definition of the access right. The Special Commission preferred not to undertake a task which, in addition to being difficult, is also not indispensable to the object of the Convention. So, subparagraph *b* of article 5 simply states that the access right 'includes the right to take a child for a limited period of time to a place other than the child's habitual residence'. It is obvious that the Special Commission did not intend to exclude all the other incidents of the access right; but it simply wanted to emphasize that such a notion also extended to the right to take the child abroad, such a right being, within the access right, a manifestation most dreaded by the rightful custodian. Furthermore, considering that this explanatory rule does not define that 'other place' where the child may be taken, we must conclude that the access right, in accordance with its conception in the Draft, also includes the right of access across borders. Moreover, this interpretation was not challenged within the Special Commission.

On the contrary, the Special Commission rejected, by a large majority, a proposal to limit to the father and mother the possibility of claiming an access right. As to the possibility of introducing a reservation along the lines of the rejected proposal, the Special Commission did not come to any decision, the question of the reservations having been tacitly postponed. So then, in the present stage of the work, we submit that the notion of 'access right' is used in its largest sense, although the Draft gives it only one element of precision.

CHAPTER II — CENTRAL AUTHORITIES

Article 6

71 This provision has already been discussed at length[49]. Having regard to the determination of the States which may designate more than one Central Authority, the question of 'regional States' was raised. However, the opinion which seems to have prevailed within the Special Commission is that the decisive element on this point is the existence, in one State, of several systems of law in matters of custody. So, the decentralized application of a single legal system does not, in principle, authorize the States to designate several Central Authorities, and this seems to be in opposition to the text of the Draft in its specific reference to a 'Federal State'.

Article 7

72 This article sums up the role of the Central Authorities in putting into effect the system set up by the Convention. The article is set out in two paragraphs; while the first one,

[48] See article 31, paragraph 1, of the Vienna Convention on the law of treaties, signed 23 May 1969.
[49] See above Nos 26 to 29.

premier, rédigé en termes généraux, établit une obligation générale de coopération, tandis que le second énumère de la lettre *a* à la lettre *h* quelques-unes des principales fonctions que les Autorités centrales doivent remplir. Tous les deux sont le résultat du compromis entre, d'une part, les experts qui désiraient des Autorités centrales fortes avec d'amples compétences d'action et d'initiative et, d'autre part, les experts qui imaginaient lesdites Autorités comme de simples mécanismes administratifs pour faciliter l'action des parties. Or, puisque ces différentes attitudes reflétaient, pour la plupart, les profondes différences existant entre les systèmes représentés à la Commission spéciale, la solution à retenir devait être souple, de manière à permettre à chaque Autorité centrale d'agir selon le droit dans lequel elle est appelée à s'insérer. C'est dans ce sens qu'il faut interpréter la phrase introductive du second alinéa, spécifiant que les Autorités centrales doivent accomplir les fonctions énumérées, «soit directement, soit par l'intermédiaire d'autres autorités compétentes dans leurs Etats respectifs». En effet, c'est à chaque Autorité centrale de choisir entre l'une ou l'autre alternative, d'après son propre droit interne et à la lumière du devoir général de coopérer que lui impose le premier alinéa. Cette approche respectueuse des droits internes représente une option qui facilitera sans doute l'acceptation par les Etats de la Convention.

73 Comme nous venons de le dire, la norme insérée dans le *premier alinéa* énonce, en termes généraux, l'obligation de coopérer qu'ont les Autorités centrales, en vue d'assurer l'accomplissement des objectifs de la Convention. Une coopération qui doit se développer à deux niveaux: d'abord, les Autorités centrales doivent coopérer entre elles; mais, en plus, elles doivent promouvoir, dans leurs Etats respectifs, la collaboration entre les autorités compétentes dans la matière visée par la Convention.

Le premier niveau de coopération, celui qui se déroule entre les Autorités centrales, n'exige pas de commentaire spécial: cette coopération étant la base même du système prévu par la Convention, elle se concrétise dans d'autres articles de l'avant-projet que nous examinerons par la suite.

Quant à la coopération entre les autorités internes compétentes appartenant à des Etats contractants différents, la Commission spéciale a considéré d'abord la possibilité d'une disposition dans le sens de l'article 11 de la Convention-Notification[50]. Finalement, la Commission spéciale a adopté une proposition de la délégation française clairement inspirée de l'article 3, alinéa premier de la Convention du Conseil de l'Europe[51]. Ainsi, le texte inclus dans l'avant-projet n'abandonne pas au bon vouloir des Etats contractants la recherche de nouvelles voies de coopération; au contraire, cette tâche, en tant qu'obligation des Autorités centrales, est incorporée à la Convention. Cependant, quoiqu'on ait fait des progrès en ce qui concerne la certitude de l'obligation, les chances de sa réalisation effective dépendront dans une large mesure de la capacité d'agir que chaque droit interne accorde aux Autorités centrales.

74 Les fonctions détaillées au *deuxième alinéa* essaient de suivre, à grands traits, les différents moments de l'intervention des Autorités centrales dans un cas type de déplacement d'enfants. Néanmoins, il est évident que l'intervention des Autorités centrales exige que, préalablement, elles aient été saisies, ou bien directement par le demandeur, ou bien par l'Autorité centrale d'un autre Etat contractant. Or, dans

written in general terms, establishes a general obligation of co-operation, the second enumerates from letter *a* to letter *h* a few of the principal functions that are to be fulfilled by the Central Authorities. Both paragraphs are the result of a compromise between, on the one hand, the experts who wanted strong Central Authorities, with great powers of action and initiative and, on the other hand, the experts who viewed such Authorities as simple administrative instruments to facilitate the action of the parties. Now, as these various attitudes reflected, for the most part, the great differences which existed in the legal systems, represented in the Special Commission, the solution to retain had to be flexible, that is to say, able to give each Central Authority the possibility to act in accordance with the law which it may have to apply in the future; and the introductory sentence of the second paragraph must be interpreted in this way, when we read that the Central Authorities must exercise the functions as given subsequently, 'either directly or through other competent authorities in their States'. Indeed, each Central Authority has the task to choose between the first or the second alternative, in accordance with its own internal law, and in the light of its general obligation to co-operate as set out in the first paragraph. This 'respectful' approach to the internal laws constitutes an option which will no doubt facilitate the acceptance of the Convention by the States.

73 As we have just said, the rule inserted in the *first paragraph* articulates, in general terms, the obligation which the Central Authorities have to co-operate, with a view to insuring the fulfilment of the objects of the Convention. Such co-operation must develop on two levels: first of all, the Central Authorities must co-operate among themselves, and, secondly, they must promote the collaboration amongst the authorities in their respective States in the matters covered by the Convention.

The first level of co-operation, that exists between the Central Authorities, does not require a special commentary; as it really forms the basis of the system provided by the Convention, it is further developed in other articles of the Draft, which we shall examine later.

As to co-operation between the internal authorities which belong to different Contracting States, the Special Commission, first of all, considered the possibility of a provision in terms of article 11 of the Convention on Service of Process[50]. Finally, the Special Commission adopted a proposal by the French delegation, a proposal which is clearly inspired by article 3, paragraph 1, of the Convention of the Council of Europe[51]. So then, the text which is included in the Draft does not leave the Contracting States free to follow their own lights when searching for new paths of co-operation; on the contrary, such a task, as constituting an obligation of the Central Authorities, is included in the Convention. However, although some progress has been made respecting the certainty of the obligation, the chances for its effective realization will greatly depend on the capacity to act which every internal law concedes to its Central Authority.

74 The functions detailed in the *second paragraph* try to set out, in broad terms, the different stages of the intervention of the Central Authorities in a typical case of child removal. Nonetheless, it is obvious that the intervention of the Central Authorities requires beforehand that an application be made to them by the applicant or by the Central Authority of another Contracting State. Now, in the second

[50] Convention relative à la signification et la notification à l'étranger des actes judiciaires et extrajudiciaires en matière civile ou commerciale, du 15 novembre 1965.
[51] Procès-verbal No 29.

[50] Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.
[51] Summary No 29.

la seconde hypothèse, l'Autorité centrale initialement saisie de l'affaire (ou Autorité centrale d'origine) devra transmettre la demande à l'Autorité centrale de l'Etat où l'on suppose que l'enfant se trouve; il s'agit d'une obligation qui n'est pas précisée à l'article 7, mais qui est implicite dans tout l'avant-projet. D'autre part, il est aussi évident que les Autorités centrales ne sont pas tenues de remplir, dans chaque cas d'espèce, toutes les obligations énumérées dans cet article; en effet, ce sont les circonstances du cas concret qui vont déterminer les démarches à faire par les Autorités centrales: par exemple, on ne peut pas soutenir qu'une Autorité centrale quelconque est tenue de «localiser» l'enfant quand le demandeur connaît avec exactitude où se trouve celui-ci.

75 En plus de la localisation de l'enfant, chaque fois que cela s'avère nécessaire (lettre *a*), l'Autorité centrale doit prendre ou faire prendre toute mesure provisoire qui semble utile (lettre *b*). Dans ce sous-alinéa – comme à la lettre *d* où l'expression «prendre ou faire prendre» est à nouveau utilisée –, la Commission spéciale a pris en considération un fait souligné auparavant: la capacité d'agir des Autorités centrales peut changer d'un Etat à un autre. Quant au fond, les mesures provisoires qui ont été envisagées par la Commission spéciale sont centrées très particulièrement sur l'idée d'éviter un nouveau déplacement de l'enfant.

76 La lettre *c* porte sur les échanges d'informations relatives à la situation sociale de l'enfant. L'obligation d'échanger de telles informations est subordonnée au critère des Autorités centrales impliquées dans chaque cas d'espèce. En effet, une majorité d'experts a considéré qu'on ne devait pas imposer une obligation rigide sur ce point: la possibilité qu'il n'existe pas d'informations à fournir, ainsi que la peur qu'elles puissent être employées comme un élément d'une tactique dilatoire des parties, sont quelques-uns des arguments soutenus.

77 La lettre *d* consacre le devoir des Autorités centrales d'essayer de trouver une solution extrajudiciaire de l'affaire. En effet, d'après l'expérience évoquée par certains experts, le nombre de cas qu'on peut résoudre sans nécessité de recourir aux tribunaux est considérable. Mais, encore une fois, c'est l'Autorité centrale qui, dans ces étapes qui précèdent une éventuelle procédure judiciaire ou administrative, dirige l'évolution du problème; donc c'est à elle de décider le moment où les tentatives, soit pour assurer la «remise volontaire» de l'enfant, soit pour faciliter une «solution amiable», ont échouées. D'ailleurs, il faut souligner que la Commission spéciale a décidé de retenir ces deux expressions dans l'avant-projet[52], par préférence au terme *concilier*, trop «significatif» dans chaque droit interne[53]; de plus, il faut reconnaître que la remise volontaire de l'enfant et la solution amiable entre les parties sont deux réalités qui ne coïncideront pas nécessairement.

78 L'obligation des Autorités centrales de donner des informations sur le contenu du droit dans leur Etat pour l'application de la Convention apparaît à la lettre *e*. Ce devoir couvre notamment deux aspects: d'un côté, dans le cas où le déplacement s'est produit quand il n'y avait pas de décision sur la garde de l'enfant, l'Autorité centrale pourra produire une sorte de certificat de coutume sur le contenu du droit de l'Etat de la résidence habituelle de l'enfant avant son déplacement; d'un autre côté, l'Autorité centrale devra renseigner les particuliers sur le fonctionnement de la Convention et des Autorités centrales, ainsi que des possibles

[52] Procès-verbal No 20.
[53] Ce terme était utilisé dans le Doc. trav. No 11 au paragraphe 4 *d*.

case, the Central Authority to which the initial application has been made (or Central Authority of origin) will have to pass the request on to the Central Authority of the State where the child is thought to be; such an obligation is not specified in article 7, but it is implicit in the Draft as a whole. Moreover, it is also true that the Central Authorities are not compelled to fulfil, in each case, all the obligations which are set out in this article; in fact, the circumstances of each concrete situation will be the determining factor for the procedures that the Central Authorities must undertake: for example, we cannot say that any Central Authority has the duty to 'locate' a child's whereabouts when the applicant actually knows exactly where these are.

75 In addition to locating the child every time this is needed (sub-paragraph *a*), the Central Authority must take or promote the taking of such provisional measures as may be necessary (sub-paragraph *b*). In this sub-paragraph – as in sub-paragraph *d* where the expression 'take or cause to be taken' is employed – the Special Commission has taken into account a previously mentioned fact, which is that the capacity to act of the Central Authorities may vary from one State to another. In substance, the provisional measures envisaged by the Special Commission centre particularly around the idea of avoiding a new removal of the child.

76 Sub-paragraph *c* deals with the exchange of information relating to the social background of the child. The obligation to exchange such information is subject to the criteria of the Central Authorities which are involved in each case. In fact, a majority of the experts thought that no fixed obligation should be imposed on this point; the possibility that there might be no information to give, as well as the fear that such information might be employed as an element of delaying tactics on the part of the parties concerned, are some of the arguments which were advanced.

77 Sub-paragraph *d* imposes upon the Central Authorities the duty to attempt an extrajudicial solution to the affair. Indeed, according to the experience called forth by some experts, the number of cases likely to find a solution without appeal to the courts is considerable. But once more, in the stages which precede possible legal or administrative proceedings, it is entrusted to the Central Authority to conduct the handling of the problem; it is therefore up to that Authority to decide when attempts have failed in handling the 'voluntary return' of the child or in encouraging an 'amicable resolution' of the issues. Moreover, we must say that the Special Commission decided to retain these two expressions in the Draft[52], in preference to the term 'conciliate', which 'signifies' too much in every internal law[53]; in addition, we must recognize that the voluntary return of the child and the amicable resolution between the parties are two factual situations which will not necessarily concur.

78 The duty which the Central Authorities have to give information on the content of their States' laws, with a view to applying the Convention, appears in sub-paragraph *e*. Among others, that duty covers two aspects: on the one hand, in the case of the removal having taken place in the absence of any custody decree, the Central Authority will produce a kind of customary document on the content of the law of the State of habitual residence of the child before the latter's removal; on the other hand, the individual persons will have to be informed by the Central Authority concerning the operation of the Convention and Central Authori-

[52] Summary No 20.
[53] This term was used in Working Document No 11, paragraph 4 *d*.

procédures à suivre. Ce sous-alinéa reprend au fond une décision déjà prise au cours de la première réunion de la Commission spéciale[54]. La possibilité d'aller plus loin, c'est-à-dire d'obliger les Autorités centrales à donner des conseils juridiques sur des cas concrets, n'a pas été retenue par la Commission spéciale.

79 Quand, pour obtenir le retour de l'enfant, il est nécessaire de faire intervenir les autorités judiciaires ou administratives de l'Etat où il se trouve, l'Autorité centrale de cet Etat doit introduire elle-même – si cela est possible selon son droit interne – ou favoriser l'ouverture d'une procédure (lettre *f*).
Jusque là la disposition se limite à ajouter une nouvelle obligation aux Autorités centrales de suivre la voie tracée par l'avant-projet en vue d'obtenir le retour de l'enfant. Pourtant, la deuxième partie de ce sous-alinéa étend cette obligation au-delà du but de la Convention. En effet, dans sa rédaction actuelle, elle oblige chaque Autorité centrale à agir de façon similaire en relation avec les procédures qui ont pour but «de fixer ou de permettre l'exercice du droit de garde ou du droit de visite». Or, comme nous avons insisté à plusieurs reprises, l'établissement du droit de garde ne se trouve pas parmi les objectifs de la Convention. D'autre part, l'intervention des autorités pour «permettre l'exercice» d'un droit de garde déjà octroyé, s'il n'envisage pas le retour de l'enfant (une situation couverte dans la première partie de ce sous-alinéa), doit se référer à l'obtention de la reconnaissance d'une décision étrangère; mais une telle interprétation serait contraire à une décision prise par la Commission spéciale, en rejetant l'introduction dans l'article 7 d'un alinéa dans ce sens. Quant à l'allusion au droit de visite, on peut se demander si elle est nécessaire en raison de l'article 17.
En résumé, pour maintenir la cohérence de la Convention, il serait souhaitable de supprimer cette partie de la lettre *f*. D'ailleurs, en aucune façon, le silence du texte pourrait être interprété comme interdisant aux Autorités centrales d'assumer d'autres obligations, surtout si elles sont imbues de l'esprit de la Convention[55].

80 Dans les cas où l'Autorité centrale ne peut pas saisir directement les autorités compétentes dans son propre Etat, elle doit accorder ou faciliter l'obtention de l'assistance judiciaire, selon les termes établis à l'article 21 (lettre *g*). En plus de souligner la nécessité d'aligner la rédaction de ce sous-alinéa à celle utilisée à l'article mentionné, nous nous arrêterons très brièvement sur un point: l'expression «le cas échéant» dans ce sous-alinéa fait référence à la carence de ressources économiques de la partie qui demande l'assistance judiciaire dans un cas concret d'après le droit de l'Etat où l'assistance est demandée; donc, elle ne fait pas allusion à des considérations abstraites sur la convenance d'octroyer une telle assistance judiciaire.

81 Finalement, la lettre *h* inclut, parmi les obligations des Autorités centrales, la mise en oeuvre des procédures administratives qui permettraient, dans chaque cas d'espèce, le retour sans danger de l'enfant. Il est difficile de préciser à l'avance quelles peuvent être ces procédures: la documentation relative à l'enfant, le confier à un service d'assistance sociale, l'organisation de son voyage, etc., sont certainement des exemples valables; or puisqu'il était impossible d'établir une relation complète des mesures qui

[54] Procès-verbal No 6.
[55] Procès-verbal No 21.

ties, as well as on all the procedures to be followed. In substance, this sub-paragraph embodies a decision which had already been taken at the first meeting of the Special Commission[54]. The possibility of going further, that is to say, of obliging the Central Authorities to provide legal advice in concrete situations, was not retained by the Special Commission.

79 When, in order to obtain the return of the child, it is necessary to involve the courts or administrative authorities of the State where the child is, the Central Authority of that State must itself initiate – if this is possible under its internal laws – or encourage the institution of proceedings (sub-paragraph *f*).
Up to now, this provision has been limited to the addition of a new obligation of the Central Authorities; these authorities must follow the route set out in the Draft when trying to obtain the return of the child. Nonetheless, the second part of this sub-paragraph extends this obligation beyond the object of the Convention. In fact, in its present drafting, it imposes upon every Central Authority the duty to act in a similar way, in relation to the proceedings which are directed to 'the determination of issues relating to rights of custody and access'. Now, as we have often stated, the determination of a custody right does not appear as an object of the Convention. Moreover, if the exercise of a custody or access right already conferred does not imply the return of the child (see part 1 of this sub-paragraph), the intervention of the authorities for 'determining' such issues must refer to the obtaining of recognition for a foreign order; but this interpretation, by ignoring the relevant introductory paragraph in article 7, would be contrary to a decision of the Special Commission. As to the reference to the access right, we may ask ourselves if it is needed, in view of article 17.

To sum up, in order to maintain the cohesion of the Convention, it would be advisable to omit that part of sub-paragraph *f*. In no case could its omission from the text be interpreted as a means to deny the Central Authorities the right of handling other obligations, particularly if these are in the spirit of the Convention[55].

80 When the Central Authority of one particular State cannot directly make an application to the competent authorities of that State, the Central Authority must provide or facilitate the provision of the legal aid, in the terms of article 21, sub-paragraph *g*. In addition to emphasizing the need for this sub-paragraph to remain in line with the drafting of this article, we will stop briefly on the following point: in this paragraph, and in accordance with the law of the State where legal aid and advice is required, the expression 'where appropriate' refers to the lack of economic resources by the party who requests that aid in a specific situation; therefore, the phrase does not allude to abstract considerations relating to the desirability of granting such aid.

81 Finally, paragraph *h* includes, among the obligations of the Central Authorities, the provision of administrative arrangements which would secure, in each specific case, the safe return of the child. It is difficult to say beforehand what such arrangements may be: providing the documentation relating to the child, entrusting that child to the care of a welfare agency, organizing his journey, etc., are certain valid examples; but, as it was impossible to establish a complete description of the measures which may be indicated in very

[54] Summary No 6.
[55] Summary No 21.

peuvent être indiquées dans des situations très différentes, la Commission spéciale a adopté une formule sciemment vague qui se réfère aux procédures administratives «nécessaires et appropriées».

different situations, the Special Commission adopted consciously a vague formula, which refers to 'necessary and appropriate' administrative arrangements.

CHAPITRE III — RETOUR DE L'ENFANT

Article 8

82 D'après le *premier alinéa*, une demande sur le retour de l'enfant peut être adressée à toute Autorité centrale. La question de savoir s'il fallait restreindre la capacité de choisir du demandeur, notamment en faveur de l'Autorité centrale de l'Etat de la résidence habituelle de l'enfant, a été longuement discutée au cours des deux réunions de la Commission spéciale[56]. Finalement, la solution incluse dans l'avant-projet consacre la liberté du demandeur pour s'adresser à l'Autorité centrale qu'il estime plus adéquate; néanmoins, s'appuyant sur des arguments d'efficacité, une mention expresse de l'Autorité centrale de la résidence habituelle de l'enfant est faite dans le texte — mention qui pourtant ne doit pas être interprétée comme signifiant que les demandes adressées aux autres Autorités centrales devraient être exceptionnelles[57].

83 Ayant décidé que l'utilisation de la formule modèle, annexée à la Convention, ne serait pas obligatoire[58], il était indispensable d'inclure dans le texte de la Convention les éléments que doit contenir une demande introduite devant une Autorité centrale pour être recevable, ainsi que les documents qui, facultativement, peuvent accompagner ou compléter une telle demande.
Les éléments que doit contenir toute demande adressée à une Autorité centrale en vue du retour d'un enfant sont énumérés au *deuxième alinéa* de l'article 8. Il s'agit, notamment, des données qui permettent l'identification de l'enfant et des parties concernées (dont l'une peut être éventuellement une institution publique), ainsi que celles qui peuvent aider à localiser l'enfant (lettres *a*, *b* et *d*). En plus, il faut que la demande contienne «les motifs sur lesquels se base le demandeur pour réclamer le retour de l'enfant» (lettre *c*). C'est une exigence logique qui, d'ailleurs, permet l'application de l'article 23 concernant la faculté qu'ont les Autorités centrales pour rejeter les demandes manifestement non fondées. Or, puisque les motifs invoqués ne peuvent être que l'exercice effectif soit d'une garde *ex lege*, soit d'un droit de garde octroyé par une décision ou reconnu dans un accord ayant force de loi (article 3), la Commission spéciale a discuté sur la nécessité d'y apporter des preuves documentaires. Le point a été traité en profondeur et il a été décidé, par 17 voix[59], que les copies des décisions ou des accords existants sur la garde de l'enfant, ainsi que les attestations ou déclarations sous affirmation sur la teneur du droit de la résidence habituelle de l'enfant, seraient mieux placées parmi les documents qui, de façon facultative, peuvent accompagner ou compléter la demande[60]. En effet, parfois, l'obtention de tels documents sera difficile; en plus, elle peut exiger un temps précieux pour une rapide localisation de l'enfant. D'ailleurs, chaque fois que l'Autorité centrale réussit à obtenir la remise volontaire de l'enfant ou une solution amiable de l'affaire, les documents en question peuvent être accessoires.

CHAPTER III — RETURN OF CHILDREN

Article 8

82 Under the *first paragraph*, an application concerning the child's return may be made to any Central Authority. The question of whether or not the ability of the applicant to choose should be restricted, in order particularly to favour the Central Authority of the State of habitual residence of the child, was discussed in length at the two meetings of the Special Commission[56]. Finally, the solution embodied in the Draft gives freedom to the applicant to make his request to the Central Authority which seems most adequate to him; nonetheless, in arguing for efficiency, a clear reference to the Central Authority of the State of habitual residence of the child is made in the text — a mention which must not, however, be interpreted as meaning that applications made to other Central Authorities should remain exceptionally[57].

83 Having decided that the use of a model form, appended to the Convention, would not have the nature of an obligation[58], it had become indispensable to include in the text of the Convention the elements which must be contained in any application addressed to a Central Authority for admissibility, and also the documents which might or might not accompany or complete such an application.
The elements which must be contained in any application addressed to a Central Authority for the return of a child are set out in the *second paragraph* of article 8. They are, in the main, all the particulars for the identification of the child and of the parties concerned (one of these might be a public institution), as well as the information likely to help in finding the child (sub-paragraphs *a*, *b* and *d*). In addition, the application must contain 'the grounds on which the applicant's claim for return of the child is based' (sub-paragraph *c*). This is a logical requirement which also allows the application of article 23 respecting the option which the Central Authorities have to reject claims which are clearly not justified. Now, as the grounds which are relied on may only be the actual exercise either of custody *ex lege* or a custody right granted by decree or recognized in an agreement having force of law (article 3), the Special Commission discussed the need to submit documentary evidence. The point was dealt with in detail and it was decided, by 17 votes in favour[59], that copies of the orders or of the existing agreements on child custody, as well as the sworn testimonials or sworn declarations respecting the content of the law of the State of the child's habitual residence, would be best placed among the documents which as an optional matter, may or may not accompany or complete the claim[60]. In fact, it will sometimes be difficult to obtain such documents; and, what is more, this difficulty may take much valuable time away from a speedy search for the child's whereabouts. Moreover, whenever the Central Authority succeeds in getting the voluntary return of the child or an amicable resolution of the matter, the documents referred to may become less important.

[56] Procès-verbaux Nos 12, 13 et 21.
[57] Une proposition dans ce sens a été rejetée par 13 voix contre 7. Voir Procès-verbal No 21, p. 2.
[58] Voir *supra* No 32.
[59] La décision a été prise le 7 novembre 1979.
[60] Une proposition contenue au Doc. trav. No 48 qui revenait sur la décision antérieure a été rejetée par 10 voix contre 8. Voir Procès-verbal No 30, p. 1.

[56] Summaries Nos 12, 13 and 21.
[57] A proposal along these lines was rejected by 13 votes against 7. See Summary No 21, p. 4.
[58] See above No 32.
[59] The decision was taken on 7 November 1979.
[60] A proposal contained in Working Document No 48, which would have set aside the previous decision, was rejected by 10 votes to 8. See Summary No 30, p. 3.

84 Par conséquent, les deux premières lettres du *troisième alinéa* concernant la documentation facultative qui peut accompagner, ou compléter à un moment ultérieur, la demande, se réfèrent aux documents pour réclamer le retour de l'enfant. Une proposition a été introduite devant la Commission spéciale[61] sur la possibilité que les Autorités compétentes de l'Etat requis puissent exiger la production d'une copie de la décision qui accordait la garde au demandeur, avant d'ordonner le retour de l'enfant. Le point n'a pas été discuté ni mis au vote; néanmoins, il semble qu'une telle idée s'accorde parfaitement avec la disposition contenue dans l'article 14 de l'avant-projet. Deuxièmement, en relation avec le problème soulevé par la détermination de qui peut produire une attestation ou une déclaration sous affirmation sur le contenu du droit de l'Etat de la résidence habituelle de l'enfant, la Commission spéciale s'est prononcée en faveur d'une formule large (lettre *f*). Ainsi, en plus des Autorités compétentes de cet Etat, un tel document peut être produit par toute personne qualifiée, – par exemple, un notaire, un avocat ou des institutions scientifiques.

D'autre part, la Commission spéciale a admis la possibilité que la demande soit accompagnée ou complétée par «tout autre document utile» (lettre *g*). Or, étant donné que la demande est introduite par la personne (ou institution) qui prétend que la garde qu'elle exerçait a été violée, ces documents complémentaires doivent être également apportés par le demandeur. Ce qui n'empêche pas que, si la demande est ultérieurement transmise à une autre Autorité centrale, l'Autorité centrale initialement saisie accompagnera la demande notamment des informations relatives à la situation sociale de l'enfant – si elle en dispose –, d'après l'obligation que l'article 7, alinéa 2 *c*, lui impose.

Article 9

85 Comme nous l'avons remarqué auparavant[62], parmi les fonctions des Autorités centrales figure celle de prendre ou faire prendre toute mesure propre à mettre d'accord les parties sur les termes d'une solution; un tel accord étant décisif, même dans les systèmes juridiques qui exigent sa ratification judiciaire ultérieure. Cette disposition, qui s'inspire d'une proposition de la délégation française[63], situe dans le temps le moment où l'Autorité centrale doit remplir ladite obligation, en attirant l'attention des Autorités centrales sur les avantages d'une remise volontaire de l'enfant. Or, il ne s'agit pas d'une obligation rigide: d'une part les efforts dans la recherche d'un accord peuvent se poursuivre après avoir saisi les autorités judiciaires ou administratives; d'autre part, c'est l'Autorité centrale qui doit décider si les tentatives en vue de la remise volontaire ont échouées.

86 D'ailleurs, quoique dans la structure de l'avant-projet, les démarches pour obtenir le retour volontaire de l'enfant puissent s'interpréter comme absolument prioritaires, la Commission spéciale a accepté à l'unanimité qu'elles ne préjugeront pas de l'action des Autorités centrales pour prendre ou faire prendre des mesures provisoires, notamment pour empêcher un nouveau déplacement de l'enfant[64]. Par conséquent le remaniement du texte de l'article serait peut-être convenable, afin qu'il reflète mieux le rôle qu'il doit jouer dans le système général de la Convention.

84 In consequence, the first two parts of the *third paragraph*, concerning the optional documentation which may accompany or subsequently complete the application, refer to the documents which call for the return of the child. A proposal was introduced before the Special Commission[61] on the possibility that the competent authorities of the State addressed may require, before ordering the return of the child, a copy of the decision which gave the custody to the applicant. The point was neither discussed nor voted on; nevertheless, it seems that such an idea agrees perfectly with the provision contained in article 14 of the Draft. Secondly, with regard to the problem arising out of the determination of the person who may issue a certificate or a sworn declaration on the content of the law of the State of the child's habitual residence, the Special Commission manifested itself in favour of an extended formula (paragraph *f*). So then, in addition to the Central Authorities, such a document may also be produced by any qualified person, for example a notary, a lawyer or a research institution.

Moreover, the Special Commission accepted the possibility that the application might be accompanied or supplemented by 'any other relevant document' (sub-paragraph *g*). Now, as the application is introduced by the person (or institution) who claims that his rightful custody has been violated, these supplementary documents must also be brought in by the applicant. But in the case of the application having been sent to another Central Authority, the Central Authority which received the initial request will still be able to support that request with all the information respecting the social background of the child, if it has such information, in accordance with the obligation which article 7, paragraph 2 *c*, imposes upon it.

Article 9

85 As we noted earlier[62], among the duties of the Central Authorities is comprised that of taking or causing to be taken all appropriate measures for bringing the parties to agree on the terms of a solution; moreover, such an agreement is decisive even within the legal systems which require that it be subsequently ratified by a court. This provision, which was inspired by a proposal of the French delegation[63], while drawing the attention of the Central Authorities to the advantages of a voluntary return of the child, indicates the time when the Central Authority has to fulfil the said obligation. But, we are not dealing with an inflexible obligation: on the one hand, even after the application has been made to the courts or administrative authorities, we may endeavour to look for agreement; on the other hand, it is up to the Central Authority to determine whether or not the attempts at voluntary restitution have failed.

86 Moreover, although the operations directed to obtaining a voluntary return of the child may, in the Draft, be interpreted as having absolute priority, the Special Commission accepted unanimously that these will not foreclose action by the Central Authorities to take or cause provisional measures to be taken, particularly with a view to preventing any new removal of the child[64]. In consequence, a restructuring of the text of the article may be advisable if the said article is to better reflect the role which it is to play in the general system of the Convention.

[61] Doc. trav. No 51, *Proposal of the Norwegian and Finnish delegations.*
[62] Voir *supra* No 77.
[63] Doc. trav. No 12, article 5 (1).
[64] Procès-verbal No 30, p. 2.

[61] Working Document No 51, Proposal of the Norwegian and Finnish delegations.
[62] See above No 77.
[63] Working Document No 12, article 5, paragraph 1.
[64] Summary No 30, p. 4.

Article 10

87 L'importance du facteur temps dans toute la matière apparaît de nouveau dans cet article. Si l'article 2 de l'avant-projet impose aux Etats contractants l'obligation d'utiliser des procédures d'urgence, le premier alinéa de l'article 10 reproduit cette obligation à l'égard des autorités judiciaires ou administratives de l'Etat où l'enfant a été emmené et qui doivent statuer sur la remise de celui-ci. L'obligation considérée a un double aspect: d'une part, l'utilisation des procédures les plus rapides connues par leur système juridique; d'autre part, le traitement préférentiel des demandes visées, dans toute la mesure du possible.

88 Par ailleurs, dans son désir de pousser les autorités internes à accorder une priorité maximum aux problèmes soulevés par les déplacements internationaux d'enfants, certains experts auraient voulu introduire dans le texte un délai pendant lequel les autorités compétentes devraient se prononcer et après lequel la garde serait rétablie d'office[65]. Or, une telle proposition, étant inconciliable avec le droit de la plupart des Etats membres de la Conférence, a été rapidement abandonnée. Par la suite, la Commission spéciale a adopté la solution de compromis qui figure dans le *deuxième alinéa*[66]. Dans cette disposition il existe certainement un délai (six semaines), mais il n'a pas un caractère impératif. S'il n'est pas respecté, l'Autorité centrale de l'Etat requis a seulement l'obligation d'informer, tant le demandeur que l'Autorité centrale de l'Etat requérant, de l'absence de décision et des motifs du retard dans son adoption.
Finalement, la dernière phrase de cet article doit être lue en relation avec la faculté reconnue au demandeur, dans l'article 25, de saisir directement les Autorités compétentes de l'Etat requis; en effet, on ne peut pas imposer à l'Autorité centrale de cet Etat une obligation à l'égard de demandes dont elle ignore l'existence.

Articles 11 et 15

89 Ces deux articles doivent être examinés ensemble étant donné leur caractère complémentaire.
La détermination de la période pendant laquelle les autorités judiciaires ou administratives de l'Etat où se trouve l'enfant doivent ordonner son retour immédiat a préoccupé fortement la Commission spéciale. En effet, si le retour est envisagé dans l'optique de l'intérêt de l'enfant, il est certain que, l'enfant étant intégré dans un nouveau milieu social, son retour ne devrait se produire qu'après un examen du fond du droit de garde – ce qui nous placerait au dehors de l'objectif de la Convention qui cherche à assurer un retour immédiat qui ne préjuge pas le fond de la garde. Or, il ne semble pas possible de traduire le critère de l'intégration de l'enfant dans une norme objective; donc, la Commission spéciale s'est décidée pour la recherche d'un délai qui sera toujours arbitraire, mais qui peut constituer la «moins mauvaise» réponse à son souci sur ce point[67]. Dans cette tâche, la Commission spéciale a dû affronter une pluralité de problèmes: *primo*, quelle doit être la durée du délai; *secundo*, le moment à partir duquel commence le délai; *tertio*, le moment d'expiration du délai; finalement, la Commission spéciale a dû prendre position sur l'applicabilité de la Convention après avoir dépassé ce délai.

[65] Ainsi Doc. trav. No 12, article 7 (3).
[66] Procès-verbal No 25, p. 2.
[67] La nécessité d'un délai dans ce contexte a été décidée par 13 voix contre 3 (Procès-verbal No 25).

Article 10

87 The importance of the time factor in all this appears again in this article. While article 2 of the Draft imposes upon the Contracting States the obligation to use emergency procedures, the first paragraph of article 10 reproduces this obligation with regard to the courts or administrative authorities of the State to which the child has been removed, who must decide on the restitution of the child. The duty in question has a two-fold aspect: on the one hand, it concerns the use of the speediest procedures which exist in their legal system, and, on the other, it deals, as far as possible, with the priority handling of the relevant applications.

88 Furthermore, in their desire to make the internal authorities give full priority to the problems which derive from the international abduction of children, some experts expressed the wish to introduce into the text a time-limit for the decisions of the competent authorities; and, after the limit was passed, the custody might be automatically restored[65]. Now, this proposal was soon abandoned, as it was incompatible with the laws of most Member States of the Conference. Subsequently, the Special Commission adopted a compromise solution, which appears in the *second paragraph*[66]. In this provision, there is certainly a time-limit (six weeks), but such time-limit is not mandatory. If it is not met, the Central Authority of the State addressed has only the duty to inform both the applicant and the Central Authority of the requesting State, of the absence of any decision and of the reasons for the delay in its adoption.

Finally, the last sentence of this article must be read in connection with the option, which is given to the applicant in article 25, of applying directly to the competent authorities of the State addressed; indeed, one cannot impose upon the Central Authority of that State an obligation with respect to applications, the existence of which is unknown to it.

Articles 11 and 15

89 These two articles must be jointly examined, as they are complementary.
The determination of the time period in which the courts or administrative authorities of the State where the child is must order his return forthwith, greatly concerned the Special Commission. In fact, if the return is looked at from the point of view of the child's interests, when the child is well integrated in his new social environment, his return should not take place before the custody rights have been examined on the merits – which would fall outside the object of the Convention, which seek to ensure an immediate return without prejudging the custody on the merits. Now, it does not seem possible to express the criterion of the child's integration in an objective rule; therefore, the Special Commission opted for a time period which will always be of an arbitrary nature but which may answer its worries on that score in the 'least detrimental' possible way[67]. In this task, the Special Commission had to face various problems: *first of all*, the length of the delay; *secondly*, its starting point; *thirdly*, its termination point; *finally*, the Special Commission had to decide on the applicability of the Convention when such a time period has expired.

[65] Working Document No 12, article 7 (3).
[66] Summary No 25, p. 4.
[67] The need for a time-limit in this context was decided on by 13 votes against 3 (Summary No 25).

90 Le premier point a été résolu par la Commission spéciale en le mettant en relation avec le second; en effet, le problème principal que soulève un délai rigide est le fait qu'il doit être appliqué à des situations différentes (notamment en raison des difficultés rencontrées par le parent dépossédé pour localiser l'enfant). Finalement, la Commission spéciale a retenu les deux délais qui figurent à l'article 11: le premier, de six mois, vise les cas dans lesquels le demandeur connaissait l'endroit où se trouvait l'enfant; le second, d'une durée *maximum* d'un an, se réfère aux situations dans lesquelles le lieu où était l'enfant n'était pas connu[68].

91 Quant à savoir *quand* s'est produite une violation du droit de garde – au sens de l'article 3 –, il faut entendre, dans le cas du non-retour d'un enfant, que la date décisive est celle à laquelle l'enfant aurait dû être remis au gardien; ou la date à laquelle le titulaire de la garde refuse son consentement à une prolongation du séjour de l'enfant dans un autre lieu que celui de sa résidence habituelle.

En ce qui concerne le *terminus ad quem*, la Commission spéciale a préféré retenir le moment de l'introduction de la demande, plutôt que la date de la décision[69], en estimant que le possible retard dans l'action des autorités compétentes ne doit pas nuire aux intérêts protégés par la Convention.

92 En dernier lieu, le problème de l'applicabilité de la Convention après les délais consacrés à l'article 11 s'est posé justement en relation avec le retour de l'enfant; en effet, il était clair que le reste des dispositions conventionnelles (par exemple en matière de droit de visite) serait applicable ultérieurement[70]. La question a reçu successivement deux solutions partiellement différentes. D'après la première[71], les autorités judiciaires ou administratives «pourraient» décider le retour «immédiat» de l'enfant lorsqu'elles estiment que l'enfant n'était pas intégré dans un nouveau milieu social. La seconde solution est celle prévue à l'article 15 de l'avant-projet[72]. La portée pratique d'une telle disposition est sans doute légère, étant donné que la possibilité d'ordonner le retour de l'enfant, après un examen du fond de l'affaire, existe toujours, même en l'absence de convention; mais, puisque certains experts ont considéré que son inclusion était nécessaire afin de permettre que les propres autorités internes agissent dans ce sens, la Commission spéciale a adopté le texte à une large majorité[73].

Article 12

93 Comme nous l'avons souvent souligné, la Convention cherche à combattre les déplacements illicites d'enfants, en favorisant le rétablissement immédiat du *statu quo* antérieur. Or, la Commission spéciale ne pouvait pas ignorer qu'il y a des circonstances dans lesquelles le retour de l'enfant peut ne pas être une solution adéquate. Pour couvrir ces cas, l'avant-projet prévoit dans cet article quelques exceptions à l'obligation générale de rétablir la garde, fixée à l'article 11.

94 Dans le *premier alinéa*, les faits qui constituent le fondement des deux exceptions visées, doivent être établis par la personne qui a déplacé ou retenu l'enfant[74], c'est-à-dire, par la personne qui s'oppose à la demande de restitution de l'enfant. En réalité, la solution retenue se limite à

90 The Special Commission has settled the first point by relating it to the second; indeed, the main problem which is raised by a fixed time-limit is the fact that it must apply to different situations (particularly where the deprived parent has met much difficulty in locating the child). Finally, the Special Commission adopted the two time-limits which appear in article 11: in the case of the first, of six months, the applicant knew where the child was; in the case of the second, with a *maximum* period of one year, the child's whereabouts were unknown[68].

91 If we wish to know the time *when* the custodial right has been violated – under the terms of article 3 – it must be understood that, in the case of the non-return of a child, the decisive date is that at which the child should have been restored to his rightful custodian, or the date on which such rightful custodian has refused to consent to an extension of the child's sojourn in a place other than that of his habitual residence.

With regard to the *terminus ad quem*, the Special Commission has preferred to adopt the moment when the application was introduced, rather than the date of the decision[69], considering that the possible delay in the action of the competent authorities must not be prejudicial to the interests which are protected by the Convention.

92 In the end, the problem of the applicability of the Convention, following the expiration of the time-limits set out in article 11, came to light precisely in relation to the return of the child; in fact, it was clear that the remaining treaty provisions (for example those on access rights) would apply subsequently[70]. The question has received two partly different solutions, one after the other. In accordance with the first one[71], the courts or administrative authorities 'could' decide on the 'immediate' return of the child if they thought that the latter was not integrated in his new social environment. The second solution is that provided in article 15 of the Draft[72]. The practical importance of such a provision is undoubtedly limited, considering that there is always, even in the absence of a convention, the possibility of prescribing the child's return, after the affair has been examined on its merits; but, since some experts thought that its inclusion was necessary for the relevant internal authorities to act in that way, the Special Commission adopted the text with a large majority[73].

Article 12

93 As we have often stressed, the Convention tries to battle against the abduction of children by encouraging and facilitating the prompt restoration of the situation which existed before the removal. However, the Special Commission could not ignore the existence of circumstances in which the return of the child may not be an adequate remedy. To cover these cases, the Draft provides, in this article, several exceptions to the general obligation which requires the restoration of custody and which appears in article 11.

94 In the *first paragraph*, the facts which constitute the basis for the said exceptions must be established by the person who has removed or retained the child[74], that is to say, by the person who resists the claim for the return of the child. In fact, the solution which was adopted is limited to

[68] Le texte de l'avant-projet suit le Doc. trav. No 20, tel qu'il a été amendé en séance (Procès-verbal No 25).
[69] Procès-verbal No 31, p. 1 et 2.
[70] Procès-verbal No 24.
[71] Voir article 16 du Doc. trav. No 37, Proposition du Comité de rédaction.
[72] Doc. trav. No 50, *Proposal of the United States delegation*.
[73] Procès-verbal No 32, p. 2.
[74] Voir Procès-verbal No 25, p. 2.

[68] The text of the Draft follows Working Document No 20, such as it was modified in session (Summary No 25).
[69] Summary No 31, pp. 3 and 4.
[70] Summary No 24.
[71] See article 16 of Working Document No 37, Proposal of the Drafting Committee.
[72] Working Document No 50, Proposal of the United States delegation.
[73] Summary No 32, p. 4.
[74] See Summary No 25, p. 4.

concrétiser une maxime générale de droit, selon laquelle celui qui invoque un fait (ou un droit) doit le prouver.

95 L'exception retenue à la lettre *a* est établie en raison de la conduite du demandeur. Il s'agit des cas où, à l'époque de la violation invoquée, ledit demandeur n'exerçait pas effectivement ou de bonne foi la garde qu'il prétend maintenant «récupérer».

L'expression garde «effective» ici, comme dans tout l'avant-projet, doit être interprétée en relation avec la définition du droit de garde donnée à l'article 5. Donc, il y a garde effective quand le gardien s'occupe des soins de la personne de l'enfant, même si pour des raisons plausibles, dans chaque cas concret, enfant et gardien n'habitent pas ensemble. Il s'ensuit que la détermination du caractère effectif ou non d'une garde doit être établie d'après les circonstances qui entourent chaque cas d'espèce.

96 La même conclusion s'impose en ce qui concerne la constatation de l'exercice de «bonne foi» d'un droit de garde. Le principe de bonne foi est un principe général du droit consacré dans la plupart des systèmes juridiques et dans le droit international (voir, par exemple, l'article 2, alinéa 2 de la Charte des Nations Unies). Nous ne pouvons pas examiner ici en profondeur un sujet complexe et l'aborder dans ce Rapport. Par conséquent, nous nous limiterons à signaler que, dans son sens objectif, le principe de la bonne foi exige des comportements conformes à des critères éthiques généralement admis; au contraire, une conduite devra être considérée comme étant de «mauvaise foi» quand elle est *morally impeachable or anomalous and unreasonable*[75]. Donc, dans le contexte de cet article, l'invocation de la bonne foi cherche à réduire les conséquences juridiques d'une garde qui, quoique effective, se basait sur un comportement contraire aux buts de l'institution.

97 La portée de l'exception consacrée à la lettre *b* a été assez clairement établie au cours des débats de la Commission spéciale. En effet, quoique les notions de «risque grave», «danger psychique» ou «situation intolérable» peuvent être interprétés très différemment, les votes effectués permettent de déduire quel était le point de vue majoritairement soutenu par la Commission spéciale à leur égard. Ainsi le *risque grave* désigne un risque sérieux objectivement constatable, mais n'inclut pas l'idée de risque «immédiat», cette dernière interprétation ayant été finalement rejetée[76]. Quant au *danger psychique* la Commission spéciale a entendu qu'il couvre tant le danger psychologique qu'un certain aspect du danger moral, mais elle a évité sciemment cette dernière expression trop large qui pourrait même être interprétée comme englobant les convictions religieuses. En relation avec ce qu'on doit entendre par *situation intolérable*, la Commission spéciale a envisagé une situation objective; en effet une proposition tendant à remplacer le mot «intolérable» par «inacceptable» a été rejetée, en raison du fait que ce dernier mot inclut un élément d'appréciation subjective qu'on voulait éviter[77]. Par ailleurs, la Commission spéciale a estimé que cette exception ne pourrait pas être invoquée si on considère que le retour de l'enfant peut nuire à ses perspectives économiques ou d'éducation.

98 Il convient encore de souligner que la Commission spéciale a rejeté d'autres exceptions possibles au retour de l'enfant. D'abord, il s'agissait d'exceptions qui – étant

[75] Wolff, *Private International Law* 1950, p. 419. Voir également, De Los Mozos, *El principio de la buena fe*, Barcelona 1965. *Studi sulla buona fede*, Milan 1975. Commentaire de Montes à l'article 7, 1° du Code civil espagnol («Les droits devront être exercés en conformité avec les exigences de la bonne foi») dans *Comentarios a las reformas del Código Civil*, Madrid 1977, p. 356 et s.
[76] Procès-verbal No 26, p. 2.
[77] Procès-verbal No 31, p. 3.

putting into a concrete form a general legal maxim, which says that the person who claims a fact (or a right) must prove it.

95 The exception which appears in sub-paragraph *a* is established on the basis of the applicant's conduct; we are dealing here with the case when, at the time of the violation referred to, the said applicant was not actually exercising the custody which he now claims to regain or acting in good faith.
Here, the expression 'actual' custody, as in the whole of the Draft, must be interpreted in relation to the definition of custody rights given in article 5. Consequently, there is an actual custody when the custodian cares for the needs of the child's person, even if, for acceptable reasons in a concrete case, the child and the custodian do not live under the same roof. It follows that the determination of the actual or non-actual nature of custody must be established out of the circumstances which make up each specific situation.

96 The same conclusion applies with regard to the 'good faith' exercise of a custody right. The principle of good faith is a general one, accepted in most legal systems and in international law (see, for example, article 2, paragraph 2 of the United Nations Charter). We cannot here deal at length with a subject which is too complex for this Report. So, we shall simply mention that, in its objective sense, the good faith principle requires behaviour which comports with generally accepted ethical criteria; on the contrary, a line of conduct will be considered to be in bad faith when it is 'morally impeachable or anomalous and unreasonable'[75]. Consequently, in the context of this article, the invocation of the good faith principle seeks to limit the legal consequences of a custody which, although it was actual, relied on a behavioural element that was contrary to the object of the institution.

97 The scope of the exception expressed in sub-paragraph *b* was sufficiently explained in the debates of the Special Commission. In fact although the concepts 'substantial risk', 'psychological harm' or 'intolerable situation' may be interpreted in entirely different ways, the votes on this permitted to find out the majority views within the Special Commission. So then, the *substantial risk* designates a serious risk which may be objectively verified, but it does not comprise the idea of 'immediate' risk; this latter interpretation was in the end discarded[76]. As to *psychological harm*, the Special Commission intended it to cover both the mental harm and a certain aspect of the moral harm, but it has knowingly avoided the latter expression which is too vague and which could even be interpreted as encompassing religious convictions. Having regard to what must be understood by an *intolerable situation*, the Special Commission had in mind an objective case; a proposal to replace the word 'intolerable' by 'unacceptable' was rejected because this latter word comprises an element of subjective evaluation which had to be avoided[77]. Moreover, the Special Commission thought that the exception would not apply if the child's return was thought to be prejudicial to his economic or educational future.

98 We should also mention that the Special Commission rejected other possible exceptions to the return of the child. First of all, they were exceptions which, suited to the con-

[75] Wolff, *Private International Law*, 1950, p. 419. See also, De Los Mozos, *El principio de la buena fe*, Barcelona, 1965. *Studi sulla buona fede*, Milan 1975. Montes' Commentary on article 7, 1° of the Spanish Common Law ('Rights must be exercised in compliance with the requirements of good faith'), in *Comentarios a las reformas del Código Civil*, Madrid 1977, p. 356 ff.
[76] Summary No 26, p. 4.
[77] Summary No 31, p. 6.

propres à des conventions sur la reconnaissance des décisions – étaient déplacées dans une convention du type envisagé. Parmi elles, il faut mentionner les propositions suivantes non adoptées: l'incompatibilité de la demande de retour avec une décision antérieure, concernant la garde de l'enfant, rendue dans l'Etat requis[78]; la décision invoquée par le demandeur aurait été rendue par une juridiction autre que celle de la résidence habituelle de l'enfant à l'époque[79]; la décision en question aurait été rendue au cours d'une procédure dans laquelle une personne n'a pas été en mesure de faire valoir ses droits[80]. D'autre part, une proposition tendant à consacrer, en tant qu'exception au retour de l'enfant, le changement des circonstances depuis la date de la décision, n'a eu que deux voix pour[81].

99 Finalement, nous devons mettre en relief l'existence de plusieurs propositions qui ont cherché à introduire dans la Convention une clause d'ordre public, soit en termes généraux[82], soit en termes restreints à l'intérêt de l'enfant[83]. Elles ont été toutes deux rejetées. Ultérieurement, une nouvelle proposition sur l'ordre public a été introduite devant la Commission spéciale qui a décidé que le Rapport en prendrait note[84]. On peut donc conclure qu'aucune clause de l'avant-projet ne consacre la réserve de l'ordre public. Est-elle nécessaire ou convenable? Personnellement nous pensons que non car, parmi d'autres raisons, elle introduirait une clause échappatoire très dangereuse dans une convention qui prétend être un instrument de dissuasion des éventuels «enleveurs»; de plus, la Convention n'étant pas une convention sur la loi applicable à la garde, il est difficile d'imaginer le fonctionnement de l'exception de l'ordre public en face d'une situation de fait, paisible et légitime dans l'Etat où elle se déroulait.

100 Le *second alinéa* a été déjà longuement commenté à plusieurs reprises dans ce Rapport. Nous nous limiterons ici à attirer l'attention sur le fait que, contrairement aux exceptions contenues au premier alinéa, dans cette disposition la charge de la preuve ne revient pas à celui qui s'oppose à la demande sur le retour de l'enfant. En effet, il est question d'une constatation que les autorités compétentes de l'Etat requis doivent faire elles-mêmes.
Dans ce contexte, la Commission spéciale a rejeté une proposition d'après laquelle l'opinion d'un enfant âgé de plus de 12 ans devrait toujours être prise en considération; néanmoins, dans un des votes préliminaires, la Commission spéciale – par 12 voix contre trois – s'était manifestée en faveur de retenir dans le texte de l'article l'âge de 12 ans en tant qu'âge minimal à partir duquel l'autorité requise devrait examiner si l'enfant a atteint, en plus, la maturité nécessaire. Finalement, la Commission spéciale est revenue au texte proposé par le Comité de rédaction[85]. Or, on peut se demander s'il ne convient pas de réfléchir à nouveau sur la possibilité d'inclure un âge minimal, étant donné les troubles psychologiques que peuvent avoir des enfants trop jeunes si on les force à se manifester pour ou contre leur retour. En effet, il est à craindre qu'ils considéreront souvent qu'on leur demande de faire un choix entre l'un ou l'autre de leurs parents; un choix toujours pénible, mais qui peut être traumatisant pour de jeunes enfants.

101 Au *troisième alinéa* on rencontre une disposition qui vise, d'une part, à équilibrer la charge de la preuve imposée à la personne qui a déplacé l'enfant; d'autre part, à renforcer l'utilité des informations fournies par l'Autorité centrale

[78] Procès-verbal No 26, p. 2.
[79] Procès-verbal No 27, p. 2.
[80] Cette proposition a été rejetée, d'abord, par 10 voix contre 9; donc, elle a été retenue entre crochets, mais elle a été finalement rejetée par 14 voix contre 3. Procès-verbaux Nos 27 et 32.
[81] Procès-verbal No 27.
[82] Procès-verbal No 26, p. 2.
[83] Procès-verbal No 27, p. 1.
[84] Doc. trav. No 54, *Proposal of the Italian Expert («the return of the child would be inconsistent with the fundamental principles of that State»).*
[85] Procès-verbal No 32.

ventions on recognition of the decisions, had no place in a convention of the kind which is contemplated. Among those exceptions, we must mention the following proposals which were not adopted: the application for a return of the child is *incompatible* with a custody order which has previously been rendered in the State addressed[78]; the case of a decision, relied upon by the applicant, which was rendered by a jurisdiction other than that of the child's habitual residence at the time[79]; the order in question was rendered in a proceeding in which a person could not assert his rights[80]. On the other hand, a proposal to adopt, as a defense to the return of the child, a change in his circumstances from the time when the decision was rendered, only received two votes in favour[81].

99 Finally, we must emphasize the existence of several proposals which attempted to insert a public policy clause into the Convention, either in general[82] or in restricted terms with regard to the interests of the child[83]. Both were rejected. Subsequently, a new proposal on public policy was introduced before the Special Commission which decided that the Report would mention it[84]. So, we may conclude that no clause of the Draft adopts the public policy exception. Is such an exception necessary or advisable? For us, the answer is in the negative because, among other reasons, it would introduce an escape clause which is very dangerous in a convention that purports to be an instrument of dissuasion for would-be 'abductors'; furthermore, as the Convention is not a convention on the law applicable to custody, it is difficult to imagine the working of a public policy exception when there was a peaceful and legal situation *de facto* in the other State.

100 The *second paragraph* has been commented in length and on several occasions in this Report. We shall simply call to mind the fact that, contrary to the exceptions contained in the first paragraph, the burden of proof does not fall, in this provision, to the person who resists a claim of restitution. In fact, we are dealing with an official determination which the competent authorities of the State addressed must make themselves.
In this connection, the Special Commission rejected a proposal which provided that the opinion of a child over 12 years must always be taken into account; nevertheless, in one of the preliminary votes, the Special Commission – by 12 votes against 3 – showed that it was in favour of keeping in the text of the article the age of 12 years as the minimum age for the addressed authority to inquire whether or not the child has also reached the necessary maturity level. Finally, the Special Commission came back to the text which was proposed by the Drafting Committee[85]. However, we may ask ourselves if we should not do better to examine again the possibility of including a minimum age, considering the psychological troubles which may result for too young children if these are made to give their views for or against their return. Indeed, we may fear that they will often see the request as a choice to be made between one parent or the other; of course, such a choice is always a very difficult one to make, but in the case of young children, it may be also highly distressing.

101 In the *third paragraph*, we have a provision which tries, on the one hand, to counter-balance the burden of proof that is imposed upon the person removing the child, and, on the other, to reinforce the usefulness of the information that

[78] Summary No 26, p. 4.
[79] Summary No 27, p. 4.
[80] Originally, this proposal was rejected by 10 votes against 9, and, in consequence, it was retained in square brackets; but, in the end, it was rejected by 14 votes against 3. Summaries No 27 and No 32.
[81] Summary No 27.
[82] Summary No 26, p. 4.
[83] Summary No 27, p. 3.
[84] Working Document No 54, Proposal of the Italian Expert ('the return of the child would be inconsistent with the fundamental principles of that State').
[85] See Summary No 32.

de l'Etat de la résidence habituelle de l'enfant. En particulier, de telles informations, y compris quand il existe des rapports sociaux, peuvent être précieuses pour permettre aux autorités de constater l'existence des circonstances à la base des exceptions au retour de l'enfant visées aux deux premiers alinéas.

Article 13

102 Cette disposition, en étroite relation avec la règle contenue dans l'article 3, établit que les autorités compétentes de l'Etat requis, en se prononçant sur la demande de retour de l'enfant, «tiendront compte» du droit de l'Etat de la résidence habituelle de celui-ci avant son déplacement.
Il est certainement difficile d'établir une distinction conceptuelle claire entre «tenir compte» et «appliquer» une loi; pourtant, l'utilisation de cette idée, précédemment, dans d'autres efforts d'unification, aide à dégager le sens d'une telle notion[86]. On peut déduire que, chaque fois qu'une expression de ce genre est employée, on veut «laisser au juge une certaine marge d'appréciation»[87], afin qu'il utilise le droit désigné comme un instrument dans l'appréciation de la conduite et des légitimes expectatives de quelqu'un[88]. Or, si nous revenons maintenant au texte de l'avant-projet, il est évident que c'est la prise en considération du droit de l'Etat de la résidence habituelle de l'enfant qui doit montrer aux autorités de l'Etat requis si la garde, qui vient d'être violée, pouvait être considérée comme légitime *prima facie* et, par conséquent, si le déplacement de l'enfant a été illicite.

103 D'autre part, la référence faite à l'article 3 éclaircit suffisamment quelle est la portée du droit de référence; donc les autorités de l'Etat requis devront aussi tenir compte des décisions et accords énoncés dans cet article. Or, tenir compte ou prendre en considération une décision ne signifie pas la reconnaître ou l'exécuter. Dans ce sens, la Convention apparaît comme une sorte de *lex specialis*, d'après laquelle les décisions visées auront dans l'Etat requis un effet indirect qui ne peut pas être conditionné à l'obtention d'un exequatur ou de toute autre modalité de reconnaissance des décisions étrangères.

Article 14

104 La prise en considération d'une loi étrangère est une notion relativement nouvelle en droit international privé. Il se peut donc que les autorités de l'Etat requis – notamment quand il s'agit d'un Etat de droit civil, dont les autorités sont habituées à la certitude de la règle écrite – ne se décident pas à statuer sur la demande de retour de l'enfant en raison de leur propre compréhension de droit de l'Etat de la résidence habituelle de celui-ci. Dans ces cas-là, tant l'Autorité centrale que les autorités judiciaires ou administratives de l'Etat requis peuvent demander aux autorités de l'Etat de la résidence habituelle de l'enfant de tout entreprendre pour obtenir une décision ou une attestation judiciaire portant sur le fait même du déplacement, ainsi que sur son caractère illicite. Or, puisque la décision visée n'est pas une décision sur la garde, le caractère illicite du déplacement ne peut découler que de l'appréciation d'un double fait: – que le déplacement a interrompu une garde effective et légitime *prima facie*; – que tel déplacement n'était pas permis par le droit de la résidence habituelle de l'enfant. Par ailleurs, ces

[86] Par exemple, article 7 de la Convention de La Haye sur la loi applicable en matière d'accidents de la circulation routière, du 4 mai 1971. Egalement, articles 7 et 12 de l'avant-projet de Convention sur la loi applicable aux obligations contractuelles et non contractuelles. Commission des Communautés Européennes, Doc. XIV/398/72, Rev. 1: remplacé, en mars 1978, par l'avant-projet de Convention sur la loi applicable aux obligations contractuelles, Doc. III/167/78.

[87] Rapport concernant le premier avant-projet des Communautés Européennes, cité *supra*, commentaire de l'article 7 par M. Giuliano, Documents XIV/408/72 et XIV/579/72.

[88] Fallon, «Les dispositions de l'Avant-projet C.E.E., relatives à la loi applicable aux obligations aquiliennes», dans *European Private International Law of Obligations*, édité par Lando, Hoffmann and Siehr, Tübingen 1975, p. 93 et 94.

is provided by the Central Authority of the State of habitual residence of the child. More particularly, such information, including, when available, social reports, may be extremely valuable for the authorities to verify the existence of the circumstances which form the basis of the exceptions to the child's return, provided in the first two paragraphs.

Article 13

102 This provision, closely connected with the rule contained in article 3, establishes that the competent authorities of the State addressed, when deciding on the child's return, will 'have regard' to the law of the State of the habitual residence of that child before the removal took place.
It is certainly difficult to find a clear conceptual distinction between 'having regard to' and 'applying a law'; however, the use of this approach previously, in other efforts at unification, has helped to clarify its meaning[86]. We may infer from this that, every time an expression of that kind is used, we 'leave to the judge a certain margin of appreciation'[87], so that he may use the designated law as an instrument for evaluating someone's line of conduct and legitimate expectations[88]. Now, if we now return to the text of the Draft, it appears quite obvious that it is the taking into consideration of the law of the State of habitual residence of the child which must indicate to the authorities of the State addressed whether or not the custody which has just been violated might be considered *prima facie* as legitimate and, consequently, whether the child's removal is wrongful.

103 Moreover, the reference made in article 3 sufficiently clarifies the scope of the relevant law; in consequence, the authorities of the State addressed will have to take the decisions and agreements mentioned in that article into consideration. Now, having regard to a decision does not mean that such decision is recognized or enforced. In this, the Convention appears as a kind of *lex specialis*, through which the relevant decisions will have, in the State addressed, an indirect consequence which does not rely on obtaining recognition and enforcement or any other form of recognition of the foreign decisions.

Article 14

104 Having regard to a foreign law is a relatively new development in private international law, and it is possible that the authorities of the State addressed – particularly in the case of a civil law State, whose authorities are accustomed to the certainty of the written rule – cannot decide on an application for return of a child, on account of the way they themselves understand the law of the State of habitual residence of that child. In these cases, the courts or administrative authorities of the addressed State, as well as the Central Authority, may ask the authorities of the State of habitual residence of the child to take all practicable steps to obtain a decision or other determination relating to the fact that the child has been removed or retained and that the removal or retention was wrongful. However, since the order referred to is not a custody order, the wrongful nature of the removal can only derive from the appreciation of a double fact: firstly, that such a removal has interfered with a *prima facie* effective and lawful custody, and, secondly, that it was not permittted under the law of the child's State of

[86] For example, article 7 of the Hague Convention of 4 May 1971, on the Law Applicable to Traffic Accidents. Also, articles 7 and 12 of the draft Convention on the law applicable to contractual and non-contractual obligations. Commission of the European Communities, Doc. XIV/398/72, Rev. 1: replaced, in March 1978, by the draft Convention on the law applicable to contractual obligations, Doc. III/167/78.

[87] Report concerning the first Draft of the European Communities, mentioned above, commentary by M. Giuliano in article 7, Documents XIV/408/72 and XIV/579/72.

[88] Fallon, '*Les dispositions de l'Avant-projet C.E.E., relatives à la loi applicable aux obligations aquiliennes*', in *European Private International Law of Obligations*, edited by Lando, Hoffmann and Siehr, Tübingen 1975, pp. 93 and 94.

deux éléments doivent permettre la constatation de la violation d'une garde conjointe paisiblement exercée, à travers l'adoption d'une résolution judiciaire dans le sens demandé.

105 L'article ne précise pas à qui doit être adressée la pétition envisagée. Du contexte de l'avant-projet, on pourrait déduire que son destinataire est l'Autorité centrale de l'Etat de la résidence habituelle de l'enfant. Pourtant, il serait peut-être souhaitable d'exprimer clairement cette idée dans le texte de la Convention.

Article 16

106 Cette disposition exprime l'idée qui se trouve à la base même de toute la Convention; en fait, nous nous sommes occupés déjà dans ce Rapport à plusieurs reprises tant de sa justification que de son commentaire. En effet, cet article se limite à préciser quelle est la portée du retour de l'enfant que la Convention essaie de garantir; un retour qui, pour pouvoir être «immédiat», ne doit pas préjuger du fond du droit de garde et qui cherche à éviter qu'une décision ultérieure sur ce droit puisse être influencée par un changement des circonstances, introduit unilatéralement par une des parties.

CHAPITRE IV — DROIT DE VISITE

Article 17

107 Le traitement que l'avant-projet donne au droit de visite est sensiblement moins élaboré que celui concernant le retour des enfants. D'ailleurs, le temps consacré à ce sujet a été en effet comparativement moins long. Néanmoins, quelques principes généraux ont été acceptés par la Commission spéciale. D'abord, la Commission spéciale a reconnu que le refus prolongé du droit de visite peut être parfois le motif déterminant des «enlèvements» d'enfants. Par conséquent, elle a admis — *alinéa premier* — que les demandes adressées aux Autorités centrales en relation avec le droit de visite peuvent viser, ou bien la détermination d'un tel droit, ou bien la protection de son exercice.
Une proposition tendant à limiter le champ d'application de la Convention à la simple protection d'un droit de visite déjà reconnu a été rejetée à une seule voix d'écart[89]. En principe, des arguments solides existent pour maintenir l'optique large, adoptée par la Commission spéciale, qui permet l'intervention des Autorités centrales pour obtenir la reconnaissance d'un droit qui, sauf dans des cas extrêmes, ne devrait pas être refusé. D'autre part, le *troisième alinéa* qui s'occupe plus précisément de cet aspect, signale qu'en même temps que la détermination du droit de visite, «les conditions auxquelles l'exercice de ce droit peut être soumis», seront établies. Il s'agit donc d'une précision qui devrait diminuer les soucis ressentis par certain experts à l'égard d'un exercice du droit de visite non contrôlé par les autorités de la résidence habituelle de l'enfant. En effet, un droit de visite fixé à travers des mécanismes conventionnels sera toujours octroyé par ces autorités qui pourront établir les conditions d'exercice qu'elles estiment nécessaires.

108 Les problèmes abordés au *deuxième alinéa* sont de nature très différente. Il s'agit d'assurer l'exercice paisible du droit de visite, sans qu'il mette en danger le droit de garde. Dans ce sens, cette disposition contient des éléments importants pour atteindre ce but. Au centre même de la

[89] Procès-verbal No 32, p. 2. La proposition a été rejetée par 10 voix contre 9.

habitual residence. Moreover, these two elements must allow the determination of a breach of joint custody peacefully exercised, through a judicial finding along the lines requested.

105 The article does not specify the person to whom the application must be submitted. Judging by the context of the Draft, we could infer that the recipient is the Central Authority of the State of habitual residence of the child. However, it might be advisable to express this clearly in the text of the Convention.

Article 16

106 This provision expresses the idea which forms the basis of the entire Convention; in fact, in this Report, we have already tried to justify as well as comment on that provision, and this on several occasions. Indeed, this article simply states the scope of application of the child's return which the Convention tries to protect, a return which, in order to be 'forthwith', must not be construed as applying to the substance of the custody right, and must also try to avoid that a later decision on such right be influenced by a change of circumstances which may be brought about unilaterally by one of the parties.

CHAPTER IV — RIGHTS OF ACCESS

Article 17

107 The Draft gives much less elaborate treatment to the access right than it does to the return of children. Moreover, the time which was devoted to this subject was comparatively less long. However, a number of general principles were accepted by the Special Commission. First of all, it recognized that the refusal of the access right over an extended period of time may sometimes be the determining factor in child abduction cases. In consequence, it accepted — *first paragraph* — that applications which are made to the Central Authorities with regard to the access right might be directed either to delimiting such right or else to protecting its exercise.
A proposal to limit the scope of application of the Convention to the simple protection of a previously recognized access right was rejected by a margin of only one vote[89]. In principle, strong arguments exist for maintaining the broad approach of the Special Commission, which permits the intervention of the Central Authorities to obtain the recognition of a right which, except in extreme cases, should not be refused. Moreover, the *third paragraph*, which deals specifically with this aspect, states that, at the same time that the right itself is determined, the 'conditions to which the exercise of these rights may be subject' will be established. This, then, is a refinement which should diminish the worries of some experts concerning the exercise of access rights without supervision by the authorities of the State of habitual residence of the child. In fact, these authorities will always grant an access right which is established through the treaty mechanisms, and they will also have full capacity for providing the terms of exercise which are deemed advisable.

108 The problems which are dealt with in the *second paragraph* are of a very different nature. The idea is to insure a peaceful exercise of the access right, without putting the custody rights in jeopardy. With this in mind, the provision contains important elements for reaching this goal. Once

[89] Summary No 32, p. 4. The proposal was rejected by 10 votes against 9.

solution entrevue dans cet alinéa, il faut situer, encore une fois, la coopération des Autorités centrales; une coopération qui vise tant à faciliter l'exercice du droit de visite qu'à garantir l'accomplissement de toute condition à laquelle un tel exercice serait soumis.

109 Parmi les moyens d'assurer l'exercice du droit de visite, l'article 17 retient le suivant: l'Autorité centrale doit essayer que «soient levés, dans toute la mesure du possible, les obstacles de nature à s'y opposer». Sur ce point, la Commission spéciale pensait, en concret, aux possibles obstacles légaux ou dérivés d'éventuelles responsabilités de type pénal[90].
Le reste est laissé à la coopération entre Autorités centrales, ce qui permettra que les conditions imposées à l'exercice du droit de visite soient respectées. C'est ce respect qui constitue la meilleure garantie, pour le titulaire de la garde, que l'exercice du droit de visite ne sera pas nuisible à ses propres droits. En effet, c'est chez le gardien qu'on trouve souvent la plus forte opposition au droit de visite; mais, du moment que ceci ne met pas en danger la garde, le refus de son exercice pourrait être considéré comme contraire à la bonne foi et il serait convenable que l'Autorité centrale de l'Etat de la résidence habituelle de l'enfant fasse voir au titulaire de la garde les possibles conséquences d'une telle optique.

110 Or, sur la question de savoir comment les Autorités centrales peuvent assurer le caractère «innocent» de l'exercice d'un droit de visite, la Commission spéciale n'a pas donné d'exemples. En réalité, nous ne croyons pas que la Convention puisse inclure une énumération, obligatoirement abstraite, des mesures possibles à cet égard. Donc, seulement à titre indicatif, on peut avancer, parmi celles-ci, qu'il convient d'éviter que l'enfant soit inclus dans le passeport du titulaire du droit de visite et, en cas d'une visite «transfrontière», qu'il serait judicieux que celui-ci prenne l'engagement devant l'Autorité centrale de l'Etat de la résidence habituelle de l'enfant de le renvoyer à une date précise, en indiquant le ou les endroits où il a l'intention d'habiter avec l'enfant. Une copie d'un tel compromis serait, par la suite, transmise tant à l'Autorité centrale de la résidence habituelle du titulaire du droit de visite, qu'à celle de l'Etat où il a déclaré qu'il séjournera avec l'enfant. En effet, cela permettrait de connaître à tout moment la localisation de l'enfant et de déclencher la procédure pour assurer son retour, à partir du moment de l'expiration de la date fixée. Evidemment, aucune des mesures avancées ne peut, par elle seule, assurer l'exercice correct du droit de visite; de toute façon, nous ne croyons pas que dans ce Rapport on puisse aller plus loin: les mesures concrètes que pourront prendre les Autorités centrales impliquées dépendront des circonstances de chaque cas d'espèce et de la capacité d'agir reconnue à chaque Autorité centrale.

Finalement, nous voudrions ajouter, dans ce contexte, que la possibilité de l'utilisation abusive d'un droit ne doit jamais constituer une raison suffisante pour nier son existence; d'ailleurs, le droit de garde peut se prêter aussi à un exercice abusif – par exemple, en refusant l'exercice du droit de visite qui est son corollaire normal – et pourtant personne n'a songé à le supprimer.

[90] Procès-verbal No 27, p. 3.

more, the co-operation of the Central Authorities is at the centre of the solution which is envisaged in this paragraph; this co-operation tends to ensure the fulfilment of every condition on which the exercise of the access right depends, as well as to facilitate that exercise itself.

109 Among the methods for protecting the exercise of access rights, article 17 supplies the following: the Central Authority must try 'to remove, as far as possible, all obstacles to the exercise of such rights'. In this connection, the Special Commission thought, in concrete terms, of the possible legal barriers, or those which could derive from liabilities of a penal type[90].
The remaining is left to the co-operation of the Central Authorities, which allows for the conditions which are imposed upon the exercise of the access right to be respected in their application. In fact, this respect is the one and best guarantee for the rightful custodian who is, with it, assured that the exercise of the access right will not be harmful to his own rights. This is true that the greatest opposition to the access right comes most frequently from the custodian; but when the exercise of that access right cannot endanger the custody, the refusal to see it performed could be viewed as contrary to any good faith principle and it would then be suitable for the Central Authority of the State of habitual residence of the child to enlighten the rightful custodian on the possible consequences of his restrictive attitude.

110 Now, when it comes to finding out the means which may be adopted by the Central Authority in order to ensure the 'innocent' nature of the exercise of the access right, the Special Commission failed to give any example. In reality, we do not believe that the Convention may set out a list, which would inevitably be abstract, of all the measures which are likely to apply in this respect. So then, and simply for indicative purposes, we may advance that, among such measures, there might be the avoidance of the child's inclusion in the passport of the holder of the access right and, in the case of a visitation 'across borders', the pertinent requirement that such a visited person promise the Central Authority of the State of habitual residence of the child to return the latter at a specific date and indicate the place or places where he or she intends to live with the child. A copy of this undertaking will, subsequently, be sent to the Central Authority of the State in which the visited person has declared that he will sojourn with the child, as well as to the Central Authority of habitual residence of that person. In fact, this would at any time enable one to locate the child's whereabouts and to engage the normal procedures for insuring his return, following the expiration of the access period. Obviously, none of those measures may by itself, protect the proper exercise of the access right; in any case, we do not think that we can go further in this Report: the concrete measures which could in the future be taken by the Central Authorities concerned will depend on the circumstances of each specific case and on the capacity to act which is recognized to each Central Authority.
Finally, in this respect, we should like to add that the possibility of the excessive use of a right could never be a good reason for denying its existence; in any case, the custody right may also lend itself to misuse – for example, when precisely there is a refusal of the exercise of the access right, the latter right being the normal corollary to the custody right; however, no one has ever had the idea to eliminate the right of access.

[90] Summary No 27, p. 6.

Article 18

111 Etant donné le champ d'application *ratione personae* de la Convention, ainsi que ses objectifs, la Commission spéciale a décidé à la majorité la suppression des mots qui figurent entre crochets dans l'avant-projet[91]. Néanmoins, le vote ayant été très serré, la décision définitive a été renvoyée à la Quatorzième session. D'autre part, il faudrait tenir compte des conclusions de la Commission sur l'assistance judiciaire et la *cautio judicatum solvi* au cours de la même Session.

Article 19

112 Cette disposition exprime dans un article séparé une idée contenue dans toutes les Conventions de La Haye qui impliquent la transmission de documents entre Etats contractants. Elle n'interdit pas seulement les «légalisations diplomatiques», mais toute autre exigence de ce genre.

Article 20

113 La Commission spéciale a décidé que les demandes, communications, ainsi que tout autre document, adressés à l'Autorité centrale de l'Etat requis doivent être rédigés dans leur langue originale[92] et accompagnés d'une traduction dans la ou l'une des langues officielles de cet Etat.
On exclut donc du champ d'application de cette disposition les communications adressées aux autres autorités compétentes. En même temps, la Commission spéciale a été sensible aux possibles difficultés pratiques que pourrait soulever l'obtention d'une telle traduction. Elle est donc tombée d'accord sur l'utilisation, dans ces cas-là, des traductions en français ou en anglais, l'une ou l'autre langue pouvant être écartée par un Etat en faisant la réserve que cet article prévoit[93].

Article 21

114 Le texte définitif de cet article, ainsi que celui de l'article 18, devrait être décidé en prenant en considération les travaux de la Commission qui s'occupera de l'assistance judiciaire pendant la Quatorzième session.
En ce qui concerne le texte proposé par l'avant-projet, nous ferons deux observations. D'abord, certains experts ont manifesté au cours de la seconde réunion de la Commission spéciale qu'ils ne pouvaient pas prendre position sans avoir préablement consulté les autorités compétentes de leurs pays (tel a été le cas, notamment, des délégations des Etats-Unis et du Canada). Deuxièmement, la disposition est généreuse, car l'emploi de l'expression «assistance juridique» prétend couvrir les frais dérivés du recours à un conseil juridique, en dehors de tout litige; néanmoins, il semble nécessaire d'aligner la rédaction de cet article sur celle de l'article 7, lettre *g*.

Article 22

115 La Commission spéciale a accepté à l'unanimité le principe inspirateur du *premier alinéa*. En vertu de celui-ci, une Autorité centrale ne peut pas réclamer ses propres frais à une autre Autorité centrale.
Quant à savoir quels sont les frais visés, la Commission spéciale est tombée d'accord pour admettre qu'ils dépendront des services prêtés par chaque Autorité centrale, le problème ayant été surtout débattu en ce qui concerne la traduction des documents. D'ailleurs, la Commission

[91] Procès-verbal No 27, p. 3. Le vote a été de 9 voix contre 7.
[92] Procès-verbal No 28.
[93] Procès-verbal No 28.

Article 18

111 Considering the scope of application *ratione personae* of the Convention, as well as its objectives, the Special Commission unanimously decided to do away with the words which appear in square brackets in the Draft[91]. Nonetheless, as the voting was very close, the final decision was held over for the Fourteenth Session. Moreover, we should take account of the conclusions of the Commission, conclusions which were reached within the same Session and which relate to legal aid and to security for costs.

Article 19

112 This provision expresses, in a separate article, an idea contained in all the Hague Conventions, namely the transmission of documents between the Contracting States. It does not simply ban the 'diplomatic legalization', but any similar requirement.

Article 20

113 The Special Commission decided that applications, communications, or other documents, adressed to the Central Authority of the State requested must be written in the original language[92] and accompanied by a translation into the, or one of the, official languages of that State.
In consequence, the communications which are addressed to other competent authorities are excluded from the scope of application of this provision. At the same time, the Special Commission was sensitive to the practical difficulties which might come from translated documents. So, in such cases, it finally agreed on the use of translations into French or into English, but the use of one or the other language could be objected to by a State making the reserve provided in this article[93].

Article 21

114 The final text of this article, as well as that of article 18, should be decided on in the light of the work of the Commission, which will deal with legal aid at the Fourteenth Session.
Having regard to the text proposed in the Draft, we shall make two observations: first, some experts stated at the second meeting of the Special Commission that they could not take a position without first consulting the competent authorities of their countries (such has been the case of the United States and Canadian delegations). Secondly, the provision is a generous one, for the use of the expression 'legal aid' purports to cover all the expenses of a legal counsel, even outside any litigation; nonetheless, it seems necessary to align the drafting of this article on that of article 7, sub-paragraph *g*.

Article 22

115 The Special Commission unanimously accepted the underlying principle of the *first paragraph*. According to it, a Central Authority may not assert a claim for its own costs against another Central Authority.
As to the nature of the costs referred to, the Special Commission agreed that they would derive from the services which are offered by each Central Authority, the point of contention being mainly the problem of the translation of the documents. Moreover, the Special Commission ex-

[91] Summary No 27, p. 7. The vote was 9 against 7.
[92] Summary No 28.
[93] Summary No 28.

spéciale a exprimé le voeu que les Autorités centrales s'efforceront dans cette voie, dans la mesure du possible.

116 En relation avec le *second alinéa*, il faut souligner, avant tout, que les autorités administratives concernées ne sont pas les autorités administratives auxquelles font référence d'autres articles de l'avant-projet; c'est-à-dire, il ne s'agit pas ici des autorités compétentes pour décider sur les droits de garde ou de visite.
Le principe contenu dans cet alinéa a été rapidement adopté, mais les exceptions retenues aux lettres *a* et *b* ont été longuement discutées et les votes montrent que la Commission spéciale reste divisée sur ces deux points. En ce qui concerne le premier, son étroite relation avec le problème de l'assistance judiciaire nous fait douter de son caractère autonome. En fait, une proposition visant à sa suppression a été rejetée avec une seule voix d'écart[94]; en tout cas, la question reste ouverte, étant donné les motifs exposés dans le commentaire à l'article 21.
En relation avec la lettre *b*, le degré d'accord acquis a été plus élevé. Le mot «remboursement» dans ce contexte a été remplacé par «paiement», pour éviter que l'on puisse interpréter que l'Autorité centrale sera toujours tenue d'avancer ces frais. D'ailleurs, quoiqu'on n'ait pas adopté[95] une proposition tendant à répercuter sur l'«enleveur» les frais visés aux deux sous-alinéas, la Commission spéciale a considéré que cette solution doit être suivie, dans la mesure du possible.

Article 23

117 Le bon sens indique qu'on ne peut pas obliger les Autorités centrales à accepter les demandes qui se situent en dehors du champ d'application de la Convention ou qui sont manifestement non fondées. Dans ces cas-là, la seule obligation des Autorités centrales est d'informer «immédiatement de ses objections le demandeur ou l'Autorité centrale qui lui a transmis la demande».

Article 24

118 La disposition contenue dans cet article n'est qu'une autre manifestation de l'optique adoptée par la Commission spéciale en relation avec l'organisation et les compétences des Autorités centrales. Puisqu'on veut éviter que les Etats aient à changer leur droit pour pouvoir accepter la Convention, la Commission spéciale a pris en considération le fait que, selon le droit des divers Etats membres de la Conférence, l'Autorité centrale pourra avoir besoin d'une autorisation du demandeur.

Article 25

119 La Convention n'essaie pas d'établir un système exclusif entre les Etats contractants pour obtenir le retour des enfants. Au contraire, elle se présente comme un instrument complémentaire en vue d'aider les personnes dont le droit de garde ou de visite a été violé. Par conséquent, ces personnes peuvent, ou bien recourir aux Autorités centrales – c'est-à-dire utiliser les mécanismes offerts par la Convention – ou bien choisir la voie d'une action directe devant les autorités compétentes en matière de garde. Sur le point de savoir si, dans ces hypothèses, la Convention doit s'appliquer ou simplement inspirer l'action des autorités compétentes, la Commission spéciale n'a pas pris de décision; le problème reste donc ouvert.

[94] Procès-verbal No 28, p. 2.
[95] Procès-verbal No 32, p. 3.

pressed the wish to see the Central Authorities progress as much as possible along that line.

116 In regard to the *second paragraph*, we must say that the administrative authorities in question are not those administrative authorities to which other articles of the Draft refer; in other words, we are not dealing here with the authorities which are competent to decide on custody or access rights.

The principle contained in this paragraph was quickly accepted, but the exceptions of sub-paragraphs *a* and *b* were discussed in length, and the votes indicate that the Special Commission remained divided on these two points. With regard to the first one, we may wonder about its autonomous character because of the strong connection it has with the problem of legal aid. In fact, a proposal for its deletion was rejected by a margin of only one vote[94], and, in any case, considering the reasons that are set out in the commentary of article 21, the question remains open.
For sub-paragraph *b* a higher level of agreement was attained. The word 'repayment' in this context has been replaced by the word 'payment' in order to avoid that the Central Authority might be deemed to be liable at all times to advance the money for those expenses*. Moreover, although a proposal which would pass on the 'abductor' the expenses mentioned in both parts was not adopted[95], the Special Commission considered that this solution should be followed as far as possible.

Article 23

117 It stands to reason that one may not compel the Central Authorities to accept requests which fall without the scope of application of the Convention or which are manifestly not well-founded. In such cases, the Central Authorities have only the obligation to 'forthwith inform the applicant or the Central Authority through which the application was submitted of its objections'.

Article 24

118 The provision contained in this article is only another manifestation of the approach which was adopted by the Special Commission with respect to the organization and the competence of the Central Authorities. As we want to make sure that the States will not have to change their own laws in order to accept the Convention, the Special Commission took account of the fact that, in accordance with the laws of the various Member States of the Conference, the Central Authority could require an authorization from the applicant.

Article 25

119 The Convention does not try to institute, between the Contracting States, an exclusive system for obtaining the return of children. On the contrary, it constitutes a complementary instrument for providing help to persons whose custody or access rights have been violated. In consequence, these persons may either use the services of the Central Authorities – that is to say, operate through the various systems of the Convention – or else choose to apply directly to the authorities which have jurisdiction in matters of custody. As to the question of knowing whether or not the Convention should, in such hypotheses, apply or simply lead the competent authorities to action, the Special Commission failed to take any decision, and the problem remains to be settled.

[94] Summary No 28, p. 4.
[95] Summary No 32, p. 6.

* Translator's note: This difference is reflected in the French text, but not in the English text, which has the word 'payment' in both places. The English text should be changed to conform with the French text.

Article 26

120 La proposition recueillie dans cet article n'a pas trouvé d'opposition au sein de la Commission spéciale. Néanmoins, le secrétariat de la Conférence a suggéré que l'on retienne cette proposition entre crochets en attendant une étude sur les conséquences éventuelles d'une telle inclusion dans la Convention. Une telle étude sera faite par le Bureau Permanent.

Articles 27 à 29

121 Ces trois articles de l'avant-projet règlent l'application de la Convention en relation avec les Etats à systèmes juridiques non unifiés. A l'instar des dernières conventions élaborées par la Conférence de La Haye, ces dispositions font une distinction entre les Etats avec plusieurs systèmes de droit d'application territoriale, et les Etats avec plusieurs systèmes de droit applicables à des catégories différentes de personnes. En général, les solutions retenues s'inspirent de celles adoptées dans les conventions élaborées au cours de la Treizième session de la Conférence[96].
En ce qui concerne le premier groupe d'Etats, l'avant-projet – article 27 – précise comment il faut comprendre, d'une part la référence à la résidence habituelle de l'enfant, et d'autre part la référence au droit de l'Etat d'une telle résidence.
Dans le deuxième groupe d'Etats, l'avant-projet, article 28, confie la détermination du droit dont il faut tenir compte aux règles en vigueur dans ces Etats.
Finalement, l'article 29 délimite les cas dans lesquels les Etats plurilégislatifs sont tenus d'appliquer la Convention[97].

Article Y

122 La disposition contenue dans cet article est devenue presque une «clause de style» des dernières Conventions de La Haye; il ne semble donc pas nécessaire d'en donner un commentaire spécial.

Article 26

120 The proposal embodied in this article did not come under question at the Special Commission. Nonetheless, the secretariat of the Conference suggested that it be retained in square brackets while an examination is made of the possible consequences of such an inclusion in the Convention; that examination will be undertaken by the Permanent Bureau.

Articles 27 to 29

121 These three articles of the Draft govern the application of the Convention with respect to States whose legal systems are non-unified. After the fashion of the later conventions of the Hague Conference, these provisions make a distinction between the States which have several legal systems with territorial application, and the States which have several legal systems that are applicable to various categories of persons. In general, the solutions which are retained derive from those adopted in the conventions of the Fourteenth Session of the Conference[96].
Respecting the first group of States, article 27 of the Draft specifies what is to be understood by, on the one hand, the reference to the habitual residence of the child, and, on the other, the reference to the law of that State.

For the second group of States, article 28 of the Draft entrusts the determination of the relevant law to the rules which apply in those States.
Finally, article 29 limits the situations in which the territorially non-unified States will have to apply the Convention[97].

Article Y

122 The provision contained in this article has almost become a 'clause of style' in the later Hague Conventions; a special commentary does not seem to be necessary here.

[96] Voir notamment le Rapport de M. von Overbeck sur la Convention sur la loi applicable aux régimes matrimoniaux, *Actes et documents de la Treizième session*, tome II, p. 374 et s.
[97] Voir *supra*, No 50.

[96] See particularly the Report by A. von Overbeck on the Convention on the Law Applicable to Matrimonial Property Regimes. *Acts and Documents of the Thriteenth Session*, Book II, p. 374 ff.
[97] See above, No 50.

Proposition du Comité Formule Modèle

ANNEXE A LA CONVENTION

REQUÊTE DE RÉTABLISSEMENT DE LA GARDE

Convention de La Haye du ..... sur les aspects civils de l'enlèvement international d'enfants

AUTORITÉ CENTRALE REQUÉRANTE	AUTORITÉ CENTRALE REQUISE

Concerne l'enfant: ..... qui aura [16] ans le ..... 19.....

I — IDENTITÉ DE L'ENFANT ET DES PARENTS

1 *Enfant*

nom et prénoms .....
date et lieu de naissance .....
résidence habituelle avant l'enlèvement .....
passeport ou carte d'identité No .....
éventuellement photo et signalement (voir annexes) .....

2 *Parents*

2.1 Mère: nom et prénoms .....
date et lieu de naissance .....
profession .....
résidence habituelle .....
passeport ou carte d'identité No .....

2.2 Père: nom et prénoms .....
date et lieu de naissance .....
profession .....
résidence habituelle .....
passeport ou carte d'identité No .....

2.3 Date et lieu du mariage .....

II — PARTIE REQUÉRANTE (qui exerçait la garde avant l'enlèvement)

3.1 nom et prénoms .....
date et lieu de naissance .....
profession .....
résidence habituelle .....
passeport ou carte d'identité No .....

relation avec l'enfant .....

avocat(s) .....

3.2 *Institution*

nom .....
adresse .....
responsable .....

III — ENDROIT OU ADRESSE OU SE TROUVE OU DEVRAIT SE TROUVER L'ENFANT APRÈS L'ENLÈVEMENT

4.1 Nom de la personne chez qui il se trouve ou devrait se trouver

nom et prénoms .....
date et lieu de naissance .....
profession .....
résidence habituelle .....
passeport ou carte d'identité No .....

Proposal of the Committee on Model Forms

ANNEX TO THE CONVENTION

REQUEST FOR RETURN OF CHILDREN

Hague Convention of ..... on the Civil Aspects of International Child Abduction

REQUESTING CENTRAL AUTHORITY	REQUESTED CENTRAL AUTHORITY

Concerns the following child: ..... who will have attained the age of [16] on ..... 19.....

I — IDENTITY OF THE CHILD AND ITS PARENTS

1 *Child*

name and first names .....
date and place of birth .....
habitual residence before the abduction .....
passport or identity card No .....
photo and description, if possible (see annexes) .....

2 *Parents*

2.1 Mother: name and first names .....
date and place of birth .....
occupation .....
habitual residence .....
passport or identity card No .....

2.2 Father: name and first names .....
date and place of birth .....
occupation .....
habitual residence .....
passport or identity card No .....

2.3 Date and place of marriage .....

II — REQUESTING PARTY (who exercised custody before abduction)

3.1 name and first names .....
date and place of birth .....
occupation .....
habitual residence .....
passport or identity card No .....

relation to the child .....

lawyer(s) .....

3.2 *Institution*

name .....
address .....
persons in charge .....

III — PLACE OR ADDRESS WHERE THE CHILD IS OR IS THOUGHT TO BE STAYING FOLLOWING THE ABDUCTION

4.1 Name of the person with whom the child is or is thought to be staying

name and first names .....
date and place of birth .....
occupation .....
habitual residence .....
passport or identity card No .....

4.2 Adresse actuelle de l'enfant

rue .....
localité .....
pays .....

4.3 Autres personnes dans l'Etat requis susceptibles de donner d'autres informations

nom et prénoms .....
date et lieu de naissance .....
profession .....
résidence habituelle .....
passeport ou carte d'identité No .....

IV — MOMENT, LIEU, DATE ET CIRCONSTANCES DE L'ENLÈVEMENT

.....
.....
.....
.....
.....

V — PROCÉDURES JUDICIAIRES CIVILES EN COURS

.....
.....

«

VI — AUTRES PERSONNES AYANT DES DROITS SUR L'ENFANT

Nom et prénoms .....
date et lieu de naissance .....
profession .....
résidence habituelle .....
passeport ou carte d'identité No .....
nature et origine du droit .....

VII — PERSONNE A QUI L'ENFANT DOIT ÊTRE REMIS

nom et prénoms .....
date et lieu de naissance .....
résidence habituelle .....

VIII — OBSERVATIONS

.....
.....
.....
.....
.....

IX ENUMÉRATION DES PIÈCES PRODUITES

.....
.....
.....
.....
.....

Fait à .....

le .....

Signature de l'Autorité centrale requérante

.....

4.2 Current adrress of the child

street .....
place .....
l .....

4.3 Other persons in the requested State who might be able to supply additional information

name and first names .....
date and place of birth .....
occupation .....
habitual residence .....
passport or identity card No .....

IV — TIME, PLACE, DATE AND CIRCUMSTANCES OF THE ABDUCTION

.....
.....
.....
.....
.....

V — CIVIL JUDICIAL PROCEEDINGS PENDING

.....
.....
.....
.....
.....

VI — OTHER PERSONS HAVING RIGHTS IN RESPECT OF THE CHILD

name and first names .....
date and place of birth .....
occupation .....
habitual residence .....
passport or identity card No .....
nature and origin of the rights .....

VII — PERSONS TO WHOM THE CHILD IS TO BE RESTORED

name and first names .....
date and place of birth .....
habitual residence .....

VIII — REMARKS

.....
.....
.....
.....
.....

IX — LIST OF DOCUMENTS PRESENTED

.....
.....
.....
.....
.....

Done at .....

the .....

Signature of the requesting Central Authority

.....

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Document préliminaire No 7 de septembre 1980
Preliminary Document No 7 of September 1980

République fédérale d'Allemagne/Federal Republic of Germany

The Draft is a basic concept for the repression of child abduction to be welcomed as a whole. In particular, however, it contains some discrepancies and open questions. Moreover, at the second meeting of the Special Commission some controversial questions were decided with a scant majority; they will surely be debated again at the XIVth Session of the Conference in October 1980. Essentially, they concern the following points:

I Conflict between article 3 and article 12, para. 1(a)

Article 3 laying down the definitional requirements of the breach of the custody rights for the purposes of the Convention and thus also the grounds on which the claim for the return of the child is valid demands that the right of custody should be 'actually exercised'. On the other hand, article 12, para. 1(*a*) concedes the refusal of the claim for the return of the child if the 'abductor' establishes that at the time of the alleged breach the applicant was not actually exercising the custody rights. Thus, in one case the burden of proof lies with the person having the custody rights (*cf.* article 23), in the other case with the 'abductor'.
However, the reason for refusal of the application under article 12, para. 1(*a*) need no longer be proved if the applicant cannot establish that he was actually exercising his custody rights. In the reverse case the reason for refusal under article 12, para. 1(*a*) fails because it is then established that the custody right was actually exercised. This contradiction may be resolved in two ways:
The first way would be to remove the requirement of the actual exercise of the right of custody from article 3. In that case, the applicant would only have to prove his rights of custody of the 'abducted' child in order to start the mechanism of the Convention. Even if, in such a case, the 'abductor' can show that the applicant was not exercising the right of custody, it would still be in the court's discretion ('is not bound to') to order the return of the child. The consequence of the critical case in which the person entitled to the custody rights had left the exercise of that right to the abductor for an uncertain period would be as follows:
If the person entitled to the custody regrets what he did and wants to have the child back he could, in this case, too, apply to the Central Authorities and set the mechanism of the Convention in motion. The competent court could then decide in his favour or to his detriment. In any case, the applicant would demand something exceeding the purpose of the Convention which is the restoration of the *status quo ante*. This solution, therefore, exceeds the framework of the Convention.
The second way would be to omit the exception of article 12, para. 1(*a*), first alternative. In this case the applicant would always have to prove that he is actually exercising his custody rights. If he does not succeed in doing so, the Convention cannot be applied *ab initio* bacause the statutory definitional requirements of article 3 are not fulfilled. It is clear that the 'abductor' can still set up this defence before the competent court in connection with the decision on the order for the child's return. Thereby, actually the same result is achieved as with the retention of the present wording of article 12, para. 1(*a*) except that in such a case the return of the child *may not* be ordered whereas, according to the present wording, it is left to the court's discretion.
The latter way may be preferable. It takes better account of the aim of the Convention, the restoration of the *status quo ante* – even in a factual respect; moreover, in the normal case, it will hardly be difficult for the applicant to prove that he is actually exercising his custody rights. Furthermore, it may be assumed that the cases which are problematical in this respect are not too frequent and, consequently, as a whole it would not be advisable to change the entire concept on their account especially because the actual exercising of the custody rights is sometimes taken to be an indication of its legal existence (*cf.* the case mentioned in section 64 of the Pérez-Vera Report).

II The age limit under article 4 (in conjuction with the provision of article 12, para. 2)

Article 4 of the Draft proposes an age limit of 16 years. This provision is based on the fact that, as a rule, a child of 16 years of age cannot be taken against his will to a place of residence he does not like. However, the fixation of the age limit should not be considered by itself but in conjunction with the ground of refusal provided for in article 12, para. 2. According thereto, the return may be refused if the competent court is of the opinion that the child is old and mature enough to take account of his views and if he objects to being returned. This rule is not without doubts.
The child is burdened with making a vital decision which psychically he is unable to make; his decision is inevitably influenced by the 'abductor' with whom he resides at the time and, consequently, it cannot be made freely. Actually, the child decides on the success or failure of the abduction. In the final analysis, an order on custody rights under substantive law is made.
Moreover, the provision leaves the courts plenty of latitude to decide whether the child is old and mature enough without binding them by objective requirements. In suitable cases the refusal of the return of the child may easily be manipulated.
Concededly, the basic concern of the provision, to take account of the will of an understanding child, is quite correct. In order to prevent manipulations and, thus, the frustration of the Convention, this basic concern should be realized with the aid of objective requirements. As a simple and clear solution of this question, again a certain age of the child suggests itself as a connecting factor. An age should be fixed from which on, according to experience, children have enough insight and understanding to realize the consequences of a change of residence. An age of 14 years should suit the purpose. But even at this age children are, as a rule, in a position to resist a compulsory change of residence and, therefore, do not require the strong protection of the Convention. For this reason, it is recommended to lower the general age limit in article 4 from 16 to 14 years which at the same time would dispense with the exception provided for by article 12, para. 2. In such a case, children under 14 years of age would have to be returned even against their will.

III Article 7, para. 2(f), *second clause*

Article 7, para. 2(*f*), second clause, conflicts with the object of the Convention laid down in article 1 exclusively to

guarantee the return of children to their former State of residence. Article 7, para. 2(*f*) second clause founds a new jurisdiction of Central Authorities regarding the initiation of proceedings to determine issues relating to rights of custody in the present State of residence if the return is not possible. However, obtaining a decision on the rights of custody by the Central Authorities exceeds the stated objects of the Convention. Therefore, in agreement with the observations made by Professor Pérez-Vera it is suggested that article 7, para. 2(*f*), second clause, should be deleted in order to preserve the inner connection of the Convention.

IV Supplementation of the wording of article 8

Article 8 provides that any person who asserts a breach of his custody rights may apply to the Central Authorities for their assistance in the return of the child.
In contrast to article 3 the requirement of the actual exercise of the custody rights is not mentioned. Accordingly, even persons having the rights of custody but leaving the exercise of the rights to the alleged 'abductor' may apply to the Central Authorities for assistance in the return of the child. But this contradicts the objects of the Convention – as stated under Part I, *supra.*
This contradiction may, however, be removed by a corresponding supplementation of the wording.

V Article 9

Article 9 provides that *prior* to the institution of legal proceedings for the return, the Central Authority of the State where the child is to be found shall endeavour to obtain the return of the child by *consent.* This indicates that an attempt to bring about an amicable agreement is a *mandatory* condition of the return proceedings within the meaning of a 'condition precedent to proceeding' ('*Prozeßvoraussetzung*'). Thus, the provision does not take account of all possible cases that can be imagined, especially if, from the beginning it is clear that the 'abductor' is not prepared voluntarily to return the child. Any attempt at an amicable agreement would only waste time and cause a delay of proceedings.
Therefore, article 9 should be made more flexible by leaving it to the discretion of the Central Authority to decide whether and when an amicable agreement should be attempted. For instance, it may turn out that the abductor would sooner give in than face court proceedings. In such a case it would be sensible to let the negotiations run parallel with the court proceedings from the beginning. Likewise, in this way, it would be possible to avoid stalling and delaying tactics employed by the abductor which are aimed at letting the 6 months time-limit of article 11, para. 1 elapse.
Editorially this flexibility may be achieved by simply deleting the first part of the sentence: 'Prior to the institution of legal proceedings'.

VI The time-limits of article 11

The time-limits mentioned in article 11 after the expiration of which an order for the return of the child is, so to say, 'precluded' are intended to take account of the fact that children may quickly get used to new surroundings.
Disputed, however, is the time the acclimatization takes. It will differ in every individual case. Therefore, a general rule can only be based on average figures and indications. In the second meeting of the Special Commission, for instance, there turned out to be great differences of opinion. Thus, in para. 1, instead of the 6 months period a one year period and, in para. 2, instead of a one year period a two years period were deemed necessary as a minimum.
In the case of article 11, para. 1, however, the six months period appears to be sufficient: if the person concerned is aware of the breach of the custody rights and the child's residence, there remains sufficient time to take the requisite steps including the submission of the application to the agency competent for the decision on the return.
The time-limit of article 11, para. 2, is, however, a different matter. For a clever 'abductor' it should not be too difficult to conceal the child's place of abode for a year. The time-limit of two years proposed in the alternative may be more appropriate. Perhaps it would be possible to agree to a compromise softening the rigidity of the time-limits of article 11 in conformity with their objects.
A beginning of flexibility may be seen in article 15. According thereto, the court may order the return of the child even if the time-limits of article 11 were not observed. This so far purely declaratory provision could be transformed into a 'should'-provision to the effect that the return should be ordered even after the expiration of the time-limits mentioned in article 11 unless the child's habituation to his new surroundings has far advanced and his removal would interrupt this process to his detriment. In this way the circumstances of the individual case and the varying readiness and capability to acclimatize himself could be better taken account of. Because of the systematic build-up of the Convention this provision (just like article 15 of the present Draft) should be inserted in article 11 as para. 3. The provision might read as follows:

The courts or authorities should order the return of the child even after the expiration of the time-limits laid down in the preceding paragraph unless it is established that the child has acclimatized to steady surroundings and a return would interrupt the advanced process of acclimatization to the child's detriment.

By the way, article 16 of the original Draft proposed by the editorial Committee of the second meeting of the Special Commission (*Doc. trav.* No. 37) was similarly worded except that in that Draft the decision was left to the court's discretion if it turned out that the child had not yet acclimatized himself (*i.e.* inverted exception-rule-relation).

VII The grounds for refusal under article 12

The grounds for refusal under article 12 deserve special attention. Indirectly they determine the scope of the Convention and the effectiveness of its conception of the suppression of child abduction.
The wider and vaguer the provision is worded, the greater the margin for the 'abductor' successfully to resist the return of the child. In the interest of an effective 'functioning', therefore, the exceptions should be restricted as closely as possible and only the situations really worthy of an exception should be provided for.
This is also in accordance with the purpose of the Convention to return the child as quickly as possible. The wide scope of discretion now left to the competent authorities under article 12, para. 1(*b*) may result in a considerable delay of the return. Expert opinions may be called for as well as second opinions by other experts which will take much time, investigations of fact may be made by which matters could easily be delayed. The following restrictions or deletions in respect of the present wording of article 12 are considered indispensable:
– The exception under article 12, para. 1(*a*), first alternative, and para. 2 have already been dealt with under parts I and II, *supra.* The result of those considerations was that these grounds for refusal of the application could be dispensed with because they either fail (article 12, para. 1(*a*), first alternative) or because their purpose could be better fulfilled by a general lowering of the age limit (article 12, para. 2).
– Article 12, para. 1(*a*), second alternative, provides that the return of the child can also be refused if the 'abductor' proves that, at the time of the alleged breach of the custody

rights, the applicant did not act in *good faith.* Meaning and scope of this provision, however, do not appear to be clear enough. The explanation given in the Pérez-Vera Report, section 96 (Prel. Doc. No 6), that the provision had to be applied if the exercise of the custody rights was based on conduct contrary to the purposes of the Convention, is unsatisfactory. It does not indicate what situations are to be covered by it. Possibly, however, the remark contained in No 31 of the *Procès-verbal,* that the exception is to include the so-called 'clean-hands-doctrine', may help us on. It suggests the conclusion that what is meant are the so-called 're-abduction cases', *i.e.* those where the child was forcibly taken away from the 'abductor' and he thinks he ought to apply to the Central Authorities.

In these cases, however, the provision is not applicable. A request by the abductor for the return of the child to him is unfounded *ab initio* because he is not entitled to the rights of custody required under article 3.

However, if before the re-abduction he, on his part, obtained a custody order in his favour in the State where the child was found he was, under article 12, para. 1(*a*) legally exercising the custody rights at the material time. Accordingly, the question of good faith does not arise in such a case.

To the extent to which the provision, in excess thereof, is intended to enable an investigation into the motivation of the person entitled to the custody rights to be made, it must be strictly rejected. In such a case, the court competent to decide on the return would have to deal with the merits of the award of custody rights. This, however, contradicts the aims of the Convention (*cf. e.g.* article 16).

For this reason the second alternative of article 12, para. 1(*a*) should be deleted.

According to article 12, para. 1(*b*) the return may be refused also if there is a substantial risk that would expose the child to physical and psychological harm or otherwise place the child in an intolerable situation. A narrower wording of the provision with more objective criteria could restrict the danger of a too large scope of discretion referred to above. Possible might be an itemization of the general wording, breaking it down to individual concrete situations of danger, such as neglect, maltreatment, abuse, etc. In this way the competent courts would be compelled more precisely to consider and state the reasons for their decision.

In support thereof, the provision of article 12, para. 3, should be more precisely framed. According thereto, the courts, when deciding on the presence of reasons for exception, shall take into account the information on the social background of the child provided by the Central Authority of the child's habitual residence. Instead, the court, in excess thereof, should be bound to obtain this information and take it into account if this is possible without much delay. In this way it would be possible more effectively to prevent the danger of the court supporting its decision only on prejudice formed from a distance and conditioned maybe culturally, thereby overestimating and misjudging the 'danger situation'.

VIII Article 13

Article 13 provides that in determining whether the child should be returned the competent court shall have regard to the law of the State of the habitual residence of the child before the removal as provided by article 3. The meaning of this provision is not clear. According to the Report of Professor Pérez-Vera, section No 102, it is intended to relax the requirements of article 3 to the effect that the courts competent for the decision on the return are not to be *firmly* bound by the law of the State where the child has so far resided and by the decisions passed there. If this interpretation is correct, this provision is a saving clause supplementing the exceptions of article 12 by a further, and much more uncertain exception. This would, however, lead to a 'watering down' of the basic conception of the Convention. It would be more honest to express this intention in article 1 by *ab initio* weakening the reference to the law of the former habitual residence of the child which is so far *mandatory.* That, however, would deprive the Convention of its effectiveness. It would, therefore, be better to dispense with article 13.

IX Article 16

The starting point of this provision is to be welcomed. It is in accordance with the conception of the Draft:

What is to be achieved is merely a restoration of the *status quo ante* and not a decision on the merits of the custody rights. Accordingly, article 16 lays down that the decision concerning the return of the child does *not* prejudice the substantive law decision on the award of the custody rights. However, this does not ensure that a competent authority in the State where the child is to be found does not pass a decision on the award of the custody rights, possibly in favour of the abductor. Neither in article 16 nor anywhere else does the Convention contain a provision precluding such a measure.

It is true that the return of the child is not excluded under article 3 if the abductor has in the meantime been granted custody rights in the State of refuge. The purely factual recovery of the child's custody rights as a result of his return may be of little help to the applicant if one considers that the State in which the child now again decides, according to its provisions on recognition, may have to accept and enforce the decision on custody rights passed in the State of refuge. At any rate it appears desirable in the framework of the Convention to avoid conflicting decisions of different States on the award of custody rights. Therefore it should be discussed at the XIVth Session whether it may be possible to deny the abductor access to the courts of the State of refuge.

Australie/Australia

Article 1

Sub-paragraph *b* could convey the impression that Contracting Countries are under an obligation to ensure that their internal law of enforcement of custody and access orders is effective. Australia would resist the suggestion that, at least as far as access is concerned, the Convention should impose any minimum requirement of across-the-board enforcement of access orders. Under the Family Law Act, while provision exists for the issue of warrants to enforce access orders, it is understood that the courts rarely exercise their discretion to issue such warrants. While paragraph 59 of the Report by Miss Pérez-Vera (hereinafter referred to as 'the Report') records that the Special Commission 'explicitly rejected the idea that Contracting Countries would be obliged to adopt new measures within their internal law', it is suggested that the wording of article 1*b* should more clearly express this view.

Article 2

See comment on article 1.

Article 3

It is suggested that the drafting of this article might be improved by recasting it thus:

The removal or the retention of a child is to be considered wrongful where, according to the law of the State in which the child was habitually resident immediately before the removal or retention, it prejudiced rights of custody actually being exercised by a person [or institution], either jointly or alone, whether deriving from operation of law or from a judicial or

administrative decision, or from an agreement having the force of law in that State.

With regard to the suggestion in paragraph 61 of the Report by Miss Pérez-Vera that 'exercised custody' might be a preferable term to 'right of custody' in the article, Australia has no difficulty with the notion of 'rights of custody' as defined in article 5*a* being vested in an institution, such as a Minister or Director of a child welfare department.

Article 4

Australia would accept the retention of the provisionally fixed age of 16 in this article. As to the need noted in paragraph 67 of the Report for the Convention to specify the time when the age limit should be applied, Australia suggests that this should be the time when any decision on an application made under the Convention by a Central Authority or the judicial or administrative authority of a Contracting State is being taken. If the child is under the specified age when an application is made to a Central Authority for return of the child, but when the judicial or administrative authority hears proceedings for an order for the return of the child he or she has attained the maximum age, it does not seem appropriate for the Convention to oblige the authority to proceed to order the return of the child.

Article 5

Sub-paragraph *a*, by the use of the expression 'in particular', could suggest that the right to determine the child's place of residence is the chief right of custody. This is not necessarily so in Australia, and it is suggested that the expression be replaced by the word 'include'.

Article 7

Sub-paragraph *e* of paragraph 2 imposes the obligation to 'provide' information of the type referred to. Presumably it is intended that a Central Authority should make this information available both to other Central Authorities and to individual persons who have made applications under the Convention. If so, perhaps sub-paragraph *e* could more specifically reflect this intention.

Article 8

The first paragraph refers to a claim that there has been a 'breach of his custody rights'. Since article 3 has defined the expression 'wrongful removal or retention' of a child, it is suggested that the paragraph should be recast as follows:

Any person who claims that his rights have been prejudiced by the wrongful removal or retention of a child . . . (followed by the existing wording commencing *may apply* . . .).

It is suggested that a 'breach of his custody rights' does not necessarily amount to a wrongful removal or retention as defined by article 3.

Article 9

Australia agrees with the view expressed in paragraph 86 of the Report that a restructuring of the article may be advisable if it is to reflect more accurately its relationship to the other functions of the Central Authorities.

Article 11

It is suggested that the drafting of the first paragraph could be improved by recasting it as follows:

Where a child has been wrongfully removed or retained and an application for the return of the child has been made to the judicial or administrative authority of the State where the child is located within 6 months from the date of the wrongful removal or retention, the authority shall order the return of the child forthwith to the country of its habitual residence.

As to the substitution of the expression 'wrongful retention or removal' for the expression 'breach of custody rights' please see the comments made above on article 8.

It is suggested that the words 'the residence' in the first line of paragraph 2 should be replaced by the words 'immediately following the removal or retention of the child, the location'. The location may not always coincide with the residence, and it is suggested that the former is the relevant information required for the purposes of this paragraph. If the suggestion in the last paragraph is accepted, the word 'breach' at the end of paragraph 2 of the article would need to be replaced by 'wrongful removal or retention'.

With regard to the choice of duration of the time-limits prescribed by the article, Australia would support the extension of the time-limit referred to in paragraph 1 to 12 months and that referred to in the last line of paragraph 2 to 18 months.

Article 12

It is suggested that in paragraph 1 the words 'the person who has removed or retained the child' be replaced by the words 'the person who has the care of the child'. There could be cases in which the wrongful removal (if not retention) of a child was carried out by a person as agent for the parent or relative who sought to gain possession of the child.

In sub-paragraph *a*, for the reasons given in the comment on article 8 above, it is suggested that the word 'breach' be replaced by the words 'wrongful removal or retention'.

As a matter of drafting only, it is suggested that the word 'authorities' in paragraphs 2 and 3 be replaced by the word 'authority', and the words 'they find' (in paragraph 2) by 'it finds' (*cf.* paragraph 1, article 11 and article 13, where 'authority' is used). Also, it seems more appropriate to substitute the word 'any' for the word 'the' immediately before the expression 'information relating to the social background' in paragraph 4.

Article 13

Particularly if the first suggestion made above regarding article 11 is accepted, Australia questions the need for the inclusion of this article in the Convention. Even in its present form, article 11 clearly directs the judicial or administrative authority to have regard to article 3, and article 13 seems to do no more than repeat the obligation of the judicial or administrative authority to have regard to one element of article 3.

Article 14

While it is accepted that, as noted in paragraph 83 of the Report, it might undesirably delay the transmission of an application to require it to be accompanied by a copy of any custody order, Australia suggests that article 14 might be expanded to enable the central, judicial or administrative authority of a Contracting State to request the provision of a copy of any custody order already made in (or recognized by) the State of habitual residence of the child.

Australia agrees with the suggestion in paragraph 105 of the Report that the expression 'authorities of the State of the habitual residence of the child' should be replaced by a reference to the Central Authority of that State.

As a matter of drafting, it is suggested that the word 'authorities' (first occurring) should be replaced by the word 'authority'.

Article 17

See the comments above on article 1.

Article 22

The question is raised whether the term 'legal counsel' in sub-paragraph *a* is sufficiently wide to cover all classes of legal practitioner. In Australia it could be construed as excluding solicitors.

It is suggested that the term 'repatriating' in sub-paragraph

b should be replaced by the term 'returning' since the latter expression is used elsewhere in the Convention to describe what is the main function of the Convention.

Article 25

Australia agrees with the comment in paragraph 119 of the Report that this article does not resolve the question whether the judicial or administrative authority of a Contracting State to which an application is made direct (*i.e.*, not via the Central Authority of that State or any other State) should be bound by article 11 (although the final sentence of article 10 implies that it is intended to be). Australia would support the application of the Convention to such a case.
For the reasons given in the comment above on article 12, it is suggested that the word 'authorities' should be replaced by the word 'authority'.

Autriche/Austria

a Whereas article 1, paragraph *b* of the Preliminary Draft establishes that it is, *inter alia*, one of the objects of the Convention to secure the effective enjoyment of the rights of custody and of access in all Contracting States, the Preliminary Draft does not, however, comprise any provisions about the recognition and enforcement of decisions concerning custody of children (*cf.* article 10 of the respective Convention of the Council of Europe). The few provisions laid down in Chapters III (Return of Children) and IV (Right of Access) do not suffice as such to meet the entire demands set forth in article 1, paragraph *b* of the Preliminary Draft. Article 2 of the Preliminary Draft is much too vague as to replace provisions about the recognition and enforcement of decisions concerning custody of children.
Moreover, in cases of abduction where the time-limits set out in article 11 of the Preliminary Draft have expired, a provision corresponding to article 10 of the Council of Europe Convention is missing. Article 15 of the Preliminary Draft cannot close this gap and guarantees the return of such children in an insufficient way only.

b According to article 3 of the Preliminary Draft, the removal of a child is also wrongful when it is in breach of rights of custody based upon law. In practice, such a provision could lead to the result that the assessment of the relevant right might require a somewhat lengthy procedure – in particular if the law of the State in which the child was habitually resident declares the law of the child's State of origin as applicable for that purpose – and that it would be impossible therefore to keep within the relatively short period of six weeks which article 10, paragraph 2 of the Preliminary Draft sets out for the decision.
Contrary thereto, the solution chosen in article 12 of the Council of Europe Convention (subsequent *decision* of an authority relating to the custody of a child and declaring the removal to be unlawful) seems to be more closely orientated along the lines of practical demands and seems to be more to the purpose. As a rule, this solution will also entail a more expeditious return of the child. Article 14 of the Preliminary Draft might not provide an adequate substitute to reach this goal.

c Article 12 of the Preliminary Draft comprises some exceptions to the general obligation to return abducted children as set forth in article 11, paragraph 1 of the Preliminary Draft. However, the circumstances provided for in article 12, paragraph 1, sub-paragraph *b* and paragraph 2 in particular include the risk that the prompt return of the child – as it is one of the objects of the Preliminary Draft (article 1, paragraph *a*) – might be thwarted or at least delayed. It is exactly with a view to the risk that the return of the child might be delayed or hindered, why these circumstances do not constitute a ground of refusal under articles 8 and 9 of the Council of Europe Convention. Hopefully no or only very little use will be made of the possibility (article 17 of the Council of Europe Convention) to make a reservation to the effect of extending the further grounds of refusal as foreseen in article 10 of the Council of Europe Convention to cases of child abduction (articles 8 and 9 of the Council of Europe Convention).
Furthermore, it is objectionable that there are no grounds provided for refusing the return of a child in cases where a parent has not been heard because he has not been able to participate in proceedings due to a failure to effect service (*cf.* the opposite provision of article 9, paragraph 1, sub-paragraph *a* of the Council of Europe Convention).

d When defining the personal scope of the Convention, article 4 of the Preliminary Draft should also take into account the fact that a child under the age of 16 years does not have the right to decide himself on his own place of residence (*cf.* article 1, paragraph *a* of the Council of Europe Convention).

e As to the question of charges, the applicant is in a less favourable position under the Preliminary Draft (article 22, paragraph 2, sub-paragraph *a* in context which article 21 and article 7, paragraph 2, sub-paragraph *g*) than an applicant would be under the Council of Europe Convention, since in article 5, paragraph 3, the latter provides that each Contracting State undertake not to claim any payment from an applicant in respect of any measures, including the costs incurred by the assistance of a lawyer – all of this being quite independent of the question whether or not the preconditions for granting legal aid are met.

f According to the Preliminary Draft, the Central Authority of the State to which the child was wrongfully removed is under no obligation to institute proceedings in order to secure a new assessment of the right of custody if the authorities of that State refuse the recognition and enforcement of a foreign decision and thus refuse the return of the child into the State of his last habitual residence. In this respect, article 7, paragraph 2, sub-paragraph *f* of the Preliminary Draft does not provide a sufficient base. Contrary thereto, article 5, paragraph 4 of the Council of Europe Convention contains a provision which is much more concrete. Moreover, even if the authorities of the State to which the child was wrongfully removed would institute proceedings in order to secure a new assessment of the right of custody, it would in no way be established that in such proceedings the benefit of legal aid would be granted to the applicant under the same conditions as to nationals of that State. Article 21 of the Preliminary Draft does not provide a sufficient base in this respect since it is not certain if such proceedings for the new assessment of the right of custody would constitute a matter covered by the scope of this Convention. Also in this regard, the provision of article 5, paragraph 4 of the Council of Europe Convention, which seems to be much clearer, is preferable.

Belgique/Belgium

I Remarques d'ordre général

De l'avis des autorités belges, la Convention ne paraît pas constituer un instrument approprié pour répondre aux difficultés nées de l'enlèvement international d'enfants et spécialement à celles que rencontre le parent dépossédé arbitrairement du droit de garde.
Tout d'abord, si le rôle des Autorités centrales peut être important, encore faut-il ne pas le surestimer. Les limites de l'action de ces autorités sont, en effet, déterminées par la

nature même du conflit qui, étant d'ordre privé, relève, dans bien des Etats, de la seule compétence des autorités judiciaires. Les Autorités centrales ne pourront, dès lors, intervenir efficacement que s'il y a accord volontaire du ravisseur pour remettre l'enfant.
Cet accord, les statistiques établies en Belgique le montrent, n'est pratiquement jamais donné, ce qui s'explique en raison de l'aspect passionnel que revêtent les enlèvements d'enfants.
Le défaut principal de la Convention est de placer, sur le plan judiciaire le centre de gravité dans le pays où l'enfant a été emmené. Ceci constitue, en fait, un avantage très net pour le ravisseur qui va pouvoir utiliser sur place toutes les ressources de la procédure judiciaire alors que la personne dépossédée de la garde va devoir agir en justice à l'étranger. L'intervention des Autorités centrales ne fait qu'atténuer cet handicap mais ne l'élimine pas.
Le Parquet de la Cour d'appel de Bruxelles fait observer, à juste titre, qu'une instance judiciaire dans le pays où l'enfant a été emmené n'est pas opportune. Il est presque inévitable, dit-il, que les lenteurs de la procédure profitent au ravisseur. Pour lui, il est nécessaire, si l'on veut que la Convention soit efficace de se référer à la décision de l'Etat requérant à laquelle tout Etat contractant doit accepter de se soumettre, sauf cas exceptionnels.
Il y a indiscutablement dans la construction envisagée quelque chose d'assez choquant. Alors que jusqu'à présent, on considérait, comme étant les mieux placées, les autorités de la résidence habituelle de l'enfant ou celles de l'Etat dont il a la nationalité, pour se prononcer sur l'intérêt de l'enfant, on leur substitue des autorités dont la compétence internationale résultera, en fait, de la volonté du ravisseur.
La réponse que l'on pourrait faire à cette remarque en affirmant que les autorités du pays de refuge ne sont pas reconnues comme compétentes quant au fond, n'est pas valable.
En effet, ces autorités ont un énorme pouvoir d'appréciation. D'après l'article 12*b* de la Convention, c'est devant ces autorités que vont être plaidés les risques éventuels que court l'enfant et ce, avec tous les délais qu'impliquent les enquêtes, les expertises et contre-expertises sur le danger physique ou surtout psychique auquel il peut être exposé. Si ces autorités statuent contre le retour de l'enfant, quelle peut être l'utilité des règles selon lesquelles sont seules compétentes quant au fond les autorités de la résidence habituelle ou celles de la nationalité?
De l'avis des autorités belges, le projet de Convention devrait être sérieusement amendé.
Il faudrait renforcer l'autorité, la compétence, la vocation presque naturelle à se prononcer, et qui est totalement méconnue par le projet, du juge de l'Etat d'où l'enfant a été emmené.
C'est en effet à ce milieu que l'enfant a été abusivement soustrait et c'est celui dans lequel, si l'on veut lui éviter de nouveaux traumatismes, il devrait être ramené le plus rapidement possible.
Parmi les solutions possibles, on peut envisager un aménagement de l'article 12 et plus particulièrement de l'article 12*b*.
Il est certain que cette disposition, qui peut se comprendre à première vue, va être utilisée par le ravisseur pour s'opposer ou retarder le retour de l'enfant.
Elle présente le danger d'être utilisée à des fins purement dilatoires (enquêtes, etc.).
Il est bien évident que si on prenait en considération les décisions rendues dans l'Etat de la résidence habituelle, l'article 12*b* ne s'indiquerait pas. On ne conçoit pas, en effet, qu'une autorité confie la garde d'un enfant là où il est exposé à un danger physique ou psychique et il est assez curieux de rendre compétent pour prendre cette décision un juge absolument étranger au lieu où l'enfant résidait et où il serait exposé à ce danger.
Nous pensons que, pour établir la réalité de ce risque, il faut s'en remettre non au juge rendu compétent par la volonté du ravisseur mais au juge du lieu d'où l'enfant a été enlevé.
C'est pourquoi, si le *littera b* devait être maintenu, il devrait être rédigé de telle sorte que le retour de l'enfant ne sera pas ordonné si le ravisseur établit que *selon les autorités judiciaires du pays d'où l'enfant a été enlevé*, il existe un risque grave pour ce dernier.
Cet amendement serait dans la ligne de l'article 11 qui prévoit que les autorités compétentes de l'Etat doivent ordonner le retour immédiat de l'enfant.
Les dérogations à ce principe doivent être tout à fait exceptionnelles si on veut que la Convention ait une portée pratique.
On a également fait la remarque suivante au sujet de l'article 12*b*. Cette disposition permet aux autorités de l'Etat requis de refuser la restitution de l'enfant si son retour l'expose à un danger physique ou psychique. Or la notion de mineur en danger tout comme celle d'intérêt de l'enfant sont des notions qui, en droit belge, concernent le fond du droit de garde (loi du 8 avril 1965 sur la protection de la jeunesse). Il en résulte que l'article 12*b* de la Convention soit – contrairement à ce qui est voulu – touche au fond du droit de garde, soit risque de poser des problèmes de compatibilité avec le droit belge, notamment quant au concept juridique du danger auquel l'enfant risque d'être exposé.
L'article 13 devrait être supprimé. En effet, si le droit de l'Etat de la résidence habituelle de l'enfant prévoit que le critère déterminant pour l'octroi du droit de garde est l'intérêt de l'enfant, il en résulte que les autorités de l'Etat de refuge seront compétentes pour examiner cet intérêt et éventuellement pour l'apprécier d'une autre façon que les autorités de l'Etat d'origine.
La Convention n'apporterait à cet égard aucun progrès par rapport à la situation actuelle.
Il est également regrettable que la compétence très large donnée aux autorités du pays choisi par le ravisseur ne souffre aucune exception, notamment lorsque l'enfant, ainsi que ses parents ont la seule nationalité de l'Etat requérant et que l'enfant avait la résidence habituelle sur le territoire dudit Etat au moment où il a été enlevé.
Nous pensons que dans des cas de ce genre, il devrait y avoir retour immédiat de l'enfant, sans aucune exception, quitte bien entendu à ce que des voies de recours soient ouvertes devant les tribunaux de l'Etat d'où l'enfant a été enlevé.
Il est bien évident que dans certains Etats membres de la Conférence, l'accès à la justice est d'un coût particulièrement élevé.
A la connaissance des autorités belges, une affaire portée devant une juridiction étrangère a coûté 1 million de francs belges à la mère dépossédée (l'équivalent de 40.000 $). D'autre part, il existe des pays où on est soumis à des conditions telles pour obtenir l'assistance judiciaire que des étrangers résidant à l'étranger ne peuvent pratiquement pas en bénéficier.
De plus, les cas d'enlèvements d'enfants se produisent souvent dans des milieux modestes ne disposant pas des ressources suffisantes pour faire face aux frais d'une procédure à l'étranger mais ne réunissent pas les conditions (indigence) pour bénéficier de l'assistance judiciaire gratuite.
La règle acceptée par les Etats européens dans l'article 5, paragraphe 3 de la Convention de Strasbourg et assurant la gratuité, non seulement pour les frais et dépens du procès, mais aussi pour la participation d'un avocat ou avoué constitue un progrès considérable auquel la Conférence de La Haye ne devrait pas rester insensible.
Au cas où la disposition serait maintenue, la question se pose de savoir qui devrait rembourser les frais et dépenses donnant lieu à remboursement.
Quant à l'emploi des langues, (article 20), la solution adoptée ne paraît pas heureuse. En effet, le critère selon

lequel «il est difficilement réalisable» d'accompagner les documents d'une traduction dans la langue ou l'une des langues officielles de l'Etat requis manque, pour le moins, de précision.
Il faudrait introduire une disposition prévoyant, selon des modalités à préciser, que l'enfant ne doit pas être restitué lorsque le ravisseur a obtenu le droit d'asile dans le pays de refuge.
Il serait sans doute utile que les Etats s'engagent à prendre des mesures préventives pour éviter les enlèvements d'enfants.
Enfin, il semble qu'il serait utile que chaque Etat fasse connaître les tribunaux compétents *ratione materiae* pour connaître des demandes de restitution.

II Examen des articles

Article premier

Le *littera b* devrait être supprimé non seulement parce qu'il ne présente aucune utilité mais aussi parce qu'il touche au fond alors qu'ainsi que le signale le Rapport No 23, la Convention ne règle pas et ne cherche pas à régler le problème de l'attribution du droit de garde et du droit de visite.

Article 2

La première phrase devrait être supprimée, non seulement elle est inutile mais, de plus, sa rédaction peut faire naître des doutes quant au caractère *self executing* de la Convention.
La dernière phrase pourrait être supprimée également étant donné que l'idée qu'elle contient est reprise à l'article 10.

Article 3

Le Gouvernement belge pense que la Convention doit s'appliquer lorsque la garde est exercée par une institution.
L'expression selon laquelle le droit de garde est attribué n'est pas des plus heureuses étant donné qu'il peut très bien ne pas avoir eu d'attribution de ce droit. Il faudrait remplacer «attribué» par «fondé».

Article 4

Selon cet article, la Convention s'applique à tout enfant de moins de 16 ans.
La formule est trop générale étant donné que la Convention ne devrait pas s'appliquer aux enfants émancipés.
Il faudrait dire que la Convention s'applique à tout enfant âgé de moins de 16 ans et qui n'a pas le droit de fixer lui-même sa résidence.

Article 7

Le *littera f* de cet article de même que l'article 17, paragraphe 3 accordent aux Autorités centrales la compétence d'introduire des procédures judiciaires sans qu'elles ne disposent d'un mandat de la personne qui a été dépossédée de la garde.
En effet, l'article 24 prévoit que ce mandat est facultatif. Il y a là atteinte à la règle selon laquelle nul ne plaide par procureur.
D'autre part, les autorités belges estiment, comme le Rapporteur (Rapport No 79), qu'il serait souhaitable de supprimer le membre de phrase «et, le cas échéant, de fixer ou de permettre l'exercice du droit de visite».
Enfin, il serait utile que les Autorités centrales se tiennent mutuellement informées des difficultés susceptibles de s'élever à l'occasion de l'application de la Convention et s'emploient à lever les obstacles rencontrés. Il faudrait compléter l'article par une disposition en ce sens.

Article 8

Au premier alinéa il faudrait préciser que le droit de garde a été violé au regard de la loi de la résidence habituelle.

Le *littera f* mentionne une «déclaration sous affirmation». Il s'agit là semble-t-il, d'une mauvaise traduction de l'anglais. Il semble qu'une attestation certifiée par une Autorité centrale serait suffisante.

Article 10

Au premier alinéa, il faudrait prévoir que les autorités doivent statuer non pas d'urgence mais statuer sur la remise de l'enfant selon une procédure simple et rapide.
Le deuxième alinéa, tel que libellé, est dépourvu de tout effet contraignant. Il ne présente dès lors, qu'un intérêt très limité et semble pouvoir être supprimé sans inconvénient.

Article 12

L'utilité du *littera a* n'apparaît pas dans la mesure où l'article 3 ne considère un déplacement d'enfant comme illicite que s'il a eu lieu en violation d'un droit de garde exercé effectivement.
En outre, on ne voit pas comment ne pourrait pas être de bonne foi, le gardien couvert par une décision judiciaire ou administrative.
Le *littera b* a déjà donné lieu à des remarques d'ordre général.
De plus, les autorités judiciaires consultées ont fait observer que les mots «ou de toute autre manière ne le place dans une situation physique intolérable» constituent une redondance par rapport aux termes qui précèdent: «danger physique ou psychique» et devraient dès lors être supprimés.

Article 13

Les mots «avant son déplacement» peuvent être supprimés puisqu'il est fait référence aux critères définis à l'article 3.
Même sans une disposition telle que celle de l'article 15, les autorités judiciaires du pays de refuge ont toujours compétence pour se prononcer sur le retour de l'enfant.

Article 14

Il serait préférable de retenir le texte suivant:

Les autorités de l'Etat requis peuvent subordonner le retour de l'enfant à la production d'une attestation judiciaire de l'Etat requérant constatant que le déplacement ou le non-retour de l'enfant était illicite au sens de l'article 3.

Article 15

Cette disposition semble inutile car elle ne fixe pas les conditions dans lesquelles le retour pourrait être ordonné.

Article 17

Le troisième alinéa devrait être supprimé car il touche au fond du droit de garde et du droit de visite.

Article 18

Les autorités belges sont d'avis de supprimer les mots qui se trouvent entre crochets.

Articles 20-21-22

Voir remarques d'ordre général.

Article 26

Si une demande peut-être recevable devant les tribunaux, il n'en est évidemment pas de même d'un «document» ou d'une «information».
On pourrait écrire:

Toute demande soumise, conformément aux dispositions de la Convention, aux Autorités centrales des Etats contractants sera recevable devant les tribunaux de ces Etats, auxquels pourront être soumis tout document ou information annexé à la demande ou fourni par une Autorité centrale.

III Remarques concernant le Rapport

Points 9, 10 et 11

Le résumé donné de la Convention du Conseil de l'Europe est quelque peu incomplet. En effet, cette Convention est fondée sur quatre principes fondamentaux: l'institution d'Autorités centrales, la gratuité, la prise en considération du bien-être de l'enfant et la confiance réciproque dans le bien-fondé des décisions étrangères sur la garde des enfants. Il est étonnant que ces principes, dont l'importance ne peut échapper, ne soient pas mentionnés.
Enfin, il est un peu prématuré de dire que la portée de la Convention se trouve considérablement affaiblie par la portée des articles 17 et 18 car tout dépendra de l'usage qui sera fait de ces articles – ce qui n'est pas connu à l'heure actuelle. Parmi les quinze pays qui ont signé la Convention deux seulement ont fait la réserve.

Point 19

On ne voit pas en quoi la Convention a un caractère révolutionnaire.

Canada

L'avant-projet de Convention adopté par la Commission spéciale, intitulé *Avant-projet de Convention sur les aspects civils de l'enlèvement international d'enfants*, propose un système simplifié de règlement du problème de l'enlèvement des enfants. L'objet principal de l'entreprise étant d'assurer le rétablissement le plus rapide possible de la situation de fait qui existait avant le kidnapping, la Commission spéciale s'est abstenue délibérément de traiter des questions relatives au fond du droit de garde et, de même, s'est refusée à élaborer une convention basée sur la reconnaissance et l'exécution de décisions relatives à la garde, comme elle aurait pu le faire à l'instar du Conseil de l'Europe qui vient tout juste de finaliser sa *Convention sur la reconnaissance et l'exécution des décisions en matière de garde des enfants et le rétablissement de la garde des enfants.* La Convention européenne sera ouverte à la signature des Etats membres du Conseil, la plupart également Membres de la Conférence de La Haye, lors de la prochaine réunion des Ministres européens de la Justice, le 10 mai 1980, au Luxembourg.
Le système proposé dans l'avant-projet de Convention de La Haye se résume en somme à peu de choses. Lorsqu'il y a déplacement ou non-retour illicite d'un enfant (article 3), c'est-à-dire lorsqu'il y a violation d'un droit de garde selon le droit de l'Etat de la résidence habituelle de l'enfant, la personne dont le droit de garde a été violé saisit l'Autorité centrale de son Etat, ou celle de l'Etat où se trouve l'enfant, en vue d'obtenir la remise de l'enfant, volontairement si possible, ou autrement par décision judiciaire. Elle peut aussi saisir directement les autorités judiciaires de l'Etat où se trouve l'enfant sans passer par l'Autorité centrale (article 25). Par Autorité centrale, on entend celle que désigne chaque Etat contractant – les Etats fédéraux ont la faculté d'en désigner plusieurs – pour satisfaire aux obligations imposées par la Convention (articles 6 et 7).
La demande doit être accompagnée de toute documentation utile (article 8), notamment toute décision ou accord relatif à la garde, ce qui permettra aux autorités compétentes de l'Etat requis de vérifier le bien-fondé de la demande. La Convention autorise à cet égard les autorités de l'Etat requis à demander qu'on produise une décision ou attestation judiciaire constatant que l'enfant a été déplacé ou retenu illicitement (article 14).

The preliminary draft Convention adopted by the Special Commission, entitled *Preliminary draft Convention on the civil aspects of international child abduction*, proposes a simplified system for solving the problem of child abduction. Since the chief aim of the undertaking is to ensure that the situation which existed before the kidnapping is re-established as quickly as possible, the Special Commission deliberately refrained from dealing with questions concerning the merits of custody rights and, similarly, declined to prepare a convention based on the recognition and enforcement of decisions concerning custody, as it could have done following the example of the Council of Europe, which has just finalized its *Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children.* The European Convention will be opened for signature by the Member States of the Council, most of which are also Members of the Hague Conference, at the next meeting of European Ministers of Justice, on May 10, 1980, in Luxemburg.

The system proposed in the Hague preliminary draft Convention is, on the whole, fairly simple. Where a child is wrongfully removed or retained (article 3), that is where there is a breach of custody rights under the law of the State in which the child is habitually resident, the person whose rights of custody have been breached applies to the Central Authority of his State, or that of the State where the child is, with a view to obtaining the return of the child, voluntarily if possible, or otherwise by means of a judicial decision. He may also apply directly to the judicial authorities of the State where the child is without going through the Central Authority (article 25). Central Authority refers to the authority designated by each Contracting State – federal States may designate more than one – to discharge the duties imposed by the Convention (articles 6 and 7).
The application must be accompanied by any relevant documentation (article 8), including any decision or agreement concerning custody, to enable the competent authorities of the requested State to ascertain the validity of the application. The Convention authorizes the authorities of the requested State to request that a decision or judicial attestation certifying that the child has been wrongfully removed or retained be produced (article 14).

Lorsque l'autorité judiciaire de l'Etat requis est saisie dans les six mois à compter de la violation du droit de garde, elle ordonne le retour immédiat de l'enfant. Lorsque le lieu de résidence de l'enfant est inconnu au moment de la violation invoquée, le délai de six mois court à compter de la découverte de l'enfant, sujet toutefois à un délai maximum d'un an à partir de la violation du droit de garde (article 11).

Les seuls moyens de défense prévus par la Convention en faveur de la personne qui a déplacé ou retenu l'enfant en violation du droit de garde, et il appartient à cette dernière d'en faire la preuve, sont les suivants (article 12): ou bien, à l'époque de la violation invoquée, le demandeur n'exerçait pas effectivement ou de bonne foi le droit de garde sur l'enfant (en d'autres termes, il ne s'agit pas d'un véritable enlèvement), ou encore il existe un risque grave que le retour de l'enfant ne l'expose à un danger physique ou psychique ou le place dans une situation intolérable (en d'autres termes, il n'est pas dans l'intérêt de l'enfant d'ordonner le retour). La Convention prévoit en outre que l'autorité judiciaire peut refuser le retour de l'enfant si celui-ci s'oppose à son retour et qu'il est d'un âge et d'une maturité où il est approprié de tenir compte de son opinion.
Rappellons que le but poursuivi est simplement d'assurer le retour de l'enfant déplacé de façon à rétablir la situation de fait qui prévalait avant le déplacement et que, par conséquent, la décision sur le retour de l'enfant ne préjuge pas du fond du droit de garde (article 16). Le kidnappeur pourra toujours faire valoir ses droits à la garde, mais il devra le faire dans l'Etat où l'enfant est retourné.
Ce régime de base est complété dans la Convention par diverses dispositions générales visant à favoriser la réalisation des objectifs de la Convention. Aucune caution judiciaire ne peut être imposée, et aucune légalisation n'est requise dans le contexte de la Convention (articles 18 et 19). Les demandeurs auront droit à l'aide juridique dans l'Etat requis (article 21) et chaque Autorité centrale supportera ses propres frais en appliquant la Convention, sauf qu'elle pourra demander le remboursement des frais d'avocats non couverts par le système d'aide juridique et le paiement des dépenses occasionnées par le rapatriement de l'enfant (article 22).
La Commission aurait pu s'en tenir à ce seul aspect du problème de l'enlèvement des enfants, mais elle a voulu faire oeuvre plus complète et s'est préoccupée du problème de l'exercice international du droit de visite, toujours lié et souvent à l'origine des cas d'enlèvement d'enfants. Ainsi, il est demandé aux Autorités centrales des Etats contractants de coopérer afin d'assurer l'exercice paisible du droit de visite et, au besoin, de prêter leur concours en vue de faire fixer le droit de visite et les conditions auxquelles l'exercice de ce droit peut être soumis (article 17).
Les clauses finales de la future Convention n'ont pas été élaborées par la Commission, à l'exception de la clause fédérale usuelle qui autorise un Etat fédéral à ratifier la Convention et à déclarer à quelles unités territoriales elle s'appliquera dans cet Etat (article Y). Quant aux autres clauses finales notamment celle qui précisera les obligations des Etats contractants qui seraient également parties à d'autres conventions internationales sur le même sujet, elle devraient être décidées lors de la Quatorzième session.
Avant de passer à l'analyse article par article de l'Avant-projet, un mot au sujet de son titre. La Convention traite des «aspects civils» de l'enlèvement international d'enfants. Aucune mention n'est faite des aspects criminels de ces enlèvements, qu'il s'agisse d'enlèvements par des parents ou d'enlèvements par des professionnels dans les cas classiques de kidnapping pour une rançon, et rien dans la Convention n'empêche un Etat contractant d'adopter en ce domaine les sanctions pénales jugées appropriées.

Where application is made to the judicial authority of the requested State within six months from the breach of custody rights, the authority will order the immediate return of the child. Where the child's place of residence is unknown at the time of the alleged breach, the period of six months runs from the date of the discovery of the child, subject, however, to a maximum time-limit of one year from the breach of custody rights (article 11).
The only grounds of defence provided for in the Convention available to the person who has removed or retained the child in breach of custody rights – and it is up to the latter to establish them – are as follows (article 12): either that, at the time of the alleged breach, the applicant was not actually exercising the custody rights or acting in good faith (in other words, this was not a true abduction), or that there is a substantial risk that the return would expose the child to physical or psychological harm or otherwise place him in an intolerable situation (in other words, it is not in the child's interests to order his return). The Convention also provides that the judicial authority may refuse the return of the child if the latter objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of his views.
It should be remembered that the aim is simply to ensure the return of the removed child, so as to re-establish the situation which existed before the removal, and that consequently the decision concerning the return of the child will not prejudice the merits of custody rights (article 16). The kidnapper will still be able to assert his custody rights, but will have to do so in the State to which the child is returned.
This basic system is complemented by various general provisions designed to promote the realization of the Convention's objectives. No judicial security or bond, nor any legalization, may be required in the context of the Convention (articles 18 and 19). The applicants will be entitled to legal aid in the requested State (article 21) and each Central Authority will bear its own costs in applying the Convention, except that it may require the payment of any lawyers' fees not met through the legal aid system and the payment of the expenses incurred or to be incurred in repatriating the child (article 22).

The Commission could have dealt with only this aspect of the problem of child abduction, but it wished to be more thorough and considered the problem of the international exercise of rights of access, which is always related to and often at the root of cases of child abduction. Thus, the Central Authorities of the Contracting States are asked to co-operate in promoting the peaceful enjoyment of access rights and, where necessary, to assist in fixing or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject (article 17).
The final clauses of the future Convention were not drafted by the Commission, with the exception of the usual federal State clause authorizing a federal State to ratify the Convention and declare to which of its territorial units it will apply (article Y). The other final clauses, including the one setting out the obligations of any Contracting States which are also parties to other international conventions on the same subject, are to be decided on at the Fourteenth Session.
Before going on to analyse the Preliminary Draft article by article, a word should be said about its title. The Convention deals with the 'civil aspects' of international child abduction. No mention is made of the criminal aspects of such abductions, whether by parents or by professionals in the classic cases of kidnapping for a ransom, but there is nothing in the Convention to prevent a Contracting State from applying any penal sanctions considered appropriate in this area.

CHAPITRE I — CHAMP D'APPLICATION DE LA CONVENTION

Article 1

On notera ici le caractère à la fois curatif et préventif des fins poursuivies par la Convention. La Convention a évidemment pour objet principal d'assurer le retour de l'enfant en cas d'enlèvement ou de rétention abusive, et c'est cet objet essentiellement que reflète le titre même de la Convention, mais elle vise aussi à prévenir les cas d'enlèvement. «... assurer également dans tout Etat contractant la jouissance effective du droit de garde comme du droit de visite» signifie notamment que les Autorités centrales seront appelées à prêter leur concours à l'établissement et à l'exercice du droit de visite. Cette intervention ne sera pas nécessairement postérieure à l'enlèvement, elle pourra également servir à prévenir un premier enlèvement.

Article 2

Il s'agit ici d'une disposition générale qui impose aux Etats contractants des obligations minimales. Les Etats pourront faire plus que ce que la Convention prescrit, notamment sur le plan des mesures préventives, en vue de favoriser la réalisation des objectifs de la Convention.
L'article 2 invite les Etats contractants à adopter des procédures rapides afin que leurs autorités judiciaires puissent statuer d'urgence sur la remise de l'enfant, mais il n'est pas fixé de délais pour l'accomplissement des obligations conventionnelles. Les seuls délais prévus à la Convention sont ceux des articles 10 et 11 concernant la saisie des autorités judiciaires, mais ils n'affectent pas la durée des procédures devant ces autorités. Certains délégués (France, USA) auraient souhaité qu'on impose un délai fixe limite (par exemple, 4, 6, 8 ou 10 semaines) pour statuer sur la remise de l'enfant, mais cela n'a pas été retenu, au motif principalement qu'il n'était pas vraiment possible, et sûrement pas souhaitable, de sanctionner la violation éventuelle de ces délais par les juges.

Article 3

Cette disposition appelle plusieurs commentaires.
D'abord, on a préféré utiliser le terme «déplacement», plus neutre que «enlèvement», car l'enleveur peut aussi avoir un droit de garde sur l'enfant. Par ailleurs, il n'est fait aucune mention de la qualité de l'enleveur, de sorte que la Convention s'applique indépendamment de l'existence ou non de liens familiaux entre l'enleveur et l'enfant.
A noter aussi qu'il n'est pas requis pour l'application de la Convention, bien que ce sera le cas la plupart du temps, que le déplacement de l'enfant s'effectue à travers une frontière internationale. En effet, il se pourra dans certains cas que «l'enlèvement» survienne entièrement sur le sol d'un seul Etat, lors de vacances familiales à l'étranger, par exemple, et il n'y a pas de raison que la Convention ne puisse pas s'appliquer dans ces cas en faveur du parent dont le droit de garde a été violé. On notera à cet égard que la Convention du Conseil de l'Europe ne s'applique qu'aux déplacements transfrontières.
Autre précision. Si les mots «[ou une institution]» apparaissent dans le texte entre crochets, ce n'est pas parce que la Commission spéciale a hésité à inclure dans le champ d'application de la Convention les enfants confiés aux institutions publiques — cette proposition a été adoptée sans opposition — mais simplement parce que la Commission s'est divisée sur la nécessité d'exprimer cela de façon expresse dans le texte même de la Convention. On reconnaîtra que cette mention n'est pas vraiment requise, vu l'emploi du mot «personne» dans le texte, ce qui recouvre sûrement les personnes morales aussi bien que physiques, mais il n'y a pas de mal à préciser la chose, si cela peut contribuer à dissiper tout doute à ce sujet.
L'article 3 est central dans la Convention. Lorsqu'il y a eu

CHAPTER I — SCOPE OF THE CONVENTION

Article 1

It will be noted here that the aims of the Convention are both curative and preventive. The main purpose of the Convention is obviously to ensure the return of the child in the event of wrongful abduction or retention, and it is essentially this purpose that is reflected in the title, but the Convention is also aimed at preventing abduction. '... to secure in all Contracting States the effective enjoyment of the rights of custody and of access' means, among other things, that the Central Authorities will be called upon to assist in the establishment and exercise of access rights. This intervention will not necessarily be subsequent to the abduction; it may also have a preventive function.

Article 2

This is a general provision which imposes minimal obligations on the Contracting States. The States will be able to do more than the Convention prescribes, especially with regard to preventive measures, in order to facilitate achievement of the Convention's objectives.
Article 2 asks the Contracting States to adopt rapid procedures so that their judicial authorities can decide expeditiously on the return of the child, but no time-limits are set for discharging the duties under the Convention. The only time-limits prescribed in the Convention are those in articles 10 and 11 concerning applications to the judicial authorities, but they do not affect the duration of proceedings before these authorities. Certain delegates (France, USA) would have liked a fixed time-limit to be imposed (four, six, eight or ten weeks, for example) for deciding on whether the child should be returned, but this was not adopted, principally because it was not really possible, and certainly not desirable, to sanction a failure by judges to meet such deadlines.

Article 3

There are several comments to be made on this provision.
Firstly, it was decided to use the term 'removal', which is more neutral than 'abduction', since the abductor may also have custody rights over the child. Moreover, the abductor is not characterized in any way, with the result that the Convention applies regardless of whether or not there are family ties between the abductor and the child.
It should also be noted that it is not necessary that the child be removed across an international boundary, even though this will usually be the case, for the Convention to apply. It is possible, in some cases, for the 'abduction' to occur entirely within the territory of one State, during a family vacation abroad, for example, and there is no reason why the Convention could not apply in such cases in favour of the parent whose custody rights have been breached. It will be noted in this regard that the Council of Europe's Convention applies only to transboundary removals.

Another point that should be made is that the words '[or institution]' appear in brackets in the text, not because the Special Commission hesitated to include children entrusted to public institutions within the scope of the Convention — this proposal was adopted unanimously — but simply because the Commission was divided on the necessity of stating this explicitly in the actual wording of the Convention. It will be recognized that this reference is not really necessary in view of the use of the word 'person' in the text, a term which certainly covers corporate entities as well as natural persons, but there is no harm in stating this explicitly if it may help dispel any doubt on the subject.

Article 3 is central to the Convention. Where there has been

violation du droit de garde au sens de l'article 3, et que la demande est présentée dans les délais impartis, les autorités judiciaires de l'Etat requis ordonnent le retour de l'enfant (article 11). En se prononçant sur la demande, on tiendra compte du droit, y compris les règles de droit international privé, de l'Etat de la résidence habituelle de l'enfant avant le déplacement (article 13). C'est le droit de cet Etat qui déterminera qui est détenteur du droit de garde dans cet Etat et qui dira s'il y a eu violation du droit de garde. Le droit de garde pourra résulter de la loi elle-même, ou d'une décision judiciaire ou administrative – dans certains pays, nordiques notamment, les décisions en matière de garde des enfants sont administratives et non judiciaires – rendue ou reconnue dans l'Etat de la résidence habituelle, ou encore d'un accord entre les parties ayant force de loi dans cet Etat. Bien que l'article 3 exige que la personne dont le droit de garde a été violé l'ait «exercé effectivement» au moment de la violation, il semble que la réalisation de cette condition sera toujours présumée car, aux termes de l'article 12, c'est à la personne qui a déplacé l'enfant qu'il appartient, en défense, de démontrer que le demandeur n'exerçait pas effectivement le droit de garde au moment de la violation. A cet égard, l'article 3 crée une certaine confusion et il serait peut-être préférable pour les fins de cet article de s'en tenir à la seule notion de violation du droit de garde.

Une dernière remarque concernant cet article. Nulle part est-il fait mention du caractère illicite d'un déplacement fait en violation d'un droit de visite. Est-ce à dire que la Convention ne serait pas applicable, du moins dans ses dispositions relatives au retour de l'enfant, lorsque le déplacement a été fait par le parent détenteur du droit de garde, mais au mépris du droit de visite de l'autre parent? Cette question ne reçoit pas une réponse claire et précise dans la Convention. On verra que la Convention autorise (article 17) le détenteur du droit de visite à demander l'aide des autorités compétentes d'un Etat contractant en vue de fixer ou protéger l'exercice de son droit de visite, mais ce dernier est-il autorisé à invoquer la Convention pour obtenir le rétablissement de la situation de fait qui prévalait avant le déplacement? Il semble, à la lecture de l'article 3 et de l'article 11, que cela ne soit possible que dans la mesure où le droit de visite constitue, selon le droit de l'Etat de la résidence habituelle, un élément du droit de garde. Les définitions de «droit de garde» et «droit de visite» de l'article 5 ne sont à cet égard d'aucune aide. L'intention de la Commission spéciale, pourtant, a été qu'il fallait inclure les cas de violation du droit de visite dans le champ d'application de la Convention. C'est un point qui devra être clarifié lors de la Quatorzième session.

Article 4

Pour enchaîner sur le commentaire précédent, l'intention de la Commission spéciale est ici clairement exprimée. Ce qu'on a en vue ce sont les cas d'atteinte non seulement au droit de garde mais aussi au droit de visite. Pourtant, comme on vient de le voir, il n'est question que du droit de garde à l'article 3, et de même aux articles 11, 12 et 13.
L'âge des enfants visé par la Convention apparaît ici entre crochets. La décision finale à ce sujet appartiendra à la Quatorzième session. Pourquoi 16 ans, et non pas 12 ou 14 comme plusieurs délégations l'auraient souhaité? Essentiellement parce que la Convention accorde au juge la faculté de tenir compte de l'opinion de l'enfant avant d'ordonner son retour (article 12). Dès lors que cette discrétion existe, il n'y a pas de raison de s'opposer, par seul principe, à ce que la Convention s'applique aux enfants d'un âge relativement élevé. Dès qu'on abaisse l'âge, on réduit la portée de la Convention, notamment pour localiser l'enfant et rechercher une solution amiable, et partant son utilité, et cela n'a pas paru souhaitable à une majorité d'experts. Quant aux implications financières de l'âge de 16 ans, il

a breach of custody rights in terms of article 3, and the application is made within the time prescribed, the judicial authorities of the requested State will order the return of the child (article 11). In determining whether or not the child should be returned, regard will be had to the law, including the rules of private international law, of the State of the habitual residence of the child before the removal (article 13). It is the law of that State which will determine who has custody rights in that State and say whether there has been a breach of these rights. The custody rights may be derived from the law itself, or from a judicial or administrative decision – in some countries, in particular the Scandinavian countries, decisions on child custody are administrative and not judicial – rendered or recognized in the State of the child's habitual residence, or from an agreement between the parties having force of law in that State. Although article 3 requires that the person whose rights of custody have been breached was 'actually exercising' them at the time of the breach, it seems that the existence of this condition will always be presumed since, under article 12, it is up to the person who removed the child to establish, in defence, that the applicant was not actually exercising the custody rights at the time of the breach. Article 3 is somewhat confusing in this regard and it would perhaps be preferable, for purposes of this article, to use only the concept of breach of custody rights.
There is a final remark that should be made concerning this article. No mention is made anywhere of the unlawfulness of a removal made in breach of access rights. Does this mean that the Convention would not be applicable, at least with respect to its provisions concerning the return of the child, where the removal was made by the parent having custody rights, but in defiance of the other parent's access rights? There is no clear and precise answer to this question in the Convention. It will be noted that the Convention authorizes (article 17) the person having the rights of access to request the assistance of the competent authorities of a Contracting State in fixing or protecting the exercise of his rights of access, but is the latter able to rely on the Convention to obtain a re-establishment of the situation that existed before the removal? It seems, from a reading of article 3 and article 11, that this is possible only to the extent that access rights are part of custody rights under the law of the State of habitual residence. The definitions of 'rights of custody' and 'rights of access' in article 5 are of no assistance in this regard. It was the Special Commission's intention, however, that cases of breach of rights of access be brought within the scope of the Convention. This is a point which will have to be clarified at the Fourteenth Session.

Article 4

To follow on the preceding remarks, the Special Commission's intention is expressed clearly here. What is aimed at are breaches not only of custody rights but also of access rights. As we have just seen, however, only rights of custody are referred to in article 3 and articles 11, 12 and 13.

The age of children covered by the Convention appears in brackets. The final decision on this subject will be made at the Fourteenth Session. Why sixteen and not twelve or fourteen, as several delegations would have liked? Essentially because the Convention gives the judge discretion to take the child's views into account before ordering his return (article 12). Since there is this discretion, there is no reason to object, on principle alone, to having the Convention apply to children of a relatively mature age. As soon as the age is lowered, the effect of the Convention is reduced, particularly for discovering the whereabouts of the child and finding an amicable solution, and therefore its usefulness, and this did not seem desirable to a majority of the experts. As for the financial implications of the age limit of sixteen

appartiendra aux Etats membres d'en évaluer l'importance et de décider, avant la Quatorzième session, s'il y a lieu de proposer un rabaissement pour cette seule considération.

Quel que soit l'âge limite qui sera finalement retenu, comme la condition d'âge est reliée à l'application de la Convention, dès que l'enfant atteint cet âge, la Convention n'a plus d'effet. Ainsi, l'autorité judiciaire saisie d'une demande de remise d'un enfant qui, en cours de procédure, atteint l'âge limite ne sera pas tenue d'ordonner le retour de l'enfant.

On notera enfin que la Convention ne vise que les enfants dont la résidence habituelle était située dans un Etat contractant au moment du déplacement ou du non-retour illicite. On n'a pas voulu, pour des raisons essentiellement d'ordre pratique reliées à l'existence et au fonctionnement des Autorités centrales établies conformément à la Convention, étendre le bénéfice de la Convention aux enfants résidant dans un Etat non contractant. Ceci dit, rien n'empêchera un Etat contractant d'accorder un traitement semblable aux cas d'enlèvement d'enfants résidant dans des Etats non contractants, mais il devra le faire en dehors de la Convention.

Article 5

Cette disposition, malgré son apparence, ne doit pas être comprise comme établissant des règles matérielles. Elle ne sert qu'à préciser – et malheureusement elle y arrive assez mal – le contenu des expressions «droit de garde» et «droit de visite» pour les fins de la Convention.
Par exemple, il est précisé que le choix du lieu de résidence de l'enfant constitue bel et bien un élément de l'exercice du droit de garde, de sorte que si le déplacement est contraire au droit (ou à une décision) de l'Etat de la résidence habituelle de l'enfant, il s'agit bien d'une violation du droit de garde au sens de la Convention. De même, l'expression «droit de visite» inclut l'élément déplacement temporaire de l'enfant du lieu de sa résidence habituelle. L'article 5 ne dit pas que le détenteur du droit de visite a le droit de déplacer l'enfant temporairement hors du lieu de sa résidence, ce qui serait une règle du droit matériel, car selon le droit de l'Etat de la résidence habituelle cette faculté aura peut-être été limitée ou supprimée ou soumise à des conditions quant à son exercice; ce que dit l'article 5, c'est que cette question fait partie de la notion de droit de visite.
L'article 5 mériterait d'être revu pour éliminer toute confusion. On pourrait, à cet égard, prendre exemple de la définition suivante adoptée par le Conseil de l'Europe pour les fins de sa propre Convention, dont la formulation est beaucoup plus claire:

«décision relative à la garde: *toute décision d'une autorité dans la mesure où elle statue sur le soin de la personne de l'enfant, y compris le droit de fixer sa résidence, ainsi que sur le droit de visite;*».

years, it will be up to the Member States to assess their importance and decide, before the Fourteenth Session, whether a reduction in age should be proposed on this ground alone.
Whatever the age limit finally decided upon, since the criterion of age is related to the application of the Convention, as soon as the child reaches that age the Convention is no longer of any effect. Thus a judicial authority considering an application for the return of a child who reaches the age limit during the proceedings will not be obliged to order that the child be returned.
It will be noted, finally, that the Convention covers only children whose habitual residence was in a Contracting State at the time of the wrongful removal or retention. For essentially practical reasons related to the existence and operation of the Central Authorities established under the Convention, the benefit of the Convention was not extended to children residing in a non-Contracting State. This having been said, there is nothing to prevent a Contracting State from treating abductions of children residing in non-Contracting States, but it will have to do so outside the Convention.

Article 5

Notwithstanding its appearance, this provision should not be interpreted as establishing substantive rules. It merely serves to define – and unfortunately does not do so very successfully – the expressions 'rights of custody' and 'rights of access' for purposes of the Convention.
For example, it is stated that choosing the child's place of residence is definitely part of exercising custody rights so that if the removal is contrary to the law (or a decision) of the State in which the child habitually resides, it constitutes a breach of custody rights within the meaning of the Convention. Similarly, the expression 'rights of access' includes the temporary removal of the child from the place of habitual residence. Article 5 does not say that the person having access rights has the right to remove the child temporarily from his place of residence, which would be a rule of substantive law, since under the law of the State of habitual residence this ability might perhaps have been restricted or eliminated or made subject to conditions governing its exercise; what article 5 says is that this question is part of the concept of rights of access.
It would be worth revising article 5 in order to eliminate any confusion. The following definition adopted by the Council of Europe for purposes of its own Convention, which is expressed much more clearly, could be used as a model:

'decision relating to custody: *means a decision of an authority in so far as it relates to the care of the person of the child, including the right to decide on the place of his residence, or to the right of access to him;*'.

CHAPITRE II — AUTORITÉS CENTRALES

Article 6

Chaque Etat contractant est tenu de désigner une Autorité centrale qui sera chargée de réaliser les objectifs de la Convention. Les obligations, pouvoirs et fonctions des Autorités centrales sont stipulés aux articles 7, 9, 10, 14, 17, 22, 23 et 24 de la Convention.
Les Etats fédéraux ont la faculté de désigner plus d'une Autorité centrale et de spécifier l'étendue territoriale des pouvoirs de chacune de ces autorités. On notera cependant que l'Etat fédéral qui exerce cette faculté doit en outre désigner l'Autorité centrale à laquelle les demandes peuvent être adressées en vue de leur transmission à l'Autorité centrale appropriée sur son territoire. Sorte d'autorité supra-

CHAPTER II — CENTRAL AUTHORITIES

Article 6

Every Contracting State is required to designate a Central Authority responsible for achieving the objectives of the Convention. The duties, powers and functions of the Central Authorities are set out in articles 7, 9, 10, 14, 17, 22, 23 and 24 of the Convention.
Federal States may designate more than one Central Authority and specify the territorial extent of their powers. It will be noted, however, that a federal State which does this must also designate the Central Authority to which applications may be addressed for transmission to the appropriate Central Authority in that State. In other words, a sort of supra-Central Authority which will provide liaison and,

centrale qui servira d'organe de liaison et permettra d'éviter aux Etats requérants, notamment dans les cas de déplacements successifs sur le territoire de l'Etat fédéral (*i.e.* d'une province à l'autre), de répéter la demande auprès de chaque autorité compétente à l'occasion de chaque déplacement. Cette disposition, qui n'a pas d'équivalent dans la Convention du Conseil de l'Europe, a été proposée en vue d'assurer une plus grande efficacité à la Convention et c'est avec une forte majorité qu'elle a été agréée par les experts.

Article 7

Pour comprendre l'étendue exacte des obligations des Autorités centrales aux termes de l'article 7, il convient de prendre connaissance de l'article 24 qui autorise toute Autorité centrale à requérir du demandeur l'autorisation d'agir en son nom ou de désigner une personne, un avocat par exemple, habilitée à agir en son nom. Cette faculté, on en conviendra, accorde toute la flexibilité voulue aux Etats, comme le Canada, dont la tradition juridique s'accommodo mal de l'intervention directe des autorités administratives dans les affaires privées. C'est pour tenir compte de cette réalité notamment que l'article 24 a été incorporé à la Convention.

Cette précision étant apportée, la liste des obligations et fonctions des Autorités centrales inscrites à l'article 7 soulève peu de problèmes. Elle appelle cependant certains commentaires:

– Les Autorités centrales doivent, bien sûr, coopérer entre elles pour réaliser les objectifs de la Convention, mais elles doivent aussi «promouvoir une collaboration entre les autorités compétentes *dans* leurs Etats respectifs». Il s'agit des autorités policières, administratives, judiciaires et autres de l'Etat contractant. On notera que le texte ne va pas aussi loin que le texte équivalent de la Convention du Conseil de l'Europe (article 3, No 2) qui envisage, dans sa version française, une collaboration entre les autorités compétentes *des* Etats contractants, c'est-à-dire une collaboration directe entre les autorités, judiciaires par exemple, de l'Etat requérant et de l'Etat requis. L'obligation des Autorités centrales, aux termes de l'avant-projet de La Haye, ne parle que de concertation entre les autorités compétentes à l'intérieur du même Etat. Ceci dit, rien n'empêche évidemment les autorités compétentes de chaque Etat de coopérer entre elles directement, par exemple pour l'exécution de commissions rogatoires ou la notification d'actes judiciaires, mais encore une fois, selon la version française du texte, les Autorités centrales ne semblent pas tenues de promouvoir cette concertation directe.

– On notera certaines divergences et un manque d'uniformité dans l'emploi de certains mots dans les textes français et anglais des paragraphes *a* à *h*. Ainsi, au paragraphe *a*, l'obligation de «tout mettre en oeuvre» semble diminuée en anglais où il n'est question que de «prendre des mesures» («*take steps*»). Aux paragraphes *b* et *d*, l'expression «prendre ou faire prendre toute mesure» est rendue différemment en anglais dans chaque paragraphe, soit au paragraphe *b* par «*take and promote the taking of such measures*» et au paragraphe *d* par «*take and cause to be taken all steps*». Au paragraphe *f* français, «introduire ou favoriser» est rendu en anglais par «*initiate and facilitate*» alors qu'au paragraphe *g* anglais, «*provide and facilitate*» est rendu en français par «accorder ou faciliter». Une révision de ces textes sera requise lors de la Quatorzième session, pour éliminer toute divergence non fondée.

– L'intention du paragraphe *b* n'est pas d'obliger les Autorités centrales à prendre toute mesure utile pour prévenir de nouveaux dangers pour l'enfant, mais plutôt d'encourager la prise de telles mesures. Le texte anglais semble plus précis à cet égard. Quant aux mesures destinées à prévenir «d'autres préjudices pour les parties concernées», il pourrait s'agir, par exemple, d'empêcher l'enleveur de

in particular, enable requesting States to avoid making the same application to each competent authority in the case of successive removals within a federal State (from one province to another). This provision, which has no counterpart in the Council of Europe's Convention, was proposed with a view to making the Convention more effective and was accepted by a large majority of the experts.

Article 7

In order to understand the exact extent of the duties of the Central Authorities under article 7, reference must be made to article 24, which authorizes any Central Authority to require from the applicant authorization to act on his behalf or to designate a person, a lawyer for example, so to act. This provision, it will be recognized, gives all the necessary flexibility to States, such as Canada, whose legal tradition does not lend itself well to direct intervention by the administrative authorities in private affairs. It was partly to provide for this situation that article 24 was included in the Convention.

This being the case, the list of duties and functions contained in article 7 raises few problems. There are certain comments to be made, however:

– The Central Authorities must, naturally, co-operate with one another to achieve the objects of the Convention, but they must also 'promote co-operation amongst the competent authorities *in* their respective States'. This refers to the police, administrative, judicial and other authorities of the Contracting State. It will be noted that this provision does not seem to go as far as the corresponding provision in the Council of Europe's Convention (article 3, No 2), which refers, in its French version, to co-operation among the competent authorities *of* the Contracting States, that is, direct co-operation between the judicial authorities of the requesting State and those of the requested State, for example. Under the Hague Preliminary Draft, the duty of the Central Authorities refers only to co-operation among the competent authorities within the same State. This having been said, there is, of course, nothing to prevent the competent authorities of each State from co-operating with one another directly, in the execution of rogatory letters or the service of judicial documents for example, but once again, according to the French text, Central Authorities would not be required to promote such direct co-operation.

– Certain discrepancies and a lack of uniformity in certain words in the French and English versions of paragraphs *a* to *h* will be noted. Thus, in paragraph *a*, the duty to '*tout mettre en oeuvre*' seems to be less stringent in English, where to 'take steps' is sufficient. In paragraphs *b* and *d*, the expression '*prendre ou faire prendre toute mesure*' is rendered differently in English in the two cases, by 'take and promote the taking of such measures' in paragraph *b* and 'take and cause to be taken *all steps*' in *d.* In *f*, the French '*introduire ou favoriser*' is rendered by 'initiate or facilitate', while in *g*, the English 'provide or facilitate' is rendered in French by '*accorder ou faciliter*'. These provisions will have to be reviewed at the Fourteenth Session, to eliminate any unfounded discrepancies.

– The intention of paragraph *b* is not to oblige the Central Authorities to take all necessary measures to prevent further harm to the child, but rather to promote the taking of such measures. The English version seems more accurate in this regard. As for the measures designed to prevent 'further prejudice to interested parties', these might be aimed, for example, at preventing the abductor from leaving the

quitter le pays requis en confisquant son passeport pour éviter que l'enfant ne soit encore déplacé avant le règlement de la demande. Ces mesures, de nature préventive, serviraient, dans l'optique de la Convention, à prévenir un second enlèvement au départ de l'Etat de refuge, mais on imagine bien que si ces mesures sont disponibles dans le droit de l'Etat de refuge, les résidents de cet Etat pourraient y avoir recours eux-mêmes pour prévenir un premier enlèvement au départ de cet Etat, mais cela est en dehors de la Convention et les Autorités centrales ne sont pas tenues d'intervenir dans ce cas.

– Autre remarque concernant le paragraphe *b*. L'emploi de l'expression «nouveaux dangers pour l'enfant» n'est peut-être pas très heureux. Pourquoi le mot «nouveaux»? Les mesures provisoires ne devraient-elles pas être prises ou favorisées chaque fois qu'il existe un danger pour l'enfant? L'expression anglaise «*further harm*» n'est guère meilleure.

– L'échange d'informations relatives à la situation sociale de l'enfant, on le notera, n'est requis que «si cela s'avère utile» (paragraphe *c*). On n'a pas voulu, à juste titre, rendre obligatoire l'échange de ce type d'information et notamment les rapports d'enquêtes sociales. On n'a pas voulu compromettre la marche nécessairement urgente des procédures de rapatriement de l'enfant. Ces informations et enquêtes sociales, lorsqu'elles existent, pourront accompagner la demande, mais il n'est pas requis de les produire. A noter à cet égard que l'article 20 de la Convention exige que les document adressés à l'Autorité centrale de l'Etat requis doivent être accompagnés d'une traduction dans la langue de cet Etat ou d'une traduction en français ou en anglais.

– Les Autorités centrales sont tenues, aux termes du paragraphe *d*, de prendre toute mesure propre à assurer la remise volontaire de l'enfant. Dans l'expérience de certains pays, les rétablissements volontaires de la garde grâce à l'intervention des autorités administratives sont très fréquents. En France, par exemple, 35% des cas d'enlèvement seraient résolus de cette façon. Dans l'esprit de la Commission, cette démarche en vue de la remise volontaire de l'enfant constitue la première phase de l'action des Autorités centrales et intervient dans les premières heures de l'enlèvement (48 heures, par exemple). En cas d'échec, l'Autorité centrale passe à la seconde phase de son action, celle de la remise judiciaire de l'enfant (paragraphe *f*). Les Autorités centrales doivent également rechercher «une solution amiable» des différends entre les parties. Cette solution amiable pourra intervenir au cours de la première ou seconde phase de l'action des Autorités centrales et pourra prendre la forme, par exemple, d'une entente entre les parties fixant les conditions et modalités de l'exercice transfrontière du droit de garde et du droit de visite.

– L'échange d'informations sur «le contenu du droit dans leur Etat» (paragraph *e*) dépendra des circonstances de chaque cas: tantôt il s'agira d'informations générales, tantôt il s'agira d'informations plus spécifiques pour résoudre le problème. Mais il appartiendra aux Autorités centrales elles-mêmes de décider si elles désirent aller au-delà du caractère purement général. La Commission a décidé à l'unanimité de ne pas inclure de disposition en vertu de laquelle l'Autorité centrale serait tenue de donner des conseils quant à l'application de la loi aux faits spécifiques du différend. L'échange d'informations juridiques de portée générale sera particulièrement utile lorsque la demande ne sera pas accompagnée d'une décision judiciaire rendue dans l'Etat requérant.

– Rappelons que les Autorités centrales qui feront usage de l'article 24 ne seront pas tenues d'introduire elles-mêmes la procédure judiciaire dont il est question au paragraphe *f*. Elles pourront obtenir du requérant qu'il désigne un avocat pour agir en son nom.

requested country by confiscating his passport so that the child will not be removed again before a decision is made on the application. Such measures, which are preventive in nature, would serve to prevent a second abduction from the State of refuge under the Convention, but one can well imagine that if such measures are available under the law of the State of refuge, residents of that State might resort to them themselves in order to prevent a first abduction from that State, but this is outside the scope of the Convention and the Central Authorities are not obliged to intervene in such a case.

– Another comment concerning paragraph *b* is that the expression 'further harm to the child' is perhaps a somewhat unfortunate choice. Why the word 'further'? Should such provisional measures not be taken or promoted whenever there is a chance of harm to the child? The French expression '*nouveaux dangers*' is no better.

– It will be noted that the exchange of information relating to the social background of the child is required only 'where appropriate' (paragraph *c*). The experts did not wish, and rightly so, to make the exchange of this type of information obligatory, particularly reports of social investigations. They did not wish to jeopardize the necessarily expeditious progress of the proceedings for repatriating the child. Such information and social investigation reports, where they exist, can accompany the application, but it is not necessary to file them. It should be noted, in this regard, that article 20 of the Convention requires that documents addressed to the Central Authority of the requested State be accompanied by a translation into the language of that State or a translation into French or English.

– Under paragraph *d*, the Central Authorities are required to take all steps appropriate to ensure the voluntary return of the child. In the experience of some countries, voluntary restorations of custody through the intervention of the administrative authorities are very frequent. In France, for example, 35 per cent of the cases of abduction are apparently resolved in this manner. In the Commission's view, this step, aimed at obtaining the voluntary return of the child, constitutes the first phase of the Central Authorities' intervention and occurs almost immediately after the abduction (within 48 hours, for example). Should this fail, the Central Authority moves on to the second phase of its intervention, namely the return of the child through judicial means (paragraph *f*). The Central Authorities must also seek 'an amicable resolution' of the disagreements between the parties. This amicable resolution might occur during the first or second phase of the Central Authorities' intervention and might take the form, for example, of an agreement between the parties establishing the terms and conditions of the transboundary exercise of custody and access rights.

– The exchange of information on 'the law of their State' (paragraph *e*) will depend on the circumstances of each case: in some cases this will be general information, in others more specific information to resolve the problem. It will be up to the Central Authorities themselves, however, to decide whether they wish to go beyond purely general information. The Commission decided unanimously not to include a provision under which the Central Authority would be obliged to provide advice on the application of the law to the specific facts of the dispute. The exchange of legal information of a general character will be particularly useful where the application is not accompanied by a judicial decision rendered in the requesting State.

– It should be remembered that Central Authorities which use article 24 will not be obliged to institute the legal proceedings referred to in paragraph *f* themselves. They may require of the applicant that he designate a lawyer to act on his behalf.

– Le paragraphe *g* concernant «l'assistance judiciaire et juridique, y compris les services d'un avocat» doit se lire en fonction de l'article 21 qui oblige chaque Etat contractant à admettre les ressortissants et les résidents des autres Etats contractants au bénéfice de son système d'assistance judiciaire comme si ces personnes étaient ses ressortissants et résidaient habituellement sur son territoire. Dans ces conditions, il semble que l'emploi de l'expression «le cas échéant» à la version française du paragraphe *g* soit plus correct que l'expression anglaise «*where appropriate*». Il semble en effet que l'action de l'Autorité centrale en ce domaine sera nécessairement soumise aux exigences du régime d'assistance juridique en vigueur dans l'Etat contractant. Prise littéralement, la version anglaise du paragraphe *g* semble imposer aux Autorités centrales une obligation plus étendue que celle assumée par les Etats contractants aux termes de l'article 21. Pour éviter cette ambiguïté, il y aurait peut-être lieu de faire une référence expresse à l'article 21 dans le paragraphe *g*.

– Autre commentaire concernant le paragraphe *g*. La mention d'«assistance ... juridique» vise à englober les conseils et consultations juridiques qui pourraient être requis à l'occasion de l'étude d'une demande particulière. L'assistance financière n'est pas limitée seulement aux cas où une procédure judiciaire sera requise.

– Enfin, il convient de noter que l'assistance financière directe ne sera en fait nécessaire et requise que dans les Etats qui n'accorderont pas à l'Autorité centrale les pouvoirs, et les moyens nécessaires (*i.e.* des avocats du ministère public), de saisir directement les autorités judiciaires compétentes dans ces affaires d'enlèvement d'enfants. Cela pourrait bien en amener quelques uns à modifier leur politique à cet égard.

– Les «procédures administratives» dont il est question au paragraphe *h* pourraient consister en l'obtention d'un document de voyage pour l'enfant et autres mesures du genre qui assureront que l'enfant pourra être retourné dans l'Etat de sa résidence habituelle.

– Paragraph *g*, concerning 'legal aid and advice, including the services of legal counsel', must be read in conjunction with article 21, which obliges every Contracting State to give nationals and residents of other Contracting States access to the benefits of its legal aid system as if these persons were its nationals and were habitually resident in that State. In these circumstances, it seems that the expression '*le cas échéant*', used in the French version of paragraph *g*, is more accurate than the English expression 'where appropriate'. It seems that the Central Authority's action in this area will necessarily be subject to the requirements of the legal aid system in effect in the Contracting State. Taken literally, the English version of paragraph *g* seems to impose a broader duty on the Central Authorities than that assumed by the Contracting States under article 21. In order to avoid this ambiguity, express reference should perhaps be made to article 21 in paragraph *g*.

– Another comment to be made concerning paragraph *g* is that the reference to 'legal aid' is meant to include legal advice and consultation that might be necessary when a particular application is being considered. Financial assistance is not limited to cases where judicial proceedings will be required.

– It should be noted, finally, that direct financial assistance will be necessary and required only in States which do not give the Central Authority the necessary powers and means (that is, government lawyers) to apply directly to the competent judicial authorities in such cases of child abduction. This might well lead some of them to alter policy in this regard.

– The 'administrative arrangements' referred to in paragraph *h* might consist in obtaining a travel document for the child and other similar measures which will ensure that the child can be returned to the State of his habitual residence.

CHAPITRE III — RETOUR DE L'ENFANT

Article 8

Même si dans le cours normal des choses et dans la grande majorité des cas c'est l'Autorité centrale de l'Etat de la résidence habituelle de l'enfant qui sera saisie de la demande de retour de l'enfant, la Commission a jugé bon de ne pas limiter le choix et de permettre à la personne dont le droit de garde a été violé de saisir l'Autorité centrale de tout Etat contractant, qu'il s'agisse d'ailleurs de l'Etat de refuge ou d'un autre. Cette faculté pourra s'avérer utile dans certains cas exceptionnels. A noter aussi que la personne dont le droit de garde a été violé peut s'adresser directement aux tribunaux de l'Etat de refuge (voir *infra*, article 25).

La demande adressée à l'Autorité centrale devra contenir les informations mentionnées aux alinéas *a*, *b*, *c* et *d*. Il s'agit d'informations essentielles et minimales, les Etats contractants étant libres de s'entendre entre eux, sur une base bilatérale, s'ils estiment utile ou nécessaire d'allonger la liste. Une proposition visant à incorporer à la Convention, en annexe, un formulaire de demande qui serait utilisé obligatoirement dans tous les cas, à l'instar de la Convention sur la notification des actes judiciaires (1965), n'a pas été retenue. D'abord, la Commission a été d'avis que l'emploi obligatoire d'un formulaire pourrait entraîner le rejet de demandes, et donc des délais inutiles, au seul motif que le formulaire ne serait pas correctement complété, ce qu'il fallait éviter dans le cadre de cette Convention. Et aussi parce que tout formulaire du genre, aussi parfait soit-il en apparence au moment de son adoption, s'avère à l'usage, la

CHAPTER III — RETURN OF CHILDREN

Article 8

Even though, in the normal course of events and in the vast majority of cases, it is to the Central Authority of the State in which the child is habitually resident that the application for the return of the child will be made, the Commission thought it advisable not to restrict the choice and to allow the person whose custody rights have been breached to apply to the Central Authority of any Contracting State, whether in the State of refuge or another State. This option might prove useful in certain exceptional cases. It should also be noted that the person whose custody rights have been breached can apply directly to the courts of the State of refuge (see *infra*, article 25).

Applications made to the Central Authority must contain the information referred to in paragraphs *a*, *b*, *c* and *d*. This is essential and minimal information, and the Contracting States are free to agree among themselves, on a bilateral basis, if they feel it useful or necessary to extend the list.

A proposal to have included in the Convention, in an appendix, an application form that would have to be used in all cases, as was done in the Convention on the Service of Judicial Documents, 1965, was not accepted. Firstly, the Commission was of the view that the mandatory use of a form might lead to applications being dismissed, and therefore to unnecessary delays, on the sole ground that the form was not completed correctly, a result which had to be avoided in this Convention. Also, any form of this type, however perfect it might seem at the time it was adopted, usually proves in practice to be incomplete or deficient and

plupart du temps, incomplet ou défaillant et requiert tôt ou tard une révision. Incorporé à la Convention, un tel formulaire ne peut être modifié et corrigé qu'en réouvrant la Convention, ce qui n'est pas commode. Ceci dit, la Commission a reconnu que l'utilisation d'un formulaire uniforme faciliterait l'application de la Convention et a chargé un comité de rédiger un formulaire modèle de requête dont l'emploi serait recommandé, mais non obligatoire, lors de la présentation d'une demande. Ce formulaire modèle est reproduit au Document de travail No 41 de la Commission spéciale. Le contenu du formulaire n'a pas été étudié par la Commission, faute de temps. On a, par ailleurs, proposé que ce formulaire figure dans un instrument distinct de la Convention, par exemple dans une Déclaration commune ou un Protocole, afin de faciliter sa révision si cela s'avérait nécessaire à l'usage. Il appartiendra à la Quatorzième session d'en décider.

L'article 8 mentionne en outre les documents dont la demande *peut* être accompagnée, notamment les décisions de justice et les accords entre les parties. La Convention aurait pu exiger que ces décisions et accords, lorsqu'ils existent, soient produits obligatoirement au soutien de la demande, mais la Commission a estimé que cela risquait trop de retarder l'acheminement de la demande – copies de ces documents n'étant pas toujours disponibles au moment de l'enlèvement ni, surtout, établis en français ou en anglais comme l'exige l'article 20 – de sorte qu'il valait mieux ne pas exiger cette production pour déclencher le mécanisme de la Convention. Il semble aller de soi, cependant, que ces décisions ou accords, lorsqu'ils existent et fondent le droit de garde du requérant, devraient éventuellement être transmis à l'Autorité centrale de l'Etat requis car on ne voit pas très bien comment l'autorité judiciaire pourrait constater qu'il y a eu violation du droit de garde aux termes de l'article 3 sans avoir examiné ces documents, à moins bien sûr que le ravisseur admette les faits. Par conséquent, il semble que la production de ces documents, lorsqu'ils existent, sera la plupart du temps requise pour obtenir le rétablissement judiciaire de la garde, même si cela n'est pas nécessaire pour mettre en branle l'Autorité centrale de l'Etat requis notamment pour localiser l'enfant et assurer sa remise volontaire. On notera cependant l'ambiguïté créée à cet égard par l'article 14 qui autorise l'Autorité centrale de l'Etat requis à demander à l'Etat requérant une décision constatant le déplacement illicite. L'Autorité centrale pourrait-elle invoquer cette disposition avant même d'entreprendre toute démarche en vue d'assurer la remise volontaire de l'enfant?

Le paragraphe *f* vise à permettre la production d'attestations officielles, ces «certificats de coutume» en usage dans plusieurs Etats, sur la teneur du droit dans l'Etat requérant. On notera que ces attestations peuvent également émaner «d'une personne qualifiée», c'est-à-dire, dans notre système, un avocat ou un notaire (Québec). Ces documents seront utilisés plus spécialement lorsqu'il n'existe pas de décision judiciaire dans l'Etat requérant au moment de l'enlèvement, mais l'attestation pourrait également s'avérer utile même s'il y a une décision sur la garde, car cette décision pourra avoir été rendue dans un Etat autre que l'Etat de la résidence habituelle de l'enfant au moment de l'enlèvement et il faudra établir que cette décision est reconnue et a force de loi dans l'Etat requérant. Le paragraphe *f* est, à cet égard peut-être un peu trop restrictif en référant uniquement aux attestations concernant «la teneur des dispositions législatives sur le droit de garde».

Article 9

Cette disposition n'est pas vraiment nécessaire dans la Convention compte tenu de ce qui est dit au paragraphe *d* de l'article 7. Toutefois, il a paru utile de souligner spécialement cette étape importante de l'action des Autorités centrales en vue d'assurer la remise volontaire de l'enfant.

sooner or later requires revision. Once incorporated into the Convention, such a form can be altered and corrected only by reopening the Convention, and this is inconvenient. This having been said, the Commission recognized that the use of a model form would facilitate the application of the Convention and instructed a committee to prepare a model application form whose use would be recommended, but not mandatory, when an application was made. This model form is reproduced in Working Document No 41 of the Special Commission. The contents of the form were not studied by the Commission, owing to a lack of time. It was also proposed that this form appear in an instrument separate from the Convention, in a Joint Declaration or a Protocol, for example, in order to facilitate its revision if this proved necessary once it was in use. It will be up to the Fourteenth Session to decide this question.

Article 8 also mentions documents by which the application *may* be accompanied, including court decisions and agreements between the parties. The Convention could have made it a mandatory requirement that such decisions and agreements, where they exist, be filed in support of the application, but the Commission felt that this was too likely to delay the progress of the application – since copies of such documents are not always available at the time of the abduction or, in particular, available in French or in English, as required by article 20 – with result that it was preferable not to require that these documents be filed before the Convention could come into operation. It seems to go without saying, however, that such decisions or agreements, where they exist and are the basis for the applicant's custody rights, should eventually be transmitted to the Central Authority of the requested State since it is difficult to see how the judicial authority could determine that there has been a breach of custody rights under article 3 without having examined these documents, unless the abductor admits the facts, of course. Consequently, it seems that it will usually be necessary to file these documents, where they exist, in order to obtain judicial restoration of custody, even if this is not necessary before the Central Authority of the requested State can take action, in particular to locate the child and ensure his voluntary return. The ambiguity created in this regard by article 14, which authorizes the Central Authority of the requested State to ask the requesting State for a decision to the effect that the child has been wrongfully removed, will be noted. Could the Central Authority invoke this provision even before taking any steps to ensure the voluntary return of the child?

Paragraph *f* permits the filing of official certificates, those 'certificates of custom' in use in several States, on the contents of the law in the requesting State. It will be noted that such certificates may also emanate from 'a qualified person', that is, in our sytem, a lawyer or a notary (Quebec). These documents will be used especially where there is no judicial decision in the requesting State at the time of the abduction, but the certificate might also prove useful even if there is a decision on custody since this decision may have been rendered in a State other than the State of the child's habitual residence at the time of the abduction and it will be necessary to establish that this decision is recognized and has force of law in the requesting State. Paragraph *f* is perhaps somewhat too restrictive in this regard in referring solely to certificates concerning 'the contents of the law of that State with respect to custody rights'.

Article 9

This provision is not really necessary in the Convention in view of what is said in paragraph *d* of article 7. However, it seemed useful to place special emphasis on this important step in the Central Authorities' action aimed at obtaining the return of the child by consent.

Cependant, dans sa rédaction actuelle, l'article 9 n'est peut-être pas entièrement satisfaisant. D'une part, il laisse entendre que l'action de l'Autorité centrale en vue du rétablissement volontaire de la garde doit cesser dès l'ouverture d'une procédure judiciaire, ce qui n'est pas l'intention. L'Autorité centrale devrait déployer tous ses efforts pour assurer la remise volontaire de l'enfant même pendant la procédure judiciaire. D'autre part, l'Autorité centrale devra dans certains cas prendre ou faire prendre de toute urgence des mesures provisoires, dans l'intérêt de l'enfant, et cela ne saurait être subordonné, chronologiquement, à la prise de mesures destinées à assurer la remise volontaire. De même, il y aura des cas où la procédure judiciaire devra être introduite d'urgence, sans délai, dès la réception de la demande, sous peine de faire perdre au demandeur le bénéfice du délai de six mois prévu à l'article 11 pour la présentation de son action judiciaire.

Article 10

L'alinéa premier de cet article est le pendant de l'article 2 (voir *supra*) qui demandait aux Etats contractants d'adopter des procédures rapides afin de permettre à leurs autorités judiciaires de statuer d'urgence sur la remise de l'enfant. Aucun problème ici pour les tribunaux canadiens car, en ces matières, ils agissent déjà d'urgence.

Le délai de six semaines dont il est question à l'alinéa deux de cet article n'est pas un délai de procédure. Il n'affecte nullement la durée des procédures devant le tribunal (voir les commentaires sous l'article 2, *supra*). Lorsque le tribunal n'a pas statué dans les six semaines de sa saisine, c'est une simple constatation à faire, l'Autorité centrale doit en informer l'Autorité centrale de l'Etat requérant en lui donnant les motifs. Elle devra faire de même envers le demandeur dans les cas, exceptionnels, où la demande lui aura été adressée directement par ce dernier sans passer par l'Autorité centrale de sa résidence. Enfin, et cela va de soi, l'Autorité centrale ne sera pas soumise à cette obligation lorsqu'elle n'a pas été informée de l'existence d'une demande judiciaire, c'est-à-dire dans les cas où le demandeur ne fera appel à aucune Autorité centrale et saisira directement le tribunal de l'Etat de refuge, comme l'autorise l'article 25.

Article 11

Lors de l'élaboration de cet article en Commission, il a été convenu que le délai de six mois ne devait pas porter atteinte à l'application en général de la Convention. Ce délai n'affecte que le jeu de l'article 11, c'est-à-dire l'obligation imposée aux tribunaux d'ordonner le retour de l'enfant lorsque la procédure judiciaire est introduite dans le délai. Pour le reste, la Convention continue de s'appliquer, même après l'expiration du délai, notamment dans ses dispositions relatives aux obligations de coopération entre les Autorités centrales en vue de réaliser le second objectif de la Convention, l'exercice paisible du droit de garde et du droit de visite (article 1).

On notera encore une fois que ce délai n'affecte pas la durée de la procédure devant le tribunal. Ce qui importe c'est que l'action judiciaire soit entreprise dans les six mois de la violation du droit de garde, délai qui peut être prolongé jusqu'à douze mois dans les circonstances décrites au second alinéa de l'article.

L'article 11 ne le dit pas expressément, mais il s'agit ici de la présentation de la demande principale (*i.e.* pour le retour de l'enfant) et non des requêtes pour mesures provisoires qui pourraient avoir été introduites dans le délai de six mois. L'article 11 pourrait à cet égard être plus explicite.

Le délai de six mois peut être prolongé jusqu'à un maximum de douze mois «lorsque la résidence de l'enfant était inconnue» au moment de la violation du droit de garde. Ce qui revient à dire que le délai de six mois court, en vérité, à compter de la découverte de l'enfant car, dans le cas

However, article 9 is perhaps not entirely satisfactory as presently worded. It implies that the action of the Central Authority with a view to obtaining voluntary restoration of custody must cease as soon as legal proceedings are instituted, and this is not the intention. The Central Authority should make every effort to obtain the return of the child by consent even during legal proceedings. Moreover, in some cases, the Central Authority will have to take or promote the taking of provisional measures as quickly as possible, in the interests of the child, and this could not be subordinated, chronologically, to the taking of measures aimed at obtaining the return by consent. Similarly, there will be cases where legal proceedings will have to be instituted expeditiously, without delay, as soon as the application is received, so that the applicant does not lose the benefit of the six-month period provided for in article 11 for instituting his judicial action.

Article 10

The first paragraph of this article is the counterpart of article 2 (see *supra*), which required Contracting States to use rapid procedures to enable their judicial authorities to rule expeditiously on the return of children. This raises no problems for Canadian courts, since they already act expeditiously in such matters.

The six-week period referred to in the second paragraph of this article is not procedural. It in no way affects the length of proceedings in court (see the comments under article 2, *supra*). Where the court has not reached a decision within six weeks of receiving the application, which is a simple matter to determine, the Central Authority must so inform the Central Authority of the requesting State, stating the reasons. It must do the same with respect to the applicant in the exceptional cases where the latter has applied to it directly, without going through the Central Authority of his State of residence. Finally, and this goes without saying, the Central Authority will not be subject to this obligation where it has not been informed of the existence of a judicial application, in other words, in cases where the applicant does not appeal to any Central Authority but instead applies directly to the court in the State of refuge, as authorized by article 25.

Article 11

When this article was being drafted by the Commission, it was agreed that the six-month period should not prejudice the general application of the Convention. This time-limit affects only the application of article 11, that is, the obligation imposed on the courts to order the return of the child where legal proceedings are instituted within the time-limit. The rest of the Convention continues to apply, even after the expiry of the time-limit, including its provisions concerning the duties of the Central Authorities to co-operate with one another with a view to realizing the second object of the Convention, the peaceful exercise of custody and access rights (article 1).

It will be noted once again that this time-limit does not affect the length of the proceedings in court. What is important is that judicial action be taken within six months of the breach of custody rights, a time-limit which can be extended to twelve months in the circumstances described in the second paragraph of the article.

Article 11 does not say so expressly, but this refers to the presentation of the principal application (that is, for the return of the child) and not to applications for provisional measures that might have been made within the six-month period. Article 11 could be more explicit in this regard.

The six-month time-limit can be extended to a maximum of twelve months 'where the residence of the child was unknown' at the time of the breach of custody rights. This means that the six months runs, in fact, from the date of the discovery of the child since, in the classic abduction case, the

classique d'enlèvement, le lieu de refuge de l'enfant ne sera pas, la plupart du temps, connu au moment de la «violation du droit de garde». Dans ce cas, cependant, la demande pour le retour de l'enfant devra être introduite au plus tard douze mois après la violation du droit de garde. Par exemple, lorsque le lieu de refuge de l'enfant n'aura été découvert que neuf ou dix mois après l'enlèvement, le demandeur n'aura que trois ou deux mois, selon le cas, pour introduire son action judiciaire.
L'autorité judiciaire saisie après l'expiration du délai ne sera pas tenue d'ordonner le retour de l'enfant. On notera cependant que celle-ci pourra, même dans ce cas, ordonner le retour. Cette faculté lui est réservée par l'article 15. Mais dans ce cas, l'autorité judiciaire agira en toute discrétion. Ce qu'on a voulu éviter ici, c'est que l'autorité judiciaire interprète la Convention comme l'obligeant à ne pas ordonner le retour lorsque la demande lui est présentée après l'expiration des délais. Or, dans certains cas, surtout lorsque le lieu de résidence de l'enfant a été caché pendant plus d'un an, cette faculté pourra s'avérer utile.

Pourquoi un délai de six mois et non un délai plus long? Parce qu'il est essentiel dans cette Convention, dont le but, rappelons-le, est de rétablir la situation de fait qui prévalait avant le déplacement, que la personne lésée agisse rapidement. Autrement, on pourrait mettre en doute qu'elle exerçait bien effectivement la garde au moment du déplacement. Et puis, il fallait tenir compte de l'intérêt de l'enfant et du nouvel environnement social qu'un déplacement de plus de six mois pouvait créer. Par contre, il fallait aussi tenir compte de l'intérêt du parent dépossédé, lequel pouvait ne pas avoir eu les moyens de localiser l'enfant avant l'expiration des six mois – il suffit de penser au cas du ravisseur qui, pour échapper aux poursuites, déplace constamment sa résidence et ne se fixe nulle part dans les premiers mois de l'enlèvement – et c'est pour cette raison que la Commission a proposé l'extension du délai dans ces circonstances jusqu'à un an maximum.

On notera que le point de départ du délai est relativement facile à identifier; il s'agit du moment de la violation du droit de garde (*i.e.* déplacement ou non-retour) ou du moment de la découverte de l'enfant. Ce dernier critère ne sera pas cependant sans créer certaines difficultés d'interprétation, notamment en cas de déplacements successifs après la découverte de l'enfant. La Convention pourrait à cet égard être plus précise.
Une proposition visant à retenir, comme point de départ, le moment où le demandeur a eu connaissance de la violation de son droit de garde n'a pas été adoptée, ce critère étant trop subjectif, et partant susceptible de requérir l'examen du demandeur.

Article 12

L'article 12 prévoit les moyens de défense que pourra faire valoir la personne qui a déplacé ou retenu l'enfant. La liste est courte, très courte même, et pourtant elle assure la protection voulue au défendeur. Rappelons que la décision judiciaire à intervenir ne vise qu'à rétablir la situation de fait qui prévalait avant l'enlèvement et ne préjuge pas du fond du droit de garde. Comme il ne s'agit pas d'une convention sur la reconnaissance et l'exécution des décisions sur la garde, il a été possible de réduire la liste des moyens de défense au strict minimum.
Dans une convention-reconnaissance (modèle adopté par le Conseil de l'Europe), il est nécessaire de tenir compte d'une foule de questions qui constituent autant d'éléments de contrôle de la décision étrangère: le défendeur a-t-il eu connaissance de la procédure dans l'Etat d'origine, le tribunal de l'Etat d'origine était-il compétent, y a-t-il décisions incompatibles, litispendance, ordre public, etc....? La Commission n'a pas retenu ce modèle, car elle n'a pas

child's place of refuge will not usually be known at the time of the 'breach of custody rights'. In that case, however, the application for the return of the child must be made within twelve months after the breach of custody rights. Where the child's place of refuge is discovered only nine or ten months after the abduction, for example, the applicant will have only three or two months, as the case may be, to bring his court action.

A judicial authority which receives an application after the period has expired will not be obliged to order the return of the child. It will be noted, however, that even in this case it may order the child's return. It has this discretion under article 15. In this case, however, the judicial authority's action will be entirely discretionary. The intention was to avoid having the judicial authority interpret the Convention as obliging it not to order the return where the application is submitted to it after the time-limits have expired. In some cases, particularly where the child's place of residence has been concealed for over a year, this discretion might prove useful.
Why a period of six months and not longer? Because it is essential under this Convention, the purpose of which, it should be remembered, is to re-establish the situation which existed before the removal, that the injured party act quickly. Otherwise, doubt might arise as to whether that person was actually exercising custody rights at the time of the removal. In addition, it was necessary to take into account the interests of the child and the new social environment which a removal of over six months might create. On the other hand, consideration also had to be given to the interests of the dispossessed parent, who might not have had the means of locating the child before the six months had expired – it is sufficient to think of the case of an abductor who, to escape legal proceedings, constantly changes his residence and does not establish himself anywhere in the first months of the abduction – and it is for this reason that the Commission proposed an extension of the time-limit in these circumstances up to a maximum of one year.
It will be noted that it is relatively easy to identify the starting point of the period; it is the time of the breach of custody rights (that is, the removal or retention) or the date of the discovery of the child. However, where the starting point is that of the discovery of the child, the provision may pose some problems of interpretation, particularly in cases of subsequent removals after the discovery of the child. The Convention could be more precise in this regard.
A proposal to use the time the applicant learned of the breach of his custody rights as a starting point was not adopted, since this criterion is too subjective and consequently likely to require an examination of the applicant.

Article 12

Article 12 sets out the grounds of defence on which the person who has removed or retained the child may rely. This list is short, very short in fact, and yet it gives the defendant the necessary protection. It should be remembered that the judicial decision to be rendered is aimed only at re-establishing the situation which existed before the abduction and does not affect the merits of custody rights. Since this is not a convention on the recognition and enforcement of decisions concerning custody rights, it was possible to reduce the list of grounds of defence to a bare minimum.
In a recognition convention (model adopted by the Council of Europe), it is necessary to take into account a large number of questions which represent as many means of control of the foreign decision: was the defendant aware of the proceedings in the State of origin, did the court in the State of origin have jurisdiction, are there any incompatible decisions, is there *lis pendens*, are there considerations of public policy, and so on? The Commission did not adopt this

voulu, à juste titre, multiplier les moyens de faire obstacle au retour de l'enfant.

On notera qu'il appartient au défendeur d'établir – il a la charge de la preuve – les faits justificatifs décrits aux lettres *a* et *b* de l'alinéa premier de l'article 12. Par conséquent, lorsque la demande ne sera pas contestée, ou étant contestée les faits justificatifs ne seront pas établis, le tribunal, après avoir constaté le déplacement ou non-retour illicite de l'enfant aux termes de l'article 3, ordonnera sa remise.

Le premier fait justificatif, «à l'époque de la violation invoquée, le demandeur n'exerçait pas effectivement... le droit de garde sur l'enfant», rappelle la définition de «déplacement ou non-retour illicite» de l'article 3. On a ici voulu tenir compte des cas, et ils sont peut-être fréquents, où la personne dont le droit de garde ou de visite a été objectivement violé se désintéressait en fait de l'enfant avant son déplacement, et empêcher qu'elle puisse invoquer la Convention, en apprenant son déplacement transfrontière, pour obtenir son retour. Il n'a pas paru juste de pénaliser la personne qui exerçait seule, et peut-être depuis plusieurs années, la garde effective de l'enfant, au seul motif que le déplacement de l'enfant était «illicite» selon le droit de l'Etat de la résidence habituelle antérieure au déplacement. Il ne s'agit pas dans ce cas d'un véritable kidnapping – de fait, il s'agit plutôt d'un simple changement de résidence de l'enfant – et on a estimé qu'il n'y avait pas lieu d'accorder la protection de la Convention au demandeur. Ce dernier pourra toujours s'adresser aux tribunaux de la nouvelle résidence pour faire valoir ses droits à la garde, soit au moyen d'une action originale ou d'une action en reconnaissance de la décision judiciaire violée, mais il devra le faire en dehors de la Convention. Il semble qu'il ne pourra pas non plus invoquer la Convention même si la décision qu'il invoque requérait le défendeur de ne pas déplacer l'enfant outre-frontière.

On a déjà noté (voir les commentaires sous l'article 3) l'ambiguïté créée par l'emploi du critère d'exercice effectif de la garde par le demandeur dans la définition de «déplacement illicite» à l'article 3. D'un côté, l'article 12 impose au défendeur d'établir la négative, et de l'autre, il semble qu'il appartienne au tribunal de déterminer objectivement si le demandeur exerçait ou non effectivement le droit de garde au moment du déplacement. S'agissant d'une question de fait, le tribunal pourra-t-il dans une procédure non contestée s'en tenir aux seules allégations de la demande sans examiner le demandeur sur ce point?

Quant à l'expression «... ou de bonne foi ...» à la lettre *a*, il n'est pas très clair ce qu'elle recouvre. En effet, il est difficile d'imaginer qu'une personne qui exerce «effectivement» un droit de garde selon «le droit de l'Etat de la résidence habituelle de l'enfant» (article 3) puisse être de mauvaise foi. Certains experts ont mentionné le cas d'exercice clandestin ou caché du droit de garde, mais on peut se demander si ce n'est pas là une question qu'il appartient plutôt aux tribunaux de l'Etat de la résidence habituelle de trancher, après le rapatriement de l'enfant? En admettant ce moyen de défense dans ce cas, on semble justifier le défendeur d'avoir procédé à l'enlèvement. Un motif plus valable, peut-être, d'accorder ce moyen de défense serait dans le cas où le demandeur, qui ne tient pas réellement à exercer son droit de garde, invoque la Convention dans le seul but d'harceler le défendeur (la doctrine de «*clean hands*»). Sa démarche, dans ce cas, ne serait pas «de bonne foi».

Mais le motif principal de défense, et le plus important, est celui de la lettre *b*. Lorsqu'il existe un risque grave que le retour de l'enfant ne l'expose à un danger physique (par exemple, violences physiques, coups, sévices) ou psychique (par exemple, cruauté mentale) ou de toute autre manière ne le place dans une situation intolérable (ce qui est plutôt imprécis, mais sans doute justifié), le tribunal pourra ne pas ordonner le retour. Ce motif vise évidemment à protéger l'enfant plutôt que l'enleveur.

model since it did not wish, justifiably, to increase the number of ways of impeding the child's return.

It will be noted that it is up to the defendant to establish – he has the burden of proof – the justifying facts described under *a* and *b* of the first paragraph of article 12. Consequently, where the application is not contested, or is contested but the justifying facts are not established, the court will order the child's return after determining that the child was wrongfully removed or retained under article 3.

The first justifying fact, 'at the time of the alleged breach the applicant was not actually exercising the custody rights', is similar to the definition of 'wrongful removal or retention' in article 3. The intention here was to cover cases, which are perhaps frequent, where the person whose custody or access rights have objectively been breached in fact took no interest in the child before his removal and to prevent him from being able to rely on the Convention, on learning of the child's transboundary removal, to obtain his return. It did not seem fair to penalize the person who was alone actually exercising custody over the child, and perhaps had been doing so for several years, on the sole ground that the removal of the child was 'wrongful' under the law of the State of habitual residence prior to the removal. There is no true kidnapping in this case – in fact, it is rather a mere change in the child's residence – and it was felt that the applicant should not be given the protection of the Convention. The latter may still apply to the courts in the State of the new residence to enforce his custody rights by means of either an original action or an action to have the judicial decision that had been breached recognized, but he will have to do so outside the scope of the Convention. It seems that he could not rely on the Convention even if the decision he was relying on required the defendant not to remove the child across any boundaries.

We have already noted (see the comments under article 3) the ambiguity created by the use of the criterion of actual exercise of custody by the applicant in the definition of 'wrongful removal' in article 3. On the one hand, article 12 obliges the defendant to establish the negative, and on the other, it seems that it is up to the court to determine objectively whether or not the applicant was actually exercising the custody rights at the time of the removal. Since this is a question of fact, could the court, in an uncontested proceeding, rely solely on the allegations in the application without examining the applicant on this point?

As for the expression 'or acting in good faith' in *a*, it is not very clear what it refers to. It is difficult to imagine how someone who is 'actually' exercising custody rights under 'the law of the State in which the child was habitually resident' (article 3) could be acting in bad faith. Some experts mentioned the case of clandestine or concealed exercise of custody rights, but one might wonder whether this is not a question which the courts of the State of habitual residence should rather decide, after the child has been repatriated? In accepting this ground of defence in such a case, we seem to be saying that the defendant was justified in having carried out the abduction. A more valid case, perhaps, for allowing this ground of defence would be where a defendant who does not really wish to exercise his custody rights invokes the Convention for the sole purpose of harassing the defendant (the 'clean hands' doctrine). His action in this case would not be 'in good faith'.

However, the principal ground of defence, and the most important, is the one under *b*. Where there is a substantial risk that the return would expose the child the physical harm (physical violence, beating or maltreatment, for example) or psychological harm (mental cruelty, for example) or otherwise place the child in an intolerable situation (which is somewhat vague, but undoubtedly justified), the court may not order the return. This ground is obviously aimed at protecting the child rather than the abductor.

La Commission n'a pas retenu certaines propositions visant soit à restreindre encore davantage la portée du texte, par exemple par l'emploi du terme «danger immédiat», ou à l'augmenter, par exemple dans le cas où l'enfant se serait intégré dans son nouvel environnement social. Il n'est pas fait mention non plus du «danger moral» (par exemple, inceste, toxicomanie), bien que cela puisse, dans certains cas, faire partie de ces «situations intolérables» dont il est question dans le texte. Enfin, une proposition visant à employer l'expression «situation inacceptable» plutôt que «situation intolérable» fut rejetée au motif qu'elle accordait trop de discrétion au juge.

De même, la Commission s'est refusée à allonger la liste et d'y inclure, par exemple, le cas où l'ordonnance de retour serait contraire à une décision antérieure de l'Etat requis (10 voix contre 5), ou lorsqu'il apparaît que le retour est contraire aux principes généraux de cet Etat (13 voix contre 7), ou encore lorsque le droit de garde invoqué découle d'une décision rendue sans que le défendeur ait été en mesure de faire valoir ses droits (14 voix contre 3). On comprend que ce dernier motif n'ait pas été retenu dans la Convention, cela eut été contraire à sa philosophie; la Convention n'est pas là pour protéger le kidnappeur qui n'a pas été notifié d'une procédure dans l'Etat de la résidence habituelle; s'il n'a pas été en mesure de faire valoir ses droits dans l'Etat d'origine au moment de la décision, il lui appartient de demander la révision de cette décision dans cet Etat, et non de kidnapper l'enfant. Quant aux deux autres motifs (décision antérieure et ordre public de l'Etat requis), bien qu'ils ressortissent davantage à une convention sur la reconnaissance et l'exécution de décisions étrangères, il n'est pas exclu qu'ils apparaissent dans le texte final de la Convention, sous forme de réserve par exemple, mais il appartiendra à la Quatorzième session d'en décider.

Le deuxième alinéa de l'article 12 appelle peu de commentaires. Lorsque l'enfant s'oppose à son retour et qu'il est d'un âge où il est approprié de tenir compte de son opinion, le juge pourra refuser d'ordonner le retour. Ce motif de refus est d'autant plus important que la Convention s'applique aux enfants de moins de 16 ans (voir article 4). Cette disposition impose une large responsabilité à l'enfant, lequel sera évidemment sous l'influence de l'enleveur, mais il n'était pas possible d'exclure ce moyen de défense, et il appartiendra aux juges de l'appliquer avec discernement. L'alternative eut été de rabaisser l'âge des enfants visés par la Convention, par exemple à 12 ans, et d'exclure ce motif de refus, ou encore de maintenir l'âge de 16 ans mais de n'autoriser la prise en considération de l'opinion de l'enfant que s'il est âgé de 12 à 16 ans par exemple, mais aucune de ces variantes n'a été retenue.

Enfin, le troisième alinéa de l'article 12 a été adopté en vue d'assister le juge dans l'appréciation des moyens de défense invoqués par le défendeur. On a voulu également, ainsi, prévenir les témoins de complaisance du kidnappeur dans l'Etat de refuge. A noter que le juge ne tient compte que des informations fournies par l'Autorité centrale de l'Etat requérant et qu'il n'est pas tenu, si elles n'ont pas été fournies, de les obtenir de l'Etat requérant avant de rendre sa décision.

Article 13

A première vue, cette disposition peut paraître superflue, car il semble aller de soi que le tribunal devra tenir compte du droit de l'Etat de la résidence habituelle de l'enfant pour déterminer s'il y a eu violation du droit de garde du demandeur aux termes de l'article 3. L'article 13 pourtant a été incorporé à la Convention. L'intention ici a été de préciser l'obligation des Etats contractants concernant l'application du droit étranger. L'article 13 impose l'obligation de *tenir compte* (*have regard*) du droit et des décisions de l'Etat de la résidence habituelle, mais il n'oblige pas à *appliquer* ce droit

The Commission did not adopt certain proposals aimed either at restricting the scope of the provision even further, for example through the use of the term 'immediate risk', or at broadening it, for example in the case where the child has become integrated into his new social environment. Neither is there any mention of 'moral danger' (incest or drug addiction, for example), even though this might, in certain cases, form part of the 'intolerable situations' referred to in the provision. Finally, a proposal that the expression 'unacceptable situation' be used instead of 'intolerable situation' was rejected on the ground that it allowed the judge too much discretion.

Similarly, the Commission decided not to extend the list and include, for example, the case where the return order was contrary to a previous decision of the requested State (by 10 votes to 5), or where it appears that the return is contrary to the general principles of that State (by 13 votes to 7), or where the custody rights invoked result from a decision rendered without the defendant having been able to assert his rights (by 14 votes to 3). It is understandable that this last ground was not incorporated into the Convention, since this would have been contrary to its philosophy; the Convention is not there to protect the kidnapper who has not been served with proceedings in the State of habitual residence; if he was not able to assert his rights in the State of origin at the time of the decision, it is up to him to ask that the decision be reviewed in the State, and not to kidnap the child. As for the other two grounds (previous decision and public policy of the requested State), although they would be more appropriate in a convention on the recognition and enforcement of foreign decisions, the possibility of their being included in the final version of the Convention, in the form of a reservation, for example, has not been ruled out, but it will be up to the Fourteenth Session to decide on this.

The second paragraph of article 12 calls for few comments. Where the child objects to being returned and is of an age at which it is appropriate to take account of his views, the judge may refuse to order his return. This ground for refusal is especially important since the Convention applies to children under the age of 16 (see article 4). This provision places considerable responsibility on the child, who will obviously be under the influence of the abductor, but this ground of defence could not be excluded, and it will be up to the judges to apply it with discernment. An alternative might have been to lower the age of children covered by the Convention to 12 years, for example, and exclude this ground for refusal, or to retain the age of 16 but allow the child's views to be taken into account only if he is between the ages of 12 and 16, for example, but none of these variations was adopted.

The third paragraph of article 12, finally, was adopted in order to assist the judge in evaluating the grounds of defence relied on by the defendant. The intention was also to prevent in this manner witnesses of convenience testifying on behalf of the kidnapper in the State of refuge. It should be noted that the judge takes into account only information provided by the Central Authority of the requesting State and that he is not obliged, if such information has not been provided to obtain it from the requesting State before rendering his decision.

Article 13

This provision may appear superfluous at first sight, since it seems to go without saying that the court must have regard to the law of the State of the child's habitual residence in determining whether there has been a breach of the applicant's custody rights under article 3. Article 13 was included in the Convention, nevertheless. The intention was to spell out the obligation of Contracting States with regard to the application of the foreign law. Article 13 imposes an obligation to *have regard* (*tenir compte*) to the law and decisions of the State of habitual residence, but it does not

ou à *reconnaître* les décisions rendues dans cet Etat, ce que l'article 3 pouvait suggérer.
Cette disposition sera complétée dans le texte final de la Convention, si la recommandation de la Commission est agréée, par une disposition précisant clairement que la Convention, pour les Etats qui la ratifieront, constituera une «*lex specialis*», rendant inutile le recours aux procédures générales de reconnaissance en vigueur dans ces Etats.

Article 14

Cet article a été adopté à l'unanimité par la Commission.
Cette disposition vise principalement à tenir compte de la difficulté créée par les cas de violation du droit de garde *ex lege*. Mais il convient de reconnaître qu'elle peut également être invoquée dans les cas où une décision judiciaire sur la garde existait dans l'Etat de la résidence habituelle de l'enfant avant le déplacement ou le non-retour illicite. La pratique dira quel usage sera fait de cette disposition, et si ces attestations judiciaires, sorte the «*chasing orders*», deviendront la règle. L'article 14 autorise ce développement. Ce qui est à craindre, c'est que cette disposition puisse être invoquée par les Autorités centrales pour refuser d'intervenir dans la phase initiale de l'opération, notamment pour la prise de mesures provisoires et la remise volontaire de l'enfant (voir les commentaires à ce sujet sous l'article 8).

Article 15

Nous avons déjà commenté cet article à l'occasion de l'étude de l'article 11 (voir *supra*).

Article 16

On a déjà référé à cette disposition à plusieurs reprises dans ce Rapport. Ce principe est partout implicite dans la Convention, mais il a paru souhaitable de le stipuler expressément.

require that this law be *applied* or that decisions rendered in that State be *recognized*, as article 3 might suggest.
This provision will be complemented in the final version of the Convention, if the Commission's recommendation is accepted, by a provision stating clearly that, for the States which ratify it, the Convention will constitute a '*lex specialis*', making it unnecessary to have recourse to the general recognition procedures in effect in these States.

Article 14

This article was adopted unanimously by the Commission.
This provision is aimed principally at dealing with the difficulty created by cases of breach of custody rights *ex lege*. It should be recognized, however, that it can also be relied on in cases where there was a judicial decision concerning custody in the State of the child's habitual residence before the wrongful removal or retention. Time will tell what use will be made of this provision, and whether such judicial determinations, a sort of 'chasing order', will become the rule. Article 14 authorizes such a development. What is to be feared is that this provision may be relied on by the Central Authorities to justify a refusal to intervene in the initial phase of the operation, in particular to take provisional measures and secure the return of the child by consent (see the comments on this subject under article 8).

Article 15

We have already commented on this article when considering article 11 (see *supra*).

Article 16

We have already referred to this provision on several occasions in this Report. This principle is implicit throughout the Convention, but it seemed desirable to state it explicitly.

CHAPITRE IV — DROIT DE VISITE

Article 17

Cette disposition vise à assurer l'exercice paisible «international» du droit de visite et à prévenir de ce fait les cas d'enlèvement.
A première vue, cette disposition ne semble pas créer de difficulté particulière pour sa mise en oeuvre dans les Etats contractants, mais à y regarder de plus près, on constate qu'elle soulève un problème réel d'interprétation. Les questions de droit de garde et de visite étant, en vertu des principes mêmes de la Convention, du ressort du tribunal de l'Etat où l'enfant avait sa résidence habituelle avant le déplacement, on comprend mal en effet qu'une demande visant à *fixer* l'exercice du droit de visite puisse être adressée à l'Autorité centrale de l'Etat de refuge. Ainsi libellé, l'article 17 — et il en est de même de l'alinéa *f* de l'article 7 — semble permettre à l'Etat requis de modifier une ordonnance rendue par un tribunal compétent, ce qui va vraisemblablement à l'encontre de l'esprit de la Convention. Si l'intention est qu'une telle demande puisse être adressée dans les cas où l'autorité judiciaire ou administrative de l'Etat requis refuserait d'ordonner le retour de l'enfant, il faudrait le préciser plus clairement dans la Convention. Autrement, il serait préférable d'enlever tout simplement le mot «fixer» de ces articles.
Le deuxième alinéa de l'article mentionne l'obligation des Autorités centrales d'intervenir «pour que soient levés, dans toute la mesure du possible, les obstacles de nature à s'opposer à cet exercice». On a mentionné, par exemple, le cas de procédures criminelles qui pourraient avoir été prises suite à un enlèvement dans l'Etat de la résidence habituelle.

CHAPTER IV — RIGHTS OF ACCESS

Article 17

This provision is aimed at ensuring the peaceful 'international' exercise of access rights and thereby preventing abductions.
At first sight, this provision does not seem to create any particular difficulties for its implementation in the Contracting States; however on closer examination it does appear to create a real problem of interpretation. Considering the underlying principles of the Convention that questions of custody and access are better dealt with by the courts of the State where the child had his habitual residence before the removal, it is indeed difficult to understand why an application for *fixing* the exercise of rights of access can be presented to the Central Authority of the State of refuge. As drafted, article 17 — and this is equally applicable in the case of paragraph *f* of article 7 — would appear to allow the requested State to modify the order of a competent tribunal, a result which very likely is contrary to the spirit of the Convention. If the intention is that such an application can be presented where the judicial or administrative authority of the requested State refuses to order the return of the child, then it should be clearly stated in the Convention. Otherwise, it would seem preferable to simply delete the word 'fixing' from this article.
The second paragraph of the article refers to the obligation of the Central Authorities to intervene 'to remove, as far as possible, all obstacles to the exercise of such rights'. Criminal proceedings following an abduction in the State of habitual residence were mentioned, for example.

Article 18

L'idée, ici, est de ne pas mettre d'obstacle à la présentation de la procédure judiciaire.
Quant aux frais de justice à l'encontre du demandeur perdant, s'ils ne sont pas couverts par le système d'assistance judiciaire, ils pourront être exécutés à l'étranger selon le droit commun ou conventionnel applicable en ces matières (voir aussi l'article 22).
Les mots qui apparaissent entre crochets visent à limiter l'exemption à fournir caution aux personnes qui résident habituellement dans un Etat contractant. La Commission s'est divisée sur la nécessité d'une telle limitation. Il semble peu probable, en vérité, qu'une demande judiciaire puisse être introduite par une personne qui ne réside pas habituellement dans un Etat contractant, car elle doit invoquer la violation d'un droit de garde en vertu du droit de l'Etat de la résidence habituelle de l'enfant. Or l'enfant doit résider habituellement dans un Etat contractant pour que la Convention s'applique. Aussi, cette limitation semble-t-elle avoir peu d'application pratique.

Article 19

Donc, pas nécessaire d'apposer une série de signatures «officielles» sur les documents à fournir, comme cela se pratique dans certains pays. A noter que cette disposition semble applicable même lorsque le demandeur s'est adressé directement aux autorités judiciaires, sans passer par les Autorités centrales, comme l'autorise l'article 25.

Article 20

Cette disposition ne présente pas de difficulté particulière pour le Canada.

Article 21

L'octroi d'assistance financière a paru indispensable au succès de cette Convention et c'est ce qui explique l'article 21. Sans cet engagement des Etats contractants, la Commission a reconnu que la Convention serait dans bien des cas, surtout dans les pays où la justice coûte cher, vouée à la paralysie. Si les Etats sont vraiment déterminés à résoudre le problème de l'enlèvement d'enfants, ils devront consentir cet effort financier. Au Canada, cette décision appartiendra ultimement aux gouvernements provinciaux.
L'intention de la Commission a été que l'octroi de l'assistance judiciaire et juridique soit soumis à la réalisation de l'une des deux conditions mentionnées à l'article 21, c'est-à-dire la nationalité d'un Etat contractant ou la résidence habituelle dans cet Etat. Le demandeur qui remplit ces conditions aurait droit à l'assistance financière dans l'Etat requis comme s'il en était ressortissant et y résidait habituellement.
Ce que la Convention ne précise pas, c'est comment l'autorité compétente de l'Etat requis procédera, dans les cas concrets, pour déterminer notamment les moyens du demandeur qui voudra bénéficier du système d'assistance judiciaire en vigueur dans cet Etat. De toute évidence, cela pourra donner lieu à certaines difficultés.

Article 22

L'essence de cette disposition est que chaque Autorité centrale supportera ses propres dépenses administratives en appliquant la Convention. Mais elle n'est pas obligée d'assumer (*a*) les frais non couverts par le système d'assistance judiciaire, de même que (*b*) les frais de voyage. Elle pourra avancer ces frais mais pourra aussi les réclamer. Ce qui n'est pas précisé c'est de qui ces frais pourront être réclamés: de l'Autorité centrale de l'Etat requérant ou du demandeur?
L'article 22 ne fait pas mention des autorités judiciaires, et il n'est pas exclu que celles-ci ordonnent au défendeur, dans

Article 18

The idea here is not to hinder the institution of judicial proceedings.
As for court costs against a losing applicant, if they are not covered by the legal aid system, they may be executed abroad under the common or conventional law applicable in such matters (see also article 22).

The words which appear in brackets are aimed at limiting the exemption from providing security to persons habitually resident in a Contracting State. The Commission was divided on the necessity for such a limitation. It seems unlikely, in reality, that a judicial application could be made by a person who was not habitually resident in a Contracting State, since it must be based on a breach of custody rights under the law of the State of the child's habitual residence, and the child must habitually reside in a Contracting State for the Convention to apply. This limitation, therefore, seems to have little practical application.

Article 19

Therefore, it is not necessary to affix a series of 'official' signatures to documents to be provided, as is the case in certain countries. It should be noted that this provision seems to be applicable even where the applicant has applied directly to the legal authorities, without going through the Central Authorities, as authorized by article 25.

Article 20

This provision does not present any particular difficulties for Canada.

Article 21

The provision of financial assistance seemed indispensable if this Convention was to be successful and this is the reason for article 21. The Commission recognized that without this undertaking by the Contracting States, the Convention would, in many cases, be paralysed, particularly in countries where legal costs are high. If the States are truly determined to resolve the problem of child abduction, they will have to provide such financial assistance. In Canada, this decision will lie ultimately with the provincial governments.
It was the Commission's intention that the granting of legal aid and advice should be subject to one of the two conditions mentioned in article 21, namely that the applicant be a national of a Contracting State or be habitually resident in that State. An applicant who meets these conditions would be entitled to financial assistance in the requested State as if he was a national of and habitually resident in that State.

What is not stated is how the competent authority of the requested State will determine the means of applicants who wish to benefit from the legal aid system in effect in that State, among other things. This may obviously lead to certain difficulties.

Article 22

The essence of this provision is that each Central Authority will assume its own administrative expenses in applying the Convention. However, it is not obliged to assume (*a*) charges not met through the legal aid system or (*b*) traval expenses. It may advance these expenses but may also claim reimbursement for them. What is not stated is from whom these expenses may be claimed: from the Central Authority of the requesting State or from the applicant?

Article 22 does not mention judicial authorities, and there is nothing to prevent them from ordering the defendant, in

les cas appropriés, de payer les frais de rapatriement de l'enfant. Une proposition visant à ajouter à l'article un paragraphe autorisant le tribunal, lorsqu'il ordonne le retour de l'enfant, à condamner le défendeur à payer les frais de rapatriement et autres dépenses, y compris les frais de représentation juridique du demandeur, n'a pas été retenue.
L'ensemble de cette question sera nécessairement revu lors de la Quatorzième session.

Article 23

Cette disposition a été admise à l'unanimité. Lorsqu'il est «manifeste» que la demande n'est pas acceptable, l'Autorité centrale peut refuser d'intervenir et, dans ce cas, elle en informe le demandeur ou l'Autorité centrale qui lui a transmis la demande. Cette faculté joue non seulement en faveur de l'Autorité centrale de l'Etat requis mais aussi de l'Autorité centrale de l'Etat requérant. En cas de rejet de sa demande, le demandeur pourra toujours s'adresser directement aux autorités judiciaires de l'Etat où se trouve l'enfant pour faire valoir ses droits.

Article 24

Cette disposition a déjà fait l'objet de commentaires à l'occasion de l'étude de l'article 7 (voir *supra*).

Article 25

Lorsque le demandeur se prévaudra de cette faculté, il va de soi que les Autorités centrales n'auront pas à intervenir. Pour le reste, les dispositions de la Convention seront applicables à sa demande.

Article 26

Cette disposition apparaît entre crochets dans l'avant-projet, la Commission n'ayant pas eu le temps d'en débattre.

Article 27

Il s'agit de la clause usuelle d'interprétation pour l'application de la Convention dans les Etats fédéraux.

Article 28

Autre règle d'interprétation, à l'intention cette fois des Etats à systèmes de droit personnel.

Article 29

Par cette disposition, les Etats fédéraux ne sont pas tenus d'appliquer la Convention aux enlèvements strictement nationaux. Par exemple, si la Convention était en vigueur en Ontario et au Québec, les déplacements entre ces deux provinces d'enfants résidant habituellement dans l'une ou l'autre province ne seraient pas régis par la Convention.

CHAPITRE VI — CLAUSES FINALES

Ces clauses (relations avec d'autres Conventions, droit transitoire, réserves, entrée en vigueur, ratifications, adhésions, etc.) seront élaborées lors de la Quatorzième session.
Seule la clause fédérale usuelle a été adoptée par la Commission. Elle figure à l'article Y de l'avant-projet. Elle autorise l'Etat fédéral, lors de la ratification, à déclarer à quelles unités territoriales la Convention s'appliquera dans cet Etat. Il peut modifier cette déclaration en tout temps en faisant une nouvelle déclaration.

CONCLUSION

La simplicité du système adopté dans l'avant-projet de Convention de La Haye (*i.e.* assurer le retour de l'enfant

appropriate cases, from paying the costs of repatriating the child. A proposal that there be added to the article a paragraph authorizing the court, when it orders the return of the child, to order the defendant to pay the costs of repatriation and other expenses, including the applicant's legal fees, was not accepted.

This entire question will have to be reviewed during the Fourteenth Session.

Article 23

This provision was accepted unanimously. Where it is 'manifest' that the application is not acceptable, the Central Authority may refuse to intervene and, in that case, informs the applicant or the Central Authority through which the application was submitted accordingly. This discretion works to the advantage not only of the Central Authority of the requested State, but also of the Central Authority of the requesting State. If his application is rejected, the applicant may always apply directly to the judicial authorities of the State in which the child is located to enforce his rights.

Article 24

This provision has already been the subject of comment when article 7 was being examined (see *supra*).

Article 25

Where the applicant takes advantage of this provision, the Central Authorities will obviously not have to intervene. In all other respects, the provisions of the Convention will be applicable to his application.

Article 26

This provision appears in brackets in the Preliminary Draft since the Commission did not have time to discuss it.

Article 27

This is the usual interpretation clause for applying the Convention in federal States.

Article 28

This is another rule of interpretation, this time for States with systems of personal law.

Article 29

Under this provision, federal States are not bound to apply the Convention to strictly national abductions. If the Convention was in effect in Ontario and Quebec, for example, removals between these two provinces of children habitually residing in one or the other province would not be governed by the Convention.

CHAPTER VI — FINAL CLAUSES

These clauses (relations with other Conventions, temporal application of the Convention, reservations, entry into force, ratifications, accessions, and so on) will be prepared at the Fourteenth Session.
Only the usual federal clause was adopted by the Commission. It appears in article Y of the Preliminary Draft. It authorizes federal States to declare, at the time of ratification, to what territorial units the Convention applies in that State. They can modify their declaration by submitting another declaration at any time.

CONCLUSION

The simplicity of the system adopted in the Hague preliminary draft Convention (that is, ensuring the return

sans préjuger du fond du droit de garde) constitue sans aucun doute l'attrait principal de cet instrument. Et s'il est prématuré de prédire le succès que connaîtra cette Convention auprès des Etats membres de la Conférence, et plus spécialement des Etats qui sont également Membres du Conseil de l'Europe (dont la Convention toute récente sur le même sujet propose une approche sensiblement différente), on doit reconnaître que la solution proposée à La Haye est originale et particulièrement adaptée au problème de l'enlèvement d'enfants, et que ses chances de succès sont très réelles.

On a eu vent, au cours de la seconde réunion de la Commission spéciale, que la Conférence de La Haye se proposait, lorsqu'elle convoquera officiellement la Quatorzième session, d'inviter les Etats membres à accorder à leurs délégations respectives les pleins pouvoirs pour la signature de la Convention lors de l'adoption du texte final par la Conférence à l'issue des travaux de la Quatorzième session. Cela n'est pas la pratique habituelle de la Conférence. D'ordinaire, les instruments adoptés par la Conférence, dans l'Acte final d'une session, sont des projets de convention, et seul l'Acte final est signé par l'ensemble des délégations. Les projets de convention sont alors soumis aux Etats membres de la Conférence en vue de leur signature et ratification éventuelle par les Etats intéressés. C'est au moment de la première signature que la Convention est conclue, et c'est d'ailleurs cette date qu'elle porte, et non celle de la session au cours de laquelle le projet a été élaboré et adopté. Ce que proposerait la Conférence, c'est que le projet de Convention sur l'enlèvement d'enfants soit soumis à la signature des Etats intéressés dès son adoption lors de la Quatorzième session. On notera à cet égard que l'engagement des Etats signataires est toujours subordonné, dans les Conventions de La Haye, à la ratification.

of the child without affecting the merits of custody rights) is no doubt this instrument's chief attraction. And although it would be premature to predict how well this Convention will be received by the Member States of the Conference, particularly States which are also Members of the Council of Europe (whose very recent Convention on the same subject proposes a considerably different approach), it must be recognized that the solution proposed at The Hague is original and particularly well suited to the problem of child abduction, and that it has very real chances of success.

During the second meeting of the Special Commission, we heard that, when it officially convenes the Fourteenth Session, the Hague Conference proposes to ask the Member States to give their respective delegations full authority to sign the Convention when the final version is adopted by the Conference at the conclusion of the Fourteenth Session's work. This is not the Conference's usual practice. Normally, the instruments adopted by the Conference in the Final Act of a session are draft conventions and only the Final Act is signed by all the delegations. The draft conventions are then submitted to the Member States of the Conference for eventual signature and ratification by the States interested. The Convention is concluded at the time of the first signature, and this is the date it bears, moreover, and not that of the session during which the draft was prepared and adopted. The Conference is apparently proposing that the draft Convention on child abduction be submitted for signature by interested States as soon as it is adopted at the Fourteenth Session. It will be noted in this regard that the commitment of signatory States is always dependant, in the Hague Conventions, upon ratification.

Danemark/Denmark

The Danish Government finds it very important that international rules concerning child abduction are established and support the efforts to the drawing up of such rules. Moreover, we consider the Draft to be a good basis for further deliberations.

Article 1

In the Report No 55 the question of children being removed or retained by public institutions is raised. We agree that the case of a public institution abducting children from the territory of another State – if at all conceivable – is outside the scope of the Convention. However, it may happen that a child having been wrongfully removed by a private person is entrusted to a public institution in the State of refuge. In our opinion such a situation is – and should be – covered by the Convention.

Article 2

The second sentence in the French version ought to be adapted to the English text in order to specify that States have no obligation to introduce new procedures, *cf.* the Report No 59.

Article 3

We favour the deletion of the square brackets.

Article 4

With the present possibilities of taking into account the child's own opinion (article 12, second paragraph) we can accept the age limit of 16 years.

Article 5

According to the Report No 70 the notion of 'rights of access' includes the right of access across borders. On this question we refer to our observations on article 17.

Article 8

According to sub-paragraphs *e, f* and *g* it is optional to the applicant to furnish the authorities of the State of refuge with copies of relevant documents and of a declaration as to the content of the law of the child's habitual residence. We support the proposal mentioned in the Report No 84 that the competent authorities of the State of refuge may request that the application be accompanied by the documents mentioned in sub-paragraphs *e, f* and *g*.

Article 12

The present draft Convention deals in essence with the same matter as the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children and a number of the Member States of the Hague Conference are possible Parties to the European Convention. We find that the drafting of the European Convention should be used as far as possible – taking into account the different nature of the two Conventions – in the drafting of the present Convention. Unnecessary differences between the two Conventions may cause uncertainty in the application of the Conventions and may make it difficult for States who have ratified the Council of Europe Convention to ratify the present Convention. The matter of grounds of refusal is an issue that it is very important to solve uniformly as far as possible in the

two Conventions. Consequently we suggest that article 12, paragraph 1, be drafted in accordance with article 10, paragraph 1, sub-paragraphs *a* and *b*, of the European Convention. This would imply the insertion of an *ordre public* provision into the Convention – an amendment which in itself is desirable.

In all events we suggest that the requirement of 'good faith' in sub-paragraph *a* be deleted, as the criterion appears to be too vague and likely to cause numerous disputes, since standards for 'behaviour which comports with generally accepted ethical criteria' (Report No 96) vary from one country to another. In the comments of the Report on article 17 (No 109) it is even suggested that a custodian parent who opposes the other parent's access to the child may be deemed to act in bad faith and thus excluded from invoking the Convention in case the other parent abducts the child. Moreover, we find that other possible examples of 'bad faith', for instance that the applicant does not intend to care for the child himself without acceptable reason or to provide the care required in the child's best interest, are covered by sub-paragraph *b*.

Article 13

The relationship between this article and articles 11 and 12 seems ambiguous. Article 11 obliges the State to return the child in case of breach of custody rights in terms of article 3. The applicable law concerning who has the right of custody is the law of the State, where the child was habitually resident before the removal. However, according to article 13 a State is only obliged to 'have regard to' that law. The article does not indicate under which circumstances a State may disregard that law.

The grounds for refusal in article 12 appear to turn on questions of fact rather than on matters which need a choice of law. Probably, therefore, article 13 gives further and unspecified grounds of refusal. One might fear that this lack of clarity may lead to uncertainty in the application of the Convention.

It should therefore be considered to delete article 13 and to supplement article 12 by further – and specified – grounds for refusal.

Article 17

We understand the article as a rule which provides that the authorities of a Contracting State shall assist persons residing in another Contracting State in matters concerning the fixing and implementation of rights of access but without being bound by foreign decisions concerning rights of access. We favour this approach, since decisions on rights of access are subject to frequent alterations and the authorities in the country of the child's residence are in the best position currently to evaluate the conditions for the implementation and exercise of the rights of access. In cases in which the parents live in different countries one essential element in a decision on the right of access is the place where that right is going to be exercised. According to Danish law a decision on the right of access in general does not permit the exercise of the right abroad without the consent of the custodian parent. This applies to parents living in Denmark as well as to parents living abroad. Article 17 imposes no obligation on Contracting States to recognize and enforce a foreign decision on the right of access. On the other hand the article provides for a co-operation between Central Authorities in order to promote the peaceful enjoyment of access rights. It might be useful that the main content of article 17 be reflected more clearly in the Report, especially in connection with article 5, sub-paragraph *b* (Report No 70).

Article 18

We prefer the retention of the words in square brackets.

Espagne/Spain

L'avant-projet de Convention sur les aspects civils de l'enlèvement international d'enfants ne fait, dans son ensemble, l'objet d'aucune objection de la part du Gouvernement espagnol. Les remarques qui suivent n'ont pour objet que de préciser quelques points très concrets se fondant sur l'idée que le but essentiel de la Convention est d'établir un système dont l'objet est la défense des situations de garde de mineurs considérées licites, effectives et exercées de bonne foi conformément au système juridique du pays de la résidence habituelle du mineur avant son déplacement, et ceci sans intervenir ni dans la question de la détermination du droit de garde *proprio sensu* ni dans la reconnaissance ni l'exécution des décisions fondant ce droit (Doc. prél. No 6, *supra*, p. 177 et 189). C'est le sens dans lequel on devrait considérer les remarques qui suivent:

1 Les parenthèses se trouvant dans les articles 3 et 4 de l'avant-projet devraient être enlevées. D'une part l'âge de 16 ans paraît être la limite la plus appropriée, notamment si on considère les modifications de la capacité d'agir de l'enfant qui peuvent se produire à partir de ce moment.

D'autre part il paraît convenable que la fonction tutélaire exercée par les institutions mentionnées dans l'article 3 et concordants soit aussi protégée contre le déplacement illicite des enfants. Cependant, attendu la nature juridique spéciale de la fonction de ces institutions, il serait utile d'introduire dans le contexte de l'article 5*a* une définition comprenant le genre de garde exercé par de telles institutions.

2 Quant à l'expression «accord ayant force de loi», employée dans l'article 3, il faut souligner que ce qui se voit attribuer force de loi c'est le résultat prétendu par la volonté contractuelle *dans la mesure où il est en conformité avec l'ordre juridique:* c'est-à-dire, force de loi signifie non simplement que l'accord puisse produire certains effets juridiques, mais en outre qu'il soit suffisant pour que la loi lie la volonté des parties établissant une relation obligatoire d'après les termes de l'accord. Dans ce sens, si la rédaction actuelle était maintenue, seuls seraient visés les accords que la loi de la résidence habituelle de l'enfant considérait suffisants pour lier la volonté des parties en matière de garde; par contre il serait exclu tout autre accord qui, cependant, pourrait fonder la bonne foi dans l'exercice d'une garde interrompue en fait par le déplacement de l'enfant. C'est dans ce sens qu'il paraît convenable d'essayer une rédaction plus flexible pour ce paragraphe.

3 La considération des particularités de l'organisation politique de quelques Etats membres de la Conférence paraît conseiller que la possibilité de désigner plus d'une Autorité centrale ne soit restreinte exclusivement aux Etats fédéraux et aux Etats dans lesquels plusieurs systèmes de droit soient en vigueur, comme le fait l'article 6, paragraphe 2. D'autant plus que l'article 6 lui-même prévoit l'existence d'une Autorité centrale chargée de recevoir les communications internationales ce qui constitue une garantie suffisante afin d'exclure les problèmes qui pourraient résulter d'une multiplication d'autorités.

4 Finalement, en ce qui concerne le droit de visite, de l'avis du Gouvernement espagnol il serait convenable que dans les cas où l'exercice de ce droit entraînerait un déplacement de l'enfant à l'étranger, la Convention devrait inclure une disposition afin que la personne exerçant le droit de garde puisse s'adresser à l'Autorité centrale de l'Etat où le droit de visite serait exercé pour lui communiquer les conditions dans lesquelles ce droit doit être exercé ainsi que sa durée; ceci permettrait, sur la base de ces renseignements, la mise en marche du dispositif de la Convention au cas où les conditions de la visite ne seraient pas respectées. Une telle disposition pourrait apaiser dans une large mesure la méfiance du titulaire du droit de garde lorsqu'il s'agit de l'exercice du droit de visite à l'étranger.

INTRODUCTION

The United States favors the objects of the draft Convention set forth in article 1. It welcomes the idea of limiting the Convention's scope to the prompt return of wrongfully removed or retained children to restore the *status quo ante.* The United States also favors the principle of securing in all Contracting States the effective enjoyment of rights of custody and of access.

The following proposals for improvements of the draft Convention are intended primarily to clarify some provisions and to assure consistency in the application of the 'prompt return' concept throughout the draft Convention.

CHAPTER I — SCOPE OF THE CONVENTION

The United States supports Chapter I, but proposes several clarifying amendments.

Article 3

Public or private non-profit agencies frequently have custody of a child for purposes of care and protection or placement in an adoptive or foster home. In the opinion of the United States, abductions by a parent or other person from such agencies should be covered by the Convention. It is proposed therefore to remove the brackets around the words 'or institution'. It is not clear, however, that the term 'institution' is broad enough to cover all agencies that might be involved. For this reason it is proposed to substitute 'public or private institution' for the word 'institution'.

Further, 'an agreement having the force of law' is not a concept that is familiar to lawyers in the United States. It is quite possible that the phrase might be interpreted to cover only agreements that have been incorporated in or referred to in a custody judgment. At its November, 1979, meeting the Special Commission had initially used the phrase 'an agreement recognized by the law of the State of the child's habitual residence'. See *Procès-verbal* No 19, pp. 1 and 3. The United States proposes to revise the last clause of article 3 to read:

or by reason of an agreement that is valid under the law of that State.

Finally, there exists an inconsistency between article 3 and article 12. According to article 12, it is up to the alleged abductor to establish that the applicant was not 'actually exercising' custody rights. See *Report* by Rapporteur E. Pérez-Vera (hereafter referred to as *Report*), paragraphs 94 and 95. Article 3 in connection with article 11 would require the aggrieved person to establish that he or she 'actually exercised' custody rights. The United States proposes that the words 'actually exercised' be deleted from article 3, so that the first part of that article would read:

The removal or the retention of a child is to be considered wrongful when it is in breach of rights of custody of a person or a public or private institution, held either jointly or alone, based upon the law of the State . . .

The problem created by the ambiguity in the meaning of 'custody rights not actually exercised' will be addressed in connection with article 12.

Article 4

It can be assumed that a child after reaching the age of 16 cannot ordinarily be abducted against his or her wishes. Age 16 appears to be an appropriate upper age limit for purposes of the Convention.

The Draft does not specify at what stage of a case the attainment of a child's sixteenth birthday prevents or terminates the applicability of the Convention. The *Report* (paragraph 67) explains that there are three options: (1) the date of the breach of custody rights, (2) the date of instituting legal proceedings, or (3) any stage of the case when the child reaches age 16. The Special Commission chose the third, 'the most restrictive option . . . In consequence, the Convention will not apply to a child after his sixteenth birthday, without regard to his age at the time of the breach of custody or at the time of the application before the courts or administrative authorities' (*Report*, paragraph 67).

The United States proposes, first, that the cut-off point be stated in the text of the Convention, and second, that the question be reconsidered at the Fourteenth Session. It would be a waste of time and resources, and a source of disappointment for aggrieved persons, if Central Authorities, courts, and other authorities should go into action, only to find that the return process is short of completion at the date of the child's sixteenth birthday, whereupon the Convention suddenly ceases to operate. In the United States, at least, it is easy to imagine how abductors could take advantage of such a provision by raising additional defenses in court or using other delaying tactics.

In the opinion of the United States, it should be clear at the time when the Convention is sought to be utilized whether or not it is applicable to the child in question. The only point in time that is ascertainable with a fair degree of certainty is the time of the breach of custody or access rights (see *Report*, paragraph 91). Accordingly, the United States proposes to revise article 4 to read:

The Convention shall apply to any child under the age of [16] years at the time of any breach of custody or access rights who was habitually resident in a Contracting State immediately before such breach.

Article 5

The term 'judicial or administrative authorities' is difficult to comprehend for persons unfamiliar with legal proceedings in countries where child custody cases may be decided by administrative bodies. Some of the confusion is caused by the use of the terms 'competent authorities' and 'Central Authorities' which are also administrative authorities. It will be noted that the Rapporteur found it necessary to give an explanation of the term in at least two contexts (*Report*, paragraph 30 and paragraph 116).

Since the *Report* will not be readily accessible to attorneys, judges, and other persons involved, the United States proposes to add another paragraph to article 5, to read:

'Judicial or administrative authorities' are courts or administrative bodies with power to make decisions in legal proceedings regarding child custody and access.

A question has also been raised regarding the meaning of the term 'retention' in article 3. The question is whether a custodial parent who refuses to allow a child to visit the other parent during a prescribed period of access or visitation may be held to 'retain' the child under the terms of the draft Convention. This was clearly not the intent of the drafters — see article 3, which refers to the breach of rights of custody only, whereas violations of rights of access are dealt with in a separate chapter (article 17). See *Report*, paragraph 54. However, confusion is apt to arise regarding this important point. Therefore the United States recommends that to make the intent clearer, an additional paragraph be added to article 5, to read:

'Retention' means the failure to return a child after a period of access or other temporary stay.

Further, the United States suggests that the definitions be moved up, to follow immediately after article 1.

Chapter II is acceptable to the United States, with some exceptions.

Article 6

It would be preferable to use the term 'appropriate' in place of 'relevant' ('*compétente*' in the French version) in the last line of the article.

Article 7

In some countries, including the United States, the duties of Central Authorities under this Convention would involve entirely novel governmental functions whose future implications and scope cannot be foreseen. The United States suggests to proceed with caution, lest some countries find themselves in the unhappy position of being unable fully to comply with each and every provision of the Convention.

The Rapporteur acknowledges the intent of the Draft to be flexible and take account of the great differences in the capabilities of Central Authorities under the internal laws of the various Contracting States (*e.g. Report*, paragraphs 27 and 72-75). Nevertheless, the United States is of the opinion that this intent should be more clearly reflected in the text of the Convention. It is proposed that the second paragraph of this article state that the Central Authorities 'shall use their best efforts to' in lieu of the words 'they shall'.

Further, some of the functions listed would presumably be exercised through private organizations, such as the International Social Service or non-profit child care agencies or counselling services. This would be true particularly for the functions listed in paragraphs *c*, *d*, and *h*. It is not entirely clear whether the named organizations are covered by the phrase 'through other competent authorities'. It is recommended to substitute the phrase 'through other competent public authorities or private organizations'.

Combining the two recommendations, the United States proposes to revise the second paragraph of article 7 to read:

In particular, either directly or through other competent public authorities or private organizations, they shall use their best efforts to:

This will require slight editiorial changes in the lettered paragraphs that follow.

Paragraph *c*, in the opinion of the United States, should include a reference to article 12, the last paragraph of which refers to information relating to the child's social background. In the ordinary 'automatic return' case there would be no occasion or authority to consider the social background of the child. However, such information could be relevant in connection with access rights under article 17. Accordingly, it is proposed to revise paragraph *c* to read:

exchange information relating to the social background of the child, where required by article 12 or where appropriate in fixing or protecting access rights.

In connection with paragraph *d* relating to amicable resolutions of the issues, one important point must be considered. The applicant who had custody of the child under a court decree of the State of origin may agree to allow the child to remain with the 'abductor' on condition that he obtain visitation rights to be exercised in the State of origin. In that case there will be a discrepancy between the court decree and the agreement reached. Once the child arrives in the State of origin for a visit, the applicant might claim custody rights under the court decree contrary to that agreement.

To avoid such a result, the United States proposes that a new article be added to read approximately as follows:

Article . . .

Where an amicable settlement of the issues in the requested State provides for custody and access rights that differ from a court order in the State of origin, the Central Authority in the requested State, if aware of such settlement, shall notify the appropriate Central Authority in the State of origin of such agreement so that any appropriate steps may be taken to obtain modification of the court order to conform to the settlement agreement.

Concerning sub-paragraph 7*f*, the United States agrees with the Rapporteur that the second part of this sub-paragraph 'extends . . . beyond the object of the Convention' (*Report*, paragraph 79). As the *Report* points out repeatedly, the Convention has the limited objective of restoring the situation that existed before the removal or retention and does not seek to settle custody rights on the merits (*e.g. Report*, paragraphs 23, 25, 63 and 106). Consequently, the reference to 'the determination of issues relating to rights of custody and access' should, as the *Report* suggests (paragraph 79) be omitted.

The United States generally supports a number of provisions in this chapter, but expresses its serious concern regarding the time-limits of article 11 and the compatibility of the exceptions of article 12 with the 'prompt return' objective of article 1.

*Article 8*e

As has been proposed in connection with article 3, the United States suggests that the words 'any agreement having the force of law' be replaced by the words 'any agreement that is valid in accordance with article 3'.

The Norwegian and Finnish delegations have proposed that a judge may require the submission of a certified copy of a prior custody decision before ordering the return of a child (see Working Document No 51). As the Rapporteur points out, this proposal was neither discussed nor voted on by the Special Commission; yet 'the idea agrees perfectly with . . . article 14 of the Draft' (*Report*, paragraph 84).

The United States has some sympathy for this proposal. Judges in the United States would probably wish to see a copy of any such decision and should have a basis in the Convention for requiring its production. An exception could be made if it is shown that it is not practically feasible to obtain such a document from the State of origin within a reasonable time, or there is evidence, such as an admission by the other party, proving the existence and the terms of the decision. To solve the problem, it may be necessary for the Convention to require the judicial or administrative authorities in question expeditiously to furnish the necessary documents.

Article 9

If an applicant approaches a court directly under article 25 without applying to a Central Authority, the provisions of this article would not come into play. A slight change in the wording of the article would make this clear.

Further, the Special Commission at its November, 1979, meeting had concluded that settlement efforts by the Central Authority may continue after the institution of legal proceedings. See *Procès-verbal* No 30, pp. 2 and 4. Although article 7*d* may be interpreted to authorize the continuation of such efforts, article 9 throws some doubt on such an interpretation. It would be desirable to add a sentence to clarify this point. Finally, some discrepancies between the French and English texts should be eliminated.

Accordingly, the United States proposes to amend article 9 to read:

In cases where application is made through a Central Authority, the Central Authority of the State where the child is

found shall, prior to the institution of legal proceedings, take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child. Such measures may continue during and after completion of legal proceedings.

This provision is of course not intended to exclude or interfere with any settlement efforts which might occur when no Central Authority is involved.

Further revisions of article 9, based on the points raised in the *Report* (paragraphs 85 and 86) might also be considered.

Article 10

It would facilitate understanding of the draft Convention if the term 'application' were reserved for the approach to Central Authorities, and a different term, such as 'petition', were employed for the institution of legal proceedings.

The second paragraph of article 10, which requires an explanation of any delay in reaching a decision, applies only to cases processed through or made known to a Central Authority. It would be desirable to learn the reasons for the delay in all cases. It would seem reasonable to permit the petitioner as well as the Central Authority to request an explanation for the delay.

Accordingly, the United States proposes to amend the second paragraph to read:

If the judicial or administrative authority concerned has not reached a decision within six weeks after receipt of the petition, the petitioner or the Central Authority of the requested State shall have the right to request a statement of reasons for the delay. If such a statement is received by the Central Authority of the requested State, that Authority shall inform the petitioner and the Central Authority of the requesting State of its contents.

Article 11

The United States is perturbed about this article's extremely restrictive time-limits. As a practical matter, it may not be possible to locate a child and to bring proceedings in an appropriate court within these limits. This is particularly true in large federated States such as the United States, which also has no requirement for persons to register upon establishing or changing their residence. A statute of limitations of six months from the date of abduction to the institution of legal proceedings, or a maximum of one year in the case of the child's concealment, will cut off many deserving applicants and their children. Rather than deterring abductions, this article may benefit those abductors who have the financial means and the aid of relatives or friends to arrange for life underground, perhaps moving from place to place to avoid detection. The child in the meantime is subjected to the life of a fugitive.

It has been said that the time-limits are necessary because children will be integrated into a new social environment within 6 months to a year, and that it would be contrary to their interests to be returned thereafter. Discussions with mental health professionals in the United States indicate that there is serious doubt about the correctness of such a general assumption. It is recognized that there comes a point in time when it could be harmful to uproot children after an abduction. However, as the Rapporteur points out, it is impossible to come up with an objective criterion concerning the child's integration into a social environment so that any time period adopted 'will always be of an arbitrary nature' (*Report*, paragraph 89).

It is true that possible harm to the child through renewed change of environment after a lengthy stay with the abductor should be considered. But this must be weighed against the Convention's principal objective of deterring kidnappings, which are themselves traumatic experiences for children. In such a weighing process the unproved assumption of harm to children after an absence of six months to one year is clearly outweighed by the necessity to curb abductions. If the time-limits of this article remain as written, they may promote rather than deter abductions.

The United States urges that at the very least 1-year and 2-year limits be substituted for the present deadlines.

Article 12

The United States is seriously concerned about the far-reaching inroads this article makes into the 'prompt return' principle. The very objects of the Convention may be defeated if this article is adopted in its present form. As the Swiss Delegate, Mr Beachler, stated in 1976, the *status quo ante* must be re-established before there is any other discussion. Only after the return of the child to the country of origin may the merits be considered. See Hague Conference on private international law, *Acts and Documents of the Thirteenth Session*, Vol. I, p. 170. See also *Report*, paragraphs 23, 26, 63 and 106.

Article 12 retains little of the 'restoration of custody' concept or of 'prompt return' without examination of the merits. Its broad exceptions will tend to turn virtually every return proceeding into an adversary contest on the merits of the custody question. No abductor's lawyer would fail to raise one or more of the exceptions.

Before work on this Convention commenced, there were signs of a gradual judicial development toward respecting the custody judgments of other nations. This is exemplified by the Uniform Child Custody Jurisdiction Act in the United States, under which courts in 39 states return abducted children to other countries without examination of the merits. Some other nations were beginning to reciprocate. If article 12 remains unchanged, this incipient movement may well be halted. Thus, this article might be considered likely to impede rather than to promote further development toward international judicial cooperation in abduction cases.

The United States does not overlook the benefits that may be derived from other provisions of the draft Convention. For example, the establishment of Central Authorities promises intensive international cooperation on the administrative level and offers aggrieved persons a specific authority from which to receive substantial aid in pursuing the search for abducted children and directing their efforts into the proper channels. However, a Central Authority cannot bring about the actual return of a child, by persuasion or other means, unless there are teeth in the substantive provisions of the Convention that back up the words of the Central Authority.

Each exception stated in article 12 will next be separately discussed.

*Paragraph 1*a permits the abductor to use the defense that the applicant 'was not actually exercising the custody rights' at the time of the alleged breach or was not 'acting in good faith'. This sub-paragraph contains two exceptions. The United States has misgivings about the first exception and strongly opposes the second.

The meaning of the first exception is not clear. Failure of the applicant actually to exercise custody rights at the time of the alleged breach may be interpreted to cover a variety of fact situations, such as the following cases:

1 The applicant who had custody *de lege* or by virtue of a legal decision, either jointly or alone, had permitted the alleged abductor in effect to assume custody of the child for an indefinite period.

2 At the time of a judgment awarding custody to the applicant the child was in the home of the alleged abductor who subsequently removed the child to another country.

3 After a serious accident the applicant, who was the legal custodian of the child, required long-term hospitalization. The child was cared for by relatives. The abductor removed the child from the home of the relatives.

Presumably it was the intent of the drafters to limit the exception to case No 1 above, but the wording is ambiguous. The *Report* acknowledges that case No 3 was not intended to fall under the exception; it does not consider the more important case No 2 (*Report*, paragraph 95).
The United States urges that this point be clarified by rephrasing the exception in article 12*a* to read:

at the time of the alleged breach the person who removed or retained the child had in effect assumed custody of the child for an unspecified period with the consent or acquiescence of the applicant.

It is essential to include the words 'for an unspecified period' in the above language to distinguish this case from cases of temporary extensions of periods of access or temporary relinquishments of a child to the alleged abductor, for example during an emergency similar to case No 3 above.
The second exception permits the defendant who wrongfully removed or retained the child to raise the issue of the applicant's 'good faith'. This defense provides an escape clause of exceedingly broad dimensions. See *Report*, paragraph 96. It may lead to an inquiry into the applicant's motivations, including the extent to which he or she was seriously concerned about the child's well-being rather than in continuation of a dispute with the former spouse. Such an inquiry in turn will prompt an examination of subjective attitudes and conduct of the parties toward each other and their relationships to the child – in short, an investigation of the merits of the case. In the opinion of the United States such an inquiry has no place in summary proceedings to restore the *status quo ante*. The United States urges the deletion of the words 'or acting in good faith'.
*Paragraph 1*b of article 12 permits the defense of 'substantial risk that the return would expose the child to physical or psychological harm' or that the return would 'otherwise place the child in an intolerable situation'. In the opinion of the United States, this exception is excessively broad. It permits an examination of psychological factors which should be reserved for the decision on the merits. The term 'intolerable situation' without qualification has only slightly less subjective connotations than 'unacceptable situation', a term rejected by the Special Commission.
Moreover, the Special Commission did decide to disallow consideration of educational or economic disadvantages under this exception. See *Report*, paragraph 97. This decision should be reflected in the text of the draft Convention.
In addition, the last paragraph of article 12 refers the judge to information provided by the Central Authority of the child's habitual residence. This provision is not sufficiently strong to counteract primary reliance on the abductor's evidence, who, in many instances, may well be able to retain the child under the exception in article 12, 1*b*.
The United States therefore proposes to amend sub-paragraph 1*b* of article 12 to read:

there is a substantial risk, supported by the evidence which is supplied by the Central Authority of the State of origin or other competent authorities or persons of that State, that the return would subject the child to severe conditions of neglect, maltreatment, or abuse, other than economic or educational disadvantages.

Moreover, a new second paragraph of article 12 should be added:

When a court determines that substantial risk as described in b *above may exist, it may refer the matter to the Central Authority of the State of origin and return the child to an appropriate person or public or private institution in that State.*

The new second paragraph of this proposed revision would enable the decision-making body to adopt an intermediary position in doubtful cases. Ultimately the State of origin would decide whether the child is to be returned to the applicant or is to be placed with a third person or institution or to be returned to the alleged abductor.
The *second paragraph of article 12* permits the child's retention in the State to which the child was abducted if the decision-making body finds 'that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views'.
The inclusion of an express, independent exception of this nature is seriously objectionable to the United States, for the following reasons:

1 The exception places the inordinate burden of responsibility to make vital decisions on young children which they are not psychologically equipped to handle.

2 At the time in question the children live with and are fully dependent upon the person who has abducted them. As experience has shown, even adults cannot help being influenced by their abductors. In addition, children can be pressured, using more or less subtle means, by the person in control, and perhaps by other family members who live in the country to which the child was abducted.

3 Permitting the child's objection to block the return will make the child the ultimate judge of the abduction's success or failure.

4 Evaluations of the child's views would inevitably entail a consideration of the merits of the custody question contrary to the basic objectives of the Convention.

In this connection paragraph 100 of the *Report* should be noted.
The United States proposes that the exception be eliminated by deletion of the second paragraph of article 12.
The last paragraph of article 12 fails to cover cases in which no Central Authority is involved. It is suggested to insert in the last line, following the words 'Central Authority', the words 'or other competent authority'.

Article 13

The words 'or retention' seem to have been inadvertently omitted in the last line.

CHAPTER IV – RIGHTS OF ACCESS

Perhaps only time will tell whether article 17 adequately protects the rights of children, and the rights of parents who do not have custody, to enjoyment of continued contact with each other across international boundaries. The right of the custodial parent to the return of the child after a period of access is covered in Chapter III on Return of Children. The right of the non-custodial parent and of the child to see each other at stated times is treated with much less specificity. The *Report* acknowledges that less time was devoted to this subject (*Report*, paragraph 107).
Since 'the access right constitutes an indispensable corollary to the custody right' (*Report*, paragraph 24; see also Prel. Doc. No 5, *supra*, p. 165), the United States recommends that article 17 be expanded at the Fourteenth Session of the Conference. As the Rapporteur points out, in order to insure the exercise of access rights, it is necessary to prevent jeopardy to the rights of the primary custodian when the child visits abroad (*Report*, paragraphs 108 to 110). The United States suggests that recommended protections of the custodial right be included, such as confirmatory judgments in the State of the visit prior to the child's departure acknowledging the time-limits of the visit. Promises by the non-custodial parent to a Central Authority to return the child at a stated time will probably not suffice to reassure the custodial parent who wishes to *prevent* wrongful retention and avoid the necessity of return proceedings under the Convention.

Article 21

This article is in principle acceptable to the United States. However, in the United States only persons of very low income are eligible for legal aid. Moreover, certain types of proceedings, which may vary from time to time, are excluded from legal aid. In the United States today legal aid is largely financed by the Federal Legal Services Corporation, which sets standards of eligibility for legal services offices throughout the United States.

It is possible that, with the assistance of the Central Authority and referrals from local Legal Services offices, aggrieved persons of moderate means may be directed to competent attorneys who offer some of their services *pro bono* or for a reduced fee. The amendment to article 22 proposed by the United States, if adopted, would further lighten the financial burden on aggrieved persons.

Article 22

The question of costs is a serious one. As the Rapporteur points out, the details of this article remain to be settled (*Report*, paragraphs 115 and 116). The United States proposes that Central Authorities may charge for translations, and that a moderate fee may be imposed for the use of locating services.

It would be preferable to change the word 'repatriating' in the last line to 'returning'.

The United States proposes the addition of the following paragraph:

Upon ordering the return of a child or issuing an order concerning rights of access under this Convention, the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child, or who prevented the exercise of rights of access, to pay necessary travel and other expenses of the applicant, including the costs of legal representation and return of the child.

A similar proposal by the United States delegation at the November, 1979, meeting of the Special Commission received substantial support from other delegations (see *Report*, paragraph 116). Such a provision could relieve many aggrieved persons of some or all of the expense caused by the wrongful removal or retention of the child. At the same time it would add a financial deterrent to international abductions.

Such a provision is important when return of the child is sought in a country which, like the United States, does not as a rule impose costs upon the losing party in a lawsuit.

Article 25

The United States suggests that for purposes of clarification this article be couched in positive rather than negative language. Also, it should be made clear that a person who initially applied to a Central Authority may, due to time pressures or for any other reason, approach a judicial or administrative authority directly and at any time, whether or not the Central Authority has completed its processing of the case.

Accordingly, the United States proposes to amend the article to read:

A person whose custody or access rights have been breached may at any time directly apply to the judicial or administrative authorities of a Contracting State for the return of a child or for the effective enjoyment of access rights under this Convention.

If this amended wording is adopted as proposed, consideration should also be given to inclusion of an additional article preserving whatever rights and remedies the applicant may have apart from the Convention, similar, for example, to article 19 of the Strasbourg Convention.

In addition, the United States recommends that this article be moved to a more prominent place in an earlier part of the draft Convention.

One other important matter must be considered in connection with legal proceedings directly initiated by an individual. In cases not processed through a Central Authority the judicial or administrative authorities would not necessarily receive the information listed in article 8 for purposes of applications to Central Authorities. There would also be no model form. In the opinion of the United States it will be necessary to repeat, or incorporate by reference, most or all the items listed in article 8. Paragraph 8*f* relating to expert opinions is of particular importance; this information is essential for pre-judgment abduction cases.

Article 26

This article is important, particularly for the benefit of applicants seeking the return of abducted children in the courts of the United States or the courts of any other country which has general rules of evidence. Removing any doubt as to the admissibility in evidence of Central Authority documents would be of considerable aid in facilitating and expediting legal proceedings for the return of a child. The United States urges that the brackets around this article be removed, and that it also cover the case where an individual applies to a court directly rather than through the Central Authority, as discussed in connection with article 25.

The United States believes that it may prove useful for the Central Authorities of Contracting States to meet from time to time to review procedures under the Convention in an effort to improve them. No provision in the Convention for such coordination appears necessary. However, it might be useful to plan for a review of the Convention at some time after it comes into force for the purpose of determining whether modifications of the Convention or procedures for its implementation are necessary and can be agreed upon in light of difficulties that may be encountered or changes made in the laws and procedures of the various Contracting States. It would be desirable for the Permanent Bureau to consider and advise on how the final clauses might provide for modification or amendment of the Convention subsequent to such review.

Finlande/Finland

General

1 The Finnish Government welcome with satisfaction the efforts of the Hague Conference to create uniform rules concerning international child abductions. We also wish to express our appreciation to the Special Commission and the Permanent Bureau for the valuable work done in the preparation of the draft Convention. Taking into account the difficult social and psychological problems connected with the subject and the differences of approach in different legal systems as to the protection of the child, the Draft in its leading principles represents an adequately balanced compromise among the conflicting interests and policies involved.

2 The underlying principle of the draft Convention is undoubtedly the protection and the welfare of the child. One of the basic assumptions in the Draft is the conviction that an unlawful abduction is presumed to be against the interests of the child: the object of the draft Convention mentioned in article 1 is to secure the prompt return of children wrongfully removed or retained in a Contracting State.

3 It should be noted, however, that although the draft Convention thus is based upon the principle that the return of an abducted child to his State of origin in *normal* cases is in the interest of the child, the Draft also, in *some cases*, provides that the competent authorities of the requested State may refuse to order the return of the child under conditions laid down in the Draft. Furthermore, it is understood that the basis of this discretion also is the protection of the welfare of the child: in *some* cases, defined by the Draft, the return of the child is presumed to be contrary to the interests of the child.

4 Consequently, the concept of the welfare of the child and the possible interpretation given to this concept in relation to international child abductions will be of considerable importance in the application of the Convention by competent national authorities, although the words 'welfare of the child' are not expressly used in the provisions of the Draft. If 'the welfare of the child' in a Contracting State is understood in a sense linked up with the traditional doctrines of *patria potestas* and of the protection of the institution of marriage, this will certainly result in the application of the Convention in interpretations, different from those adopted in a Contracting State where the concept of the welfare of the child is based upon 'progressive' ideas of children as individuals with their own and equal rights, not subordinated to the inviolable and in principle unlimited powers of the parents.

5 On the basis of the considerations above the Finnish Government consider that a mere reference in the Convention to the vague concept 'welfare of the child' is not sufficient. Instead, the Convention should, possibly in the preamble or in article 4, give some indications as to the contents of this concept in relation to child abductions. In particular, we propose that the Convention explicitly adopt the principle that the basic general aim of the Convention is the protection of the rights and the interests of the child and the respect for the child as an individual and not the most effective possible enforcement of the rights and powers of the parent over the child.

6 In our opinion this 'philosophy' ought to be reflected also in the terminology of the Convention. In that respect the terminology chosen in the Draft (*e.g.* '*rights* of custody', '*rights* of access', '*rights* relating to the care of the person of the child', '*right* to determine the child's place of residence' etc.) seems to be based upon the traditional views concerning a child's position within the family and in society which have been widely criticized in modern family law.

7 We therefore suggest that the terminology used in the Convention be reconsidered at the Fourteenth Session and also that the recent reforms and reform plans concerning the law of children in Member States be duly taken in account.

8 The scope of application of the draft Convention is limited to the 'civil aspects' of international child abduction. Although it may be clear that the fact that child abduction by one parent may be sanctioned by penal law in the State of origin or in the State of refuge does not in itself exclude the application of the Convention, this interpretation might possibly be explicitly expressed in the Convention.

9 Furthermore, experiences in various Member States seem to indicate that where an abduction by one parent has taken place, criminal law in most cases cannot be used as an instrument to achieve satisfactory solutions of the situation. In particular, extradition of the abductor from the State of refuge is often excluded because the abductor is a national of that State. Besides, even in cases where the abductor is extradited, this does not guarantee the return of the child to the State of origin. In most extreme cases the result may even be that the use of penal law sanctions and extradition of the abductor results in the separation of the child from both parents. Therefore we suggest the inclusion into the preamble of the principle that the application of penal sanctions should be limited to cases of grave misconduct by the abductor and where the use of such sanctions does not violate the welfare of the child. Another possibility could be to state this principle, if accepted at the Fourteenth Session, in the final Report.

10 During the work of the Special Commission a proposal was made to include in the Convention a provision stating that a Contracting State could always apply its own domestic penal legislation. We consider that such provision would not add anything to the existing provisions of the Draft and would thus be legally meaningless. The provision might also be interpreted to be an encouragement for making a wider use of penal sanctions within the scope of application of the Convention. This, in our opinion, would be contrary to the principles adopted in article 7, paragraph 2*d* and article 9 as well as article 17, paragraph 2.

Comments on specific articles

Article 1

Since sub-paragraph *b* expresses the general aim of the Convention while sub-paragraph *a* is a more specific, although the most important element of the Convention, one might consider the possibility of changing the order of the sub-paragraphs as follows:

a to secure in all Contracting States [the effective enjoyment of the rights of custody and of access] and, in particular,

b to secure the prompt return of children . . .

Also the end of article 7, paragraph 1 might be changed accordingly.

Article 3

This article seems to introduce – at least indirectly – the concept of 'breach of custody rights', which is used in the subsequent articles of the Convention. The article might be redrafted and clarified so that it would indicate that whatever term will be adopted for this purpose in article 3, this term, when used in the Convention, always refers to the concept defined in article 3. Consequently, cross-references to article 3 in the subsequent articles would be superfluous. We are of the opinion that the protection against unlawful abductions established by the Convention should in principle be extended also to children who *e.g.* have been in the care of public institutions according to the child protection laws in the State of the child's habitual residence immediately before the abduction. Consequently, we are in favour of the deletion of the square brackets in the article.

Article 4

We prefer the age limit of 16 years, provided that no essential changes are made in article 12, paragraph 2.

Article 5

If the square brackets in article 3 will be deleted, the definition of the concept of custody ought to be clarified so that it would indicate that the term 'custody' also covers the powers and responsibilities of an institution concerning the person of the child. Following the terminology of the 1961 Convention on the Protection of Minors one might add the word 'protection' after the word 'care' in sub-paragraph *a* ('care *and protection* of the person of the child').

Article 7

The English text of paragraph 2*b-c* seems to be consistent whereas the French text is unnecessarily divergent from the English one.

We support the suggestion made by Professor Pérez-Vera

(*Report supra*, p.198) to consider the deletion of the end of paragraph 2*f*: '. . ., where appropriate, the determination . . .'. This part of paragraph 2*f* might, despite article 16, be interpreted even so that the provision refers to the obtaining of a decision from the competent authorities of the *State of refuge* in any 'appropriate' case on the merits of the custody issue or of the rights of access (see also our comments below under article 16).

Article 8

If the Convention shall apply to cases where the child has been abducted from an institution, it will be necessary that also such an institution may act in the capacity of an applicant under the Convention, provided that it has the power to represent the child in matters concerning the custody of the child under its law. We therefore suggest that the words 'or an institution' be inserted into paragraph 1 after the words 'Any person'.

Article 9

This provision seems to be already covered by article 7, paragraph 2*d*. We also wish to point out that 'legal proceedings' in article 7 have been mentioned *after* sub-paragraph *d*, in sub-paragraph *f*.

Article 11

We propose that the period of six months in paragraph 2 would run from the date of the discovery of the child *in a Contracting State.*

Article 12

According to paragraph 1*a* the requested State is not bound to order the return of the child *inter alia* if the applicant was not 'acting in good faith'. In our opinion it seems to be rather unclear whether the word 'acting' only refers the applicant's behaviour in the *actual exercise* of the rights of custody or also to cases where the applicant has obtained his position as the lawful custodian by 'not acting in good faith', *e.g.* by a decision rendered in manifestly fraudulent *ex parte* proceedings.

Article 13

The intention in the article is to leave to the competent authorities of the requested State a certain margin of discretion when deciding upon the return of the child.
However, the article does not give any indications as to the limits of this discretion, nor does it define any criteria under which the court may refuse to order the return of the child. Neither does the article indicate which law, if any, the competent authority of the requested State is expected to respect if it decides that the law referred to in article 3 is a 'bad' law. In consequence, it may be feared that the article in its present wording would probably result in divergent and unpredictable interpretations by national judges in the Contracting States.
We also wish to point out that even though clauses similar to article 13 have been previously used in international instruments they have – as far as we know – only been applied to a limited extent (as a supplementary rule) in conventions relating to the applicable law within the law of obligations (*e.g.* Convention on the Law Applicable to Traffic Accidents 1971, article 7 and Convention on the Law Applicable to Agency, article 9). It seems to be very doubtful whether a provision of such a general application as article 13 is capable of offering sufficient guidelines for the competent authorities of the requested State in deciding upon the return of an abducted child.
On the other hand we wish to emphasize that the principle introduced in article 13, is in itself acceptable. The competent authority in the requested State when making a decision concerning the return of the child ought to have a certain margin of discretion which could be used in exceptional cases. Such a limited power of discretion ought to be given to the courts of the requested State especially because all the possible situations which may arise in the application of article 3 are not foreseeable in the preparation of the Convention.
Still, as pointed out above, we consider that for a proper operation of the Convention, the limits of such powers ought to be defined as clearly as possible in order to prevent that the provision would be interpreted in a highly subjective or even arbitrary manner by national judges.

Article 14

With reference to article 7, paragraph 2*f*, we suggest that the request should be submitted to the Central Authority of the State of the habitual residence of the child. The article would consequently read as follows:

. . . *may request the* Central Authority *of the State of the habitual residence of the child to take* . . .

In this context we also wish to point out that according to article 8, paragraph 2*e-f*, a certified copy of any relevant decision or agreement as well as a certificate emanating from a competent authority of the State of the habitual residence of the child, concerning the contents of the law of that State, are placed among the optional documents only.
From a practical point of view we think that the operation of the Convention would be more effective and expedient if the applicant, in cases where his legal position as the lawful guardian has been obtained by operation of law, would always be required to obtain a decision (or an equivalent certificate) from the State of origin establishing the breach of custody rights. This requirement would mean that the court of the requested State *should not be bound to order the child to be returned* until the applicant has produced a certified copy of such a decision.
A copy of the decision should equally be produced in cases where a decision has been issued on the merits of the custody question in the State of origin. When the applicant's custody rights are based upon an agreement, the applicant likewise ought to produce a copy of the agreement, preferably accompanied by a certificate from a competent authority in the State of origin, containing the necessary information as to the legal effects of such agreements in that State. These rules might be taken into the Convention either directly or by adopting a provision which would permit a Contracting State to make a reservation.
Finally, as a minor drafting point, we suggest that the text, beginning from the end of the third line, would be written as follows:

. . . *that there has been a breach of custody [rights in the meaning of article 13].*

(See article 11, paragraph 1 and our comments above under article 3).

Article 16

As pointed out in the Report by Professor Pérez-Vera (*supra,* p. 178), the idea of the Convention is to protect an effective and lawful situation, the rights of custody under the law of the habitual residence of the child. In particular, the Convention ought to 'deprive the abductor of the fruits of his kidnapping' (Legal Kidnapping, *Prel. Doc. No 1*, August 1978, *supra*, p. 48).
In our opinion, however, the Convention, especially article 16, seems to be rather 'weak' in this respect. It does not provide for any effective arrangements which would prevent a Contracting State to which the child has been abducted from assuming jurisdiction on the merits of the custody question (or rights of access). As far as we have been able to understand article 16, it only defines the mandatory legal effects of a decision which concerns the return of the child, issued by a competent authority in the requested State. Such a decision, article 16 tells us, shall not be con-

strued as one relating to the merits of custody rights. This means that in cases where the decision is a positive one, *i.e.* the court has ordered the child to be returned to the applicant, this decision does not in itself award the rights of custody to the applicant, nor does it deprive the abductor from his possible rights of custody (or access). On the other hand, the article does not seem to apply to a situation where an abduction has taken place and the abductor is going to institute proceedings on the merits of the custody issue in the State of refuge, *e.g.* in connection with divorce proceedings. Article 16, as it now has been worded, or any other provision in the Draft does not prevent the Contracting State to which the child has been abducted from assuming jurisdiction on the merits in this situation. As stated above, article 16 only seems to apply to the application proceedings under the Convention and to the decision concerning the return of the child, rendered in such proceedings. The door for obtaining a favourable decision on the merits of the custody question in the State of refuge seems to have been left open for the abductor.

This again may lead to the result that once the Central Authority of the State of refuge has received the application under the Convention, the abductor may already have succeeded in obtaining custody of the child by a decision rendered by a court of that State. Furthermore, as the case may be, such a decision may be a decision which the State of origin, by virtue of another convention, is bound to recognise and enforce. Under these circumstances the applicant would hardly be satisfied even if the child would, upon the application, be returned to the State of origin where the abductor, by virtue of the decision rendered in the State of refuge after the abduction, has become the sole lawful custodian of the child.

The 'physical' removal of the child from the State of refuge to the State of origin, which is guaranteed under the Convention, would obviously be an insufficient remedy for the applicant. Furthermore, we wish to point out that in the situation described above the court in the State of refuge may have acted in good faith with respect to the abduction, especially because the authority competent to order the child to be returned under the internal law of the State of refuge will not necessarily be the court which has issued the decision on the merits of the case.

On the basis of the considerations above we regret that the question of eliminating the abductor's access to the courts has been left outwith the Draft. This extremely important question ought to be carefully reconsidered at the Fourteenth Session.

Article 17

One might consider the possibility of limiting the provisions concerning access rights to apply only to the right of access between a parent and his child. If necessary, this limitation might, in accordance with the Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations (1973), be adopted in the form of a provision permitting a Contracting State to make a reservation.

Article 18

We propose the deletion of the words between square brackets.

Irlande/Ireland

General

It is not doubted that the adoption of the draft Convention would be a useful step towards checking the evil of child abduction. It is agreed that the Draft corresponds to the objects that the members of the Special Commission in general had in mind. It would appear that the chief obstacle to widespread acceptance of the draft Convention is the difficulty likely to arise for some States because of the absence of any provision that would enable the courts of a country to which a child has been removed to refuse to order his return if they consider that, notwithstanding that the removal was wrongful, the welfare of the child requires that he should remain in that country. It is to be hoped that this obstacle will be removed.

In this connection, the question of reservations will obviously be of great importance.

Article 3

It is considered that, in accordance with the view put forward in paragraphs 39 and 61 of the Rapporteur's Report, the words 'or institution' should remain in the text. This is because it seems that, provided that the right that the institution enjoys is a right such as falls within the definition in paragraph *a* in article 5, that right should be protected by the Convention in the same way as if the right was enjoyed by a parent. It seems doubtful whether the Convention should protect any rights enjoyed by an institution other than rights within the definition in article 5*a*. Therefore, if, as seems to be the case, the purpose of the suggestion in paragraph 61 of the Report that article 3 should speak of 'exercised custody' instead of 'rights of custody' is to make the Convention apply to rights enjoyed by an institution which could not be enjoyed by an individual, it seems better not to make this amendment.

Article 4

It is agreed that the Convention should apply to children under 16.

However, in spite of the explanations given in paragraph 68 of the Report, it seems doubtful whether it is necessary to provide that, in order that the provisions as to restoration of custody should apply, the child should have to have been habitually resident in a Contracting State immediately before the breach of custody rights. For if a child is habitually resident in a non-Contracting State but temporarily resident in Contracting State A and is wrongfully removed to Contracting State B, it seems reasonable, and practicable, that the Convention should apply so as to require him to be returned to State A.

Article 7

It does not seem clear what is meant by 'social background' in sub-paragraph *c* (and in article 12, paragraph 3).

Subject to any explanation at the Fourteenth Session of the Conference, the view expressed in paragraph 79 of the Report that in sub-paragraph *f* the reference to the 'determination of issues relating to rights of custody and access' should be left out seems to be correct.

Article 12

It seems undesirable to adopt the suggestion in paragraph 100 of the Report that a minimum age should be fixed below which the authority addressed should not be free to take account of the child's views, because it seems better to leave this matter to the discretion of the authority.

Article 17

Some difficulty is felt in judging the effect of this article, read in conjunction with other provisions of the Convention relating to access rights. In particular, it does not seem easy

to see how far article 17 has the effect of causing the substantive and procedural provisions of the Convention concerning the restoration of rights of custody to apply for the purpose of securing the restoration of rights of access. For example, suppose that the child is habitually resident with his mother in Contracting State A but is spending the summer holidays with his father in Contracting State B in accordance with a right of access granted by the courts of State A. If the mother wrongfully takes the child back to State A, the father should presumably apply to the courts of State A for the protection of his right. But if the mother, or somebody else, wrongfully takes the child to Contracting State C, should the father be able to apply for redress to the Central Authority in State B (or State C) and, if so, what should be the obligations of that Central Authority?
In this connection it is noted that, although article 4, in fixing the maximum age, refers to the time of a breach of access rights as well as the time of a breach of custody rights, article 3, in defining wrongful removal or retention, refers only to rights of custody and not to rights of access. It seems difficult to see whether this difference is important as regards the application of the Convention to rights of access.

Article 20

It seems desirable to include a provision allowing States to make special arrangements as regards languages (as was done in article 6 of the Council of Europe Convention of 30 November 1979 on Recognition and Enforcement). For example, two States might agree to dispense with translations.

Article 23

It seems possible that it would be better if the Central Authority addressed were required to inform the other Central Authority in all cases when the application has been submitted through the latter Central Authority. This would avoid disputes as to whether the article has been complied with.

Article 25

With regard to the question raised in the last sentence of the commentary on this article in paragraph 119 of the Report, it seems that, unless express provision is made to the contrary, the effect of the article will be that, if an application is made directly to the competent authorities of a Contracting State, only the law of that State will apply and the provisions of the Convention will be irrelevant, except to the extent that those authorities would no doubt apply the principles of the Convention in so far as the law allowed this. It seems questionable whether it would be right to require States to apply the rules in the Convention in dealing with applications not made in accordance with the procedure under the Convention.

Article 26

Grave doubts are felt about this proposal, because it involves an amendment of the law of evidence, which is essentially a matter for the internal law and practice of States. Moreover, the Draft does not deal with the question of the probative effect to be attributed to statements contained in the documents or other information (including oral information?) to which the draft article would apply. This question is particularly important in relation to the rule against hearsay. In the absence of any compelling evidence of the need for a provision on this subject it is submitted that the article should not be included.

Norvège/Norway

I International child abduction by one parent has become an increasingly important problem in many Member States of the Hague Conference. The Norwegian Government is of the opinion that the preliminary draft Convention prepared by the Special Commission on International Child Abduction by One Parent constitutes a valuable basis for the solution of this problem.
Although the draft Convention is largely acceptable to the Norwegian Government, it will propose amendments to some articles, see below.

II The Norwegian Government would like to submit the following observations.

Article 3

1 The Norwegian Government would prefer the retention of the words in the square brackets so that an institution having rights of custody can use the Convention to get back an abducted child.
2 It should be made clear in the Report whether 'the law of the State in which the child was habitually resident immediately before the removal or retention' includes the rules of private international law of this State.

Article 4

The Norwegian Government would prefer an age limit of 16 years, *provided that* article 12, second paragraph is left as it stands.

Article 7

In *sub-paragraph b* the Norwegian Government would prefer the word 'facilitate' instead of 'promote' (*'faciliter'* instead of *'faire prendre'* in the French text).
In *sub-paragraph f* the word *'favoriser'* in the French text should be replaced by the word *'faciliter'*, as this will be in better accordance with the English text.
The meaning of *sub-paragraph g* should be clarified. In Norway 'legal aid and advice' usually means *free* legal aid and advice (legal aid for court proceedings and legal advice outside court proceedings paid for wholly or in part by the Government). 'Legal aid and advice' may, and usually does, include a legal counsel's fee. But it does *not*, as it does in some other countries, in itself include the assistance of a legal counsel. The person seeking free legal aid or advice must himself contact a lawyer.

Article 8

According to *sub-paragraph e* an application for return of a child *may* be accompanied or supplemented by a certified copy of any relevant decision or agreement having the force of law. The Norwegian Government proposes that if such a decision or agreement exists, there shall be no obligation to return the child unless a certified copy of the decision or the agreement is submitted to the relevant authority. Such a provision should be incorporated in article 12.

Article 9

This provision is more or less identical with article 7, sub-paragraph *d.* Therefore, the Norwegian Government proposes that one of these provisions be deleted.

Article 10

The Norwegian Government doubts the expediency of the obligation under the second paragraph of this article. It would prefer an obligation to give information *on request* from the applicant or the Central Authority.
In case the Central Authority of the requesting State is not the Central Authority of the child's habitual residence (*cf.* article 8, first paragraph) the Norwegian Government raises

the question whether the information under article 10, second paragraph, should not rather be given to the Central Authority of the child's habitual residence.

Article 12

The Norwegian Government fails to understand what is meant by 'acting in good faith' in *sub-paragraph a.* It proposes to delete or qualify these words.
In *sub-paragraph b* the French text and the English text ought to be in better accordance with each other. The Norwegian Government suggest that in the English text 'mental' would be a more appropriate word than 'psychological'.

Article 13

The Government has difficulties in understanding the provision of this article. It is hard to see in what way this provision could be implemented in national law: either one would have to pass an Act relating to the applicable law (which would have to be the law of the State of the habitual residence of the child before the removal), or one could pass an Act leaving the question more or less to the discretion of the judge. A provision prescribing that the judge 'shall have regard to' a foreign law, but not necessarily apply it, does not really make sense in Norwegian law.
Another problem is that article 13 appears to be at variance with articles 11 and 3. According to article 11 the Contracting States are obliged to return the child if there has been a breach of custody rights in terms of article 3; and according to article 3 the law of the State in which the child was habitually resident immediately before the removal or retention settles this question. – In addition, article 3 defines 'wrongful removal' as a removal in breach of rights of custody based upon the law of the State in which the child was habitually resident; and according to article 1 the Contracting States have an obligation to secure the prompt return of children who are 'wrongfully removed'.
Because of these difficulties and ambiguities the Norwegian Government will suggest the deletion of article 13. Instead one might consider incorporating a more general 'escape clause' in *article 12*, making it possible for a judicial or administrative authority to deviate from the law of the State of habitual residence of the child in exceptional cases.

Article 14

It is not quite clear what is meant by 'other determination' in the English text, and it does not correspond exactly to '*attestation judiciaire*' in the French text.

Article 17

It is not quite clear to the Norwegian Government what exactly is meant by the provisions of this article, for example what is meant by an application for 'protecting the exercise of rights of access'.
In the *second paragraph* there is a discrepancy between the English text and the French text, as 'promote' in English does not correspond to '*assurer*' in French. The Norwegian Government suggests the word '*favoriser*' in the French text.
In the *third paragraph* there also is a discrepancy between the English text and the French one, as 'assist in' is not exactly the same as '*favoriser*'. The Norwegian Government proposes the word 'facilitate' in the English text and '*faciliter*' in the French text.

Article 18

The Norwegian Government prefers the retention of the words in square brackets.

Article 26

The Norwegian Government has difficulties in accepting this article, because there are rules in the Norwegian Act relating to judicial procedure in civil cases according to which certain categories of written evidence are not admissible.

Royaume-Uni/United Kingdom

Introduction

The United Kingdom Government welcomes the draft Convention elaborated by the Special Commission in November 1979. It offers simple and effective solutions to procedures of a somewhat intractable character. The effectiveness, however, of any convention on the international abduction of children will depend very largely upon the number of States which ratify it and upon the courts of those States giving it fair effect. We would therefore deplore the inclusion of provisions which would preclude the adoption of the Convention by the many States which adopt the principle that, in matters relating to children, the courts must regard the welfare of the child as the first and paramount consideration.

Title

We favour the retention of the present title.

Preamble

We share the view expressed by the Rapporteur in paragraphs 34 and 36 of her Report that there should be a reference in the preamble to the principle agreed by the Special Commission in March 1979 that in questions of custody and access the welfare of the child is of the first importance.

Article 1

We think that article 1*a* does not make it entirely clear that the Convention (as is intended) applies only to 'international' removals and retentions. The present Draft could be construed as covering purely domestic cases, at least in respect of wrongful retentions. Although the title of the Convention is inconsistent with this construction, certain articles (notably articles 3 and 4) are not.

Article 3

We strongly support the view that the immediate return of an abducted child should be required only where the abduction was in breach of custody rights which were effectively exercised by the person from whom the child was abducted. We consider, nevertheless, that article 3 may be an inappropriate place to deal with this problem. The effect of the present Draft is to disapply the Convention to situations where the court of the habitual residence of the child makes an order transferring the child from the custody of the parent with whom it is presently residing to the custody of the other parent, and the former immediately abducts the child. This is a situation which frequently arises in United Kingdom practice and we consider that the Convention should apply to it. We propose, therefore, that the reference in article 3 to the actual or effective exercise of custody rights should be deleted and that it should be left to the court to exercise its discretion under article 12*a* to refuse to return the child where the rights of custody were not effectively exercised immediately before the removal.
We favour the proposition that rights of custody exercised by an institution should be treated on the same basis as rights exercised by an individual.
We find some difficulty in interpreting this article in respect of wrongful retentions. For example, the problem could arise where the wrongful retention of a child in one juris-

diction follows his lawful removal there after a court had granted a lengthy period of staying access in the foreign country. In such a case residence in the country in which he is wrongfully retained might be regarded as habitual residence 'immediately before the retention', if the article remains in its present form. In such circumstances, the relevant habitual residence should, we think, be habitual residence before the initial *removal* even though that of itself was lawful.

Article 4

On balance, we favour the restriction of the applicability of the Convention to children under 16 (as in the present text). If the second paragraph of article 12 (referring to the child's wishes) remains unchanged, we see no objection to the present text of article 4.

Article 6

The United Kingdom will probably need to use the power given in this article to designate more than one Central Authority.

Article 9

The United Kingdom shares the view, expressed to the Special Commission by certain experts, that Central Authorities should do all in their power to obtain a resolution of the conflict between the parties by consent. But this is dealt with in general terms by article 7*d* and we question whether further provision is required. As drafted, the present article 9 is too restrictive, carrying the implication that the measures under it will be taken only prior to the institution of legal proceedings and that legal proceedings cannot start until the attempt has been made and perhaps the further implication that article 7*d* is to be read in that sense. But, pending negotiations to secure the return of a child by consent, it may be necessary to take some judicial measures, such as obtaining from the court a provisional order prohibiting the removal of the child to a third country. We therefore agree with the Rapporteur's comment in paragraph 86 of her Report that a re-structuring of the text may be advisable.

Article 11

The drafting of this article could, we think, be improved in two respects.

The opening words do not link well with the statement of objects in article 1 or with the terms of article 3. Those articles are directed primarily to wrongful removal. 'Custody rights' is a much wider term embracing actions not involving any movement of the child at all. We suggest that the text should be amended to read:

Where a child has been wrongfully removed or retained within the meaning of article 3, and, at the date of application to the judicial or administrative authority of the State where the child is located, a period of less than 6 months has elapsed from the date of such wrongful removal or retention, the authority shall order the return of the child forthwith.

The word 'residence' in the first line of the second paragraph is not altogether satisfactory, since in English it connotes some degree of settlement. The word 'location' would be more appropriate.

Article 12

We suggest that in the English text of paragraph *a* the word 'effectively' should be substituted for 'actually'.

The United Kingdom shares the view expressed by a substantial number of delegates to the Commission that this article should include a provision enabling the judicial or administrative authority in the requested State to decline to order the return of the child where the making of such an order would be manifestly contrary to the fundamental principles of its law. Although such a provision would only need to be invoked in exceptional cases, we think these cases must be provided for. It should be remembered in this context, that in the United Kingdom there is no legal doctrine enabling the court to treat the words of a statute as unconstitutional on grounds of this kind, or on the grounds that a decision conflicts with '*ordre public*'.

Article 13

We think the drafting of this article could be clarified, though we agree with its intention. We suggest the text would be clearer if it were amended to read:

In determining whether there has been a wrongful removal or retention within the meaning of article 3, the judicial or administrative authority shall have regard to the law of the State of the habitual residence of the child before the removal or retention complained of, and in particular to any decision of the judicial or administrative authorities of that State relating to the custody of or access to the child.

Article 17

The reference in the first paragraph to 'an application for fixing or protecting the exercise of rights of access' is not entirely clear. The primary purpose of the Convention is to secure the prompt return of children wrongfully removed or retained. The United Kingdom does not object in principle to Central Authorities assisting in securing the recognition of access rights; but we tend to regard provisions of this kind as more appropriate to a convention dealing with the mutual recognition and enforcement of decisions.

Article 21

We support this article. We think that the availability of legal aid and advice will play an important part in the effective operation of the Convention.

Article 26

We suggest that the intention of this article might be better expressed if it were to provide that the applications, documents, etc., in question should be admissible in the same way as similar applications, documents, etc., made or prepared in the State addressed.

Articles 27 and 29

These provisions are necessary for the United Kingdom because of the existence of separate systems of law in (*a*) England and Wales, (*b*) Scotland and (*c*) Northern Ireland. There are also separate systems of law in the Channel Islands and the Isle of Man and in some other territories for whose international relations the United Kingdom is responsible.

Article V (Relations with other Conventions)

We think that the present draft Convention should be capable of coexistence with the Council of Europe Convention on the Recognition and Custody of Children.

Article W (Temporal application)

We favour the application of the Convention to wrongful removals or retentions which take place before, as well as after, the Convention comes into effect.

Article X (Reservations)

If (contrary to our recommendations) article 12 is not amended so as to allow refusal to return a child where such a return is contrary to the fundamental principles of the law of the State addressed, then we think that any State should be allowed to make a reservation to this effect.

The Swedish Government would first like to express its appreciation for the work that has culminated in the draft text in question. The subject area is one of immediate concern in which international rules are greatly needed. Given the varying concepts that exist as regards the form such rules should take, the Swedish Government considers that the draft text constitutes a good starting-point for the Conference's future work.

Swedish law at present contains special provisions protecting children against the possible harmful consequences of compulsory measures in custody disputes. Further provisions to reinforce such protection are currently being considered. In our opinion, it is of fundamental importance that the child's best interests should be the guiding principle in the Conference's future work. On certain points there are grounds for examining more closely what these interests require. This applies primarily to the rules regarding enforcement and the choice of compulsory measures, which will be taken up again below in connection with articles 12 and 13.

Article 4

We have no objection to an age limit of 16, provided that the second paragraph of article 12 remains unchanged.

Article 7

In order to stress that the authorities' actions must be based on the child's interests, we suggest that the phrase 'further prejudice to interested parties' in sub-paragraph *b* be deleted. In addition, we should like to point out in connection with sub-paragraph *c* that legislation regarding access to public documents in a Contracting State may prevent information on proceedings being handed over. It should be made clear that such legislation must be respected.

Articles 12 and 13

In the Swedish Government's view, one prerequisite for an authority to be able to order that a child be returned should be that enforcement is possible both under the law of the country in which the child was habitually resident immediately prior to the removal or retention and in the country in which enforcement is requested. Though, generally speaking, we have no objection here to a Contracting State being entitled to refuse to order the return of a child in the cases suggested in *article 12*, it should be considered whether the rules set out in that article should not be framed in some other manner.

As regards sub-paragraph *a* of the first paragraph of article 12, we consider that the first part can be interpreted too broadly while the wording of the second part is far too vague. The essential purpose of this provision would seem to be to allow derogations from article 11 in cases where it has formally been a question of wrongful removal under article 3 but where it is unreasonable in the particular case concerned to describe the removal as wrongful. This matter in turn seems to be related, at any rate partially, to the possible purpose of *article 13*, namely to make it possible for the judicial or administrative authority, notwithstanding article 3, to disregard the fact that the act was to be regarded as wrongful according to the law of the country in which the child is habitually resident. However, in our view, the wording of article 13 is unclear and would almost seem to conflict with articles 3 and 11. We therefore propose that article 13 be deleted and that sub-paragraph *a* of the first paragraph of *article 12* be so worded as to allow refusal to order the return of a child in those exceptional cases where it would be inconsistent with equity and justice to consider the removal or retention as wrongful.

The Report on article 12 questioned whether an exception should be made for 'public policy'. In our opinion, it cannot be considered necessary to include a specific exception to this effect in this article since the principle must be regarded as evident, regardless of the circumstances, on grounds of private international law. Nevertheless, for purposes of clarity, it may be advisable to make specific provision for this exception.

Lastly, we wish to recommend that the comparatively strong emphasis on the applicant's burden of proof as stated in the first paragraph of article 12 should be toned down. Regardless of the circumstances, the judicial or administrative authority should be required to take account of any information that emerges in the case and is relevant to its examination.

As regards the choice of compulsory measures for ensuring the child's return (for instance, a fine or physical collection arranged by the authority), we consider that the legislation of the country in which national decisions or corresponding measures are to be enforced should be applicable. By way of illustration, mention can be made of a current committee proposal in Sweden to the effect that normally only fines may be used as a compulsory measure in respect of a parent who refuses to return a child who has been wrongfully removed or retained. Under this proposal it would only be possible to collect the child if this is justified with regard to the child's best interests.

Should our proposal regarding the choice of compulsory measures not be acceptable, we consider that a Contracting State should, on accession, be permitted to make a reservation to the effect of this proposal. Alternatively, we suggest that a State may accede only to those sections of the Convention that concern the Central Authorities, cooperation between them and efforts to achieve amicable solutions as well as assistance in any proceedings.

Article 14

In our view, it should be made clearer which authorities are to provide the information required and in what form. It can be added that, under the existing rules, the Swedish courts would not seem able to make a special pronouncement on whether a particular instance of a child being removed is wrongful.

Article 17

We consider the draft wording to be far too general and imprecise. We suggest that the Convention be worded so as to make it clear that a Contracting State shall not be required under the Convention to hand over a child by force to ensure a right of access and that the Central Authorities shall merely seek to achieve amicable solutions or assist in any proceedings regarding right of access. Alternatively, we suggest that a Contracting State be permitted to make such a reservation concerning enforcement of decisions relating solely to access to a child.

Article 20

The provisions of this article should be applicable unless the Central Authorities concerned have agreed otherwise.

Article 26

The observations made above in connection with sub-paragraph *c* of article 7 regarding legislation in a Contracting State on access to public documents are also applicable here.

Actes

Note du Bureau Permanent

Conformément à une pratique qui a pris naissance lors de la Session extraordinaire de 1966, les interventions ont été résumées dans la langue, anglaise ou française, utilisée par les orateurs. De même les Documents de travail sont reproduits dans la langue utilisée par leur auteur, le Bureau Permanent ne disposant pas de service de traductions. Sont toutefois diffusés dans les deux langues les documents émanant des Président et Rapporteur, du Secrétariat et des Comités de rédaction.

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Procès-verbal No 1

Séance du lundi 6 octobre 1980 (après-midi)
Meeting of Monday 6 October 1980 (afternoon)

La séance est ouverte à 15h. 05 par M. Schultsz, Président de la Quatorzième session.

Le Président fait quelques communications d'ordre administratif et social et procède à la nomination du Président de la Commission I.

M.Anton (Royaume-Uni) est nommé par acclamation.

The Chairman stressed the need for the assistance of delegates in reaching a satisfactory conclusion to the Convention. He nominated Mr Leal (Canada) as Vice-Chairman.

The nomination was accepted unanimously.

The Chairman then proposed that Miss Pérez-Vera (Spain) act as Rapporteur.

This proposal was accepted unanimously.

The Chairman expressed his profound regret that Mrs Bodenheimer (United States) was unable to attend due to illness. He proposed that a telegram be sent in the name of the delegates expressing their regrets at her absence and wishing her a speedy recovery.
The telegram was in the following terms:

Commission I profoundly regrets your absence but sends to you every good wish for a speedy recovery.

The meeting was closed at 3.10 p.m.

Documents de travail Nos 1 à 3
Working Documents Nos 1 to 3

Distribués le 7 octobre 1980
Distributed on 7 October 1980

No 1 – Proposal of the United States delegation

It is proposed to substitute 'public or private institution' *for the word* 'institution'.

It is proposed that the words 'actually exercised' *be deleted so that the first part of that article would read:*

The removal or the retention of a child is to be considered wrongful when it is in breach of rights of custody of a person or a public or private institution, held either jointly or alone, based upon the law of the State . . .

Revise the last clause of article 3 to read:

or by reason of an agreement that is valid under the law of that State.

No 2 – Proposal of the United Kingdom delegation

Article 1

The objects of the present Convention are –

a to secure the prompt return of children wrongfully removed to or retained in any Contracting State, and thereby

b to ensure that rights of custody and of access arising under the law of one Contracting State are more effectively respected in the other Contracting States.

Article 3

The removal or the retention of a child is to be considered wrongful where it is in breach of rights of custody attributed to a natural person or legal entity under the law (including the rules of private international law) of the State in which the child was habitually resident immediately before the removal or retention and if, at the time of the removal or retention those rights were actually exercised or would have been so exercised but for the removal or retention.
Such rights may be founded upon statute law, upon judicial or administrative decisions or upon agreements which are valid under the law of that State.

No 3 – Provisional proposal of the United Kingdom delegation

Article 12

Delete present *a* and substitute –

a his assumption of the care of the child has been acquiesced in by the applicant or that the applicant has condoned the child's removal.

Procès-verbal No 2

Séance du mardi 7 octobre 1980 (matin)
Meeting of Tuesday 7 October 1980 (morning)

The meeting was opened at 10 a.m. Mr Anton (United Kingdom) was in the Chair. The Rapporteur was Miss Pérez-Vera (Spain).

Mr Dyer (First Secretary at the Permanent Bureau), asked delegates to ensure that all Working Documents were given to the Secretariat in written form.

The Chairman, in thanking delegates for appointing him Chairman, welcomed those representatives of Member States who had not attended the meetings in November 1979. He welcomed also the representatives of institutions attending as observers and invited them to join in the debates.
In emphasising the importance of the subject-matter of the Convention and the necessity to find a solution to a problem which caused harm to children and suffering to parents, he acknowledged that an ideal solution was not within the scope of this Convention, which was concerned to ensure the return of abducted children as quickly as possible and with as few legal formalities as possible. The precise terms of the Convention were not as important as ensuring its acceptance by the largest possible number of States. This would help create a climate of thought and encourage judges to order the return of children irrespective of their own personal opinions. A spirit of mutual compromise on the part of delegates was therefore necessary.
The Chairman referred to the Law Ministers of the Commonwealth who had intended to draw up their own Convention but decided in April 1980 to follow the deliberations of the Hague Conference and see if the Hague Convention was appropriate for the Commonwealth. This made it appropriate for delegates to keep non-Member States in mind during their deliberations.
The Chairman then directed the attention of the meeting to article 1 of the draft Convention.

Mr Dyer (First Secretary at the Permanent Bureau) and **Mr Reymond** (Recording Secretary) read out the terms of article 1.

Mr Jones (United Kingdom) referring to Working Document No 2, stated that the purpose of the proposed change was to make the objects of the Convention clearer and to clarify article 1. As at present drafted, article 1 could be read as requiring a change in the internal law of a State in order to make enforcement more effective. This was contrary to its aim of making *international* enforcement more effective.

M. Jenard (Belgique) partage le point de vue de la délégation britannique. La délégation belge voulait supprimer la disposition de l'article 1*b*, mais la relation établie entre les alinéas *a* et *b* de l'article 1 est une solution à laquelle la délégation belge se rallierait volontiers.

M. Chatin (France) explique la portée de l'alinéa *b* de l'article 1. Cette dernière disposition a pour but de limiter le recours à la notion d'ordre public telle que chaque Etat la conçoit. De ceci découle notamment que les Etats doivent reconnaître le droit de garde quelle que soit la situation du gardien et le lieu de sa résidence.

Le Rapporteur souligne que la Convention, à l'origine très ambitieuse, s'est limitée à assurer le retour des enfants; l'interprétation de M. Chatin amènerait les Etats à modifier le droit interne. Alors, de deux choses l'une, soit on clarifie la disposition, soit on la supprime.

Mr Leal (Canada) congratulated the Chairman on his appointment. In expressing his reservations concerning Working Document No 2, he stressed the importance of not proceeding too hastily to consider article 1 until the terms of some of the other articles had been discussed. He referred in particular to article 17 and the problem of its real meaning. Nothing should detract from the force of the Convention which should both substantiate and support legitimate access rights. It was therefore not entirely desirable to start with a discussion of article 1.

Mr van Boeschoten (Netherlands) agreed with Mr Leal. In his view, article 1*b* should not be deprived of its independent meaning. He referred to articles 17 and 8 of the draft Convention concerning the Central Authorities and the determination of rights of custody and access. It was essential that decisions concerning the return of children also allow arrangements regarding custody and access.

The Chairman suggested that the word 'thereby' in Working Document No 2 caused problems as a link between article 1*a* and *b*.

M. Deschenaux (Suisse) relève que l'enlèvement d'enfants a souvent été envisagé comme la conséquence du refus de l'exercice du droit de visite. L'alinéa *b* de l'article 1 a notamment pour mission de protéger le droit de visite. De plus, en raison des liens étroits entre l'article 1 et l'article 17, il convient de ne pas biffer la lettre *b* de l'article 1 avant d'avoir décidé du sort de l'article 17.

Mr Yadin (Israel) doubted whether article 1 was the first operative article of the Convention. In his view it belonged to the preamble.

M. Barile (Italie) observe que l'article 1, alinéa *a*, explique bien le champ d'application de la Convention. Il a des doutes sur la deuxième partie de la proposition britannique.

Mr Jones (United Kingdom) acknowledged the points made by Mr Leal and Mr van Boeschoten and agreed that it was very difficult to form a final opinion concerning article 1, which was interrelated with article 17. He suggested that the meeting return to a consideration of article 1 after considering article 17. However, he was still of the opinion that Working Document No 2 was an improvement, although it was not a matter of principle but merely a suggestion for clarification.

The Chairman noted that Working Document No 2 contained points both of drafting and of substance. Regarding the latter, the word 'thereby' appeared to limit the scope of article 1*b* compared with article 1*b* of the draft Convention.

Mr Jones (United Kingdom) announced that he was prepared to withdraw the word 'thereby' from the text of Working Document No 2.

The Chairman announced that 'thereby' was deleted from Working Document No 2.

Mr Jones (United Kingdom) in agreeing with the Chairman that the Convention was concerned with internationality and not with the internal law of Member States, repeated his point that questions of substance in article 1 should be postponed until article 17 had been considered.

Mr Leal (Canada) agreed that Working Document No 2 should remain on the table until a decision on access rights had been taken.

Mr Creswell (Australia) commented that the word 'ensure' in Working Document No 2 imported a greater degree of compulsion than was acceptable.

Mr Jones (United Kingdom) replied that the degree of compulsion implied by the word 'ensure' was a subjective question. In his view, 'ensure' merely stated what other articles required and went no further than that. Mr Jones conceded that it might be necessary to change the objects in article 1 after consideration of later articles. However, 'ensure' was not excessively strong, and the matter should be referred to the Drafting Committee.

Mr van Boeschoten (Netherlands) noted that the Convention did not purport to deal with the internal law of Member States, but with internationality. He indicated his support of the proposal in Working Document No 2, subject to deletion of the word 'thereby'.

M. Barile (Italie) recommande qu'on soumette par écrit l'amendement proposé.

Mr Dyer (First Secretary at the Permanent Bureau) read Working Document No 2 with 'thereby' deleted.

The Chairman referred to the problem caused by the interrelationship of articles. He therefore proposed that a decision whether or not to reconsider at a later point certain articles of the Convention be taken by a simple majority and not an absolute majority as required by article 16 of the Procedural Rules of the Conference. This proposal was accepted unanimously.

Mr Leal (Canada) asked whether rights of access arising out of the laws of third States were covered in terms of Working Document No 2.

Mr Jones (United Kingdom) sought to meet Mr Leal's point by the addition of the words 'or recognized by' immediately after the words 'arising under' in article 1*b* of Working Document No 2. He noted that the applicable law may be that *recognized* by the country of the child's habitual residence.

The Chairman stated that article 1*b* should be read in a broad sense in order to be compatible with article 3.

Mr Dyer (First Secretary at the Permanent Bureau) observed that article 1, as now proposed by Mr Jones, was becoming too complicated and substantive.

Le Rapporteur exprime le désir de ne pas compliquer le texte et de s'en tenir à la version actuelle.

Mr Savolainen (Finland) stated that article 1, as originally drafted, did not make clear that there was no obligation on the part of a Member State to return a child to a non-Member State to which a custodial parent had changed his residence, whereas the United Kingdom proposal seemed to indicate rather clearly that in such a case the child need not be sent to a non-Contracting State.

M. Francescakis (Grèce) propose de différer le vote sur cet article. La fonction de ce dernier est d'offrir un préambule à la Convention et non pas de limiter d'emblée sa portée; il ajoute de plus que la perte de temps sur ce point est un facteur à considérer.

Mr Creswell (Australia) said that he still had difficulty with the word 'ensure'. He suggested that it be replaced with words to the effect that one object of the Convention was to promote a respect for the exercise of rights of custody and access. He asked that the matter be referred to the Drafting Committee.

The Chairman stated that the Drafting Committee would take note of Mr Creswell's point.

Mr Yadin (Israel) emphasised that the Convention should affect only Member States and should not impose obligations on or grant entitlements to, third States.

The Chairman noted that article 1*a* met with the approval of the delegates. He asked that the meeting proceed to a vote on the possible amendment of article 1*b*. The vote would be on the text as proposed in Working Document No 2, with the word 'thereby' deleted.

M. Batiffol (France) s'étonne que l'on vote sur l'amendement lui-même et non pas sur son report à une date ultérieure.

The Chairman replied that a review of the terms of article *b* was not precluded by the precise terms of article 16 of the Rules of Procedure. However, it was important to proceed from the consideration of one article to another in chronological order.

Mr Dyer (First Secretary at the Permanent Bureau) read out to the delegates the general sense of article 16 of the Rules of Procedure.

Vote

Working Document No 2 was approved by a vote of 16 (Australia, Belgium, Czechoslovakia, Denmark, Finland, France, Ireland, Israel, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, United Kingdom, United States), to 7 (Canada, Egypt, Federal Republic of Germany, Greece, Italy, Japan, Luxemburg).

The amendment in Working Document No 2 was referred to the Drafting Committee.

The Chairman then proposed that article 2 be referred to the Drafting Committee.

M. Jenard (Belgique) propose une suppression de la première phrase.

The Chairman suggested that a simple amendment be moved for the deletion of the first sentence of article 2.

M. Jenard (Belgique) observe que cette disposition est superflue et que la mise en application de la Convention va de soi; la disposition serait aussi dangereuse: on pourrait se demander si elle est ou non *self-executing*; la délégation belge la considère comme telle. Quant à la deuxième phrase, il faudrait la mettre en relation avec l'article 10.

The Chairman asked the delegates to consider first the possible deletion of the first sentence of article 2.

M. Espinar (Espagne) soutient le propos de M. Jenard.

M. Barile (Italie) estime que la première phrase de l'article 2 est utile puisque la Convention s'adresse avant tout aux Etats.

Le Rapporteur se déclare hostile à cette disposition; en réponse à la déclaration de M. Barile, il faut relever que la Convention ne se limite pas à créer des obligations aux Etats, mais crée des droits pour les individus eux-mêmes. Le Rapporteur est pour la suppression de l'article 2.

Mr van Boeschoten (Netherlands) pronounced himself to be in favour of retaining the first sentence of article 2. It contained a public relations element which could be useful in demonstrating wide support for the Convention. It could also have practical effects by encouraging Member States to create machinery to help the Convention work.

Mr Leal (Canada) also pronounced himself to be in favour of retention. The deletion of the first sentence of the article would leave the second sentence devoid of substance and meaning.

M. Jenard (Belgique) retire sa proposition.

The Chairman asked Mr Jenard whether deletion of the first sentence of article 2 would necessarily cause the second sentence to fall.

M. Jenard (Belgique) renvoie la question au Comité de rédaction pour ce qui est du sort de la deuxième phrase.

The Chairman requested a seconder for the proposal that the first sentence of article 2 be deleted.

M. Espinar (Espangne) relève la différence des versions anglaise et française du texte; le texte anglais préconise l'utilisation de procédures déjà existantes; le texte français fait une référence plus large aux procédures d'urgence.

The Chairman judged the sense of the meeting to be that article 2 be sent to the Drafting Committee. No vote was taken. He then referred the meeting to article 3 of the draft Convention.

Mr Dyer (First Secretary at the Permanent Bureau) pointed out that Working Document No 1 related to article 3.

The Chairman asked the meeting to consider first the United States proposals, contained in Working Document No 1.

Mr Dyer (First Secretary at the Permanent Bureau) read out to the meeting the terms of Working Document No 1 and Working Document No 2 relative to article 3.

Miss Selby (United States) stated that the United States proposal contained both a substantive and an interpretative point:
a on the point of substance, an 'institution' may have rights that should be protected;
b it should be made clear that *any* institution holding such rights should be included in the Convention.
She added that the United States was in agreement with the United Kingdom on the substantive question.

Mr Jones (United Kingdom) agreed that the intention behind the United Kingdom proposal in Working Document No 2 was the same as that behind the United States proposal in Working Document No 1. However, he felt there was one substantive difference, since in the United Kingdom a public authority (*e.g.* a local authority) may have rights of custody but not be regarded as an institution. Hence it was necessary to include the words 'legal entity'. He referred to article 13 of the Agency Convention which contained a precedent for the use of this term.

The Chairman took the sense of the meeting to be that article 3 should not be limited to the custody exercised by natural persons. He suggested that the meeting remit to the Drafting Committee the question of entities other than natural persons.

M. Chatin (France) tient à souligner que les placements en institution peuvent être soit volontaires soit forcés.
Les placements volontaires sont couverts par l'article 3, dans sa rédaction actuelle, le parent gardien demeurant seul représentant de l'enfant. Le nombre de ces placements est très important en France.
En ce qui concerne les placements forcés, on peut se demander s'il est opportun des les soumettre tous, indistinctement, au régime de la Convention. Il existe en effet des placements par nécessité. Un travailleur migrant, par exemple, expulsé d'un territoire retourne dans l'Etat dont il est ressortissant. Son enfant confié à l'autre conjoint est abandonné par ce dernier et se voit placé dans un établissement. On peut se demander si la Convention devrait s'appliquer contre le père qui aurait repris son enfant. Il semble bien qu'une certaine retenue s'impose ici.

Mr Savolainen (Finland) suggested that the problem was connected to article 8 which concerned the question of applications to Central Authorities. He asked that the Drafting Committee note this inter-relationship.

Miss Selby (United States) felt that the proposal of the United Kingdom in Working Document No 2 was narrower than that of the United States. In the United States, the term 'legal entities' would exclude a number of institutions. The United States wanted any alteration to be as broad as possible in its application.

Mr Yadin (Israel) suggested that article 3 speak only of the rights of access and custody arising out of the law of a Member State. In his view, article 8 strengthened this formulation, since it dealt with questions of institutions and legal entities.

The Chairman commented that Mr Yadin's point related to the actual exercise of custody rights. It should therefore be considered later as a separate question. He then asked Mr Jones to agree that the United States proposal in Working Document No 1 be put to the vote.

Mr Jones (United Kingdom) stated his doubts as to the precise terms now of the United States proposal.

Miss Selby (United States) suggested that the United Kingdom and United States proposals both be sent to the Drafting Committee.

Mr Dyer (First Secretary at the Permanent Bureau) outlined the history behind the proposals concerning article 3 made by the United States and the United Kingdom. The meetings in November 1979 contained extended discussions regarding the scope of the term 'person'. In his view, 'person' extended only to those with legal personality and the word 'entity' should be understood as such. Although primarily a drafting difficulty, a problem of substance arose concerning whether an entity without legal personality could have standing in a court of law.

Mr Leal (Canada) asked that non-legal entities be included in the Convention.

Mr Müller-Freienfels (Federal Republic of Germany) noted that a public authority may not be a legal person but yet have rights of custody. The Drafting Committee should be asked to find an expression which would cover public authorities without legal personality.

Mr Walsh (Ireland) stated that the proposal of the United Kingdom covered the whole question. A legal entity could be not merely a local authority but also an unincorporated institution, where the head of that institution was regarded as the person with the right to custody.

Mr Dyer (First Secretary at the Permanent Bureau) referred to the problem of mechanics raised by Mr Müller-Freienfels. The conclusion of governmental authorities with custody rights but without legal personality would lead to problems with article 8 of the draft Convention.

Mr Leal (Canada) commented that article 8 did not require an applicant to be a legal entity, but concerned merely applications to a Central Authority, not to a Court.

Mr Eekelaar (Commonwealth Secretariat) felt that article 3 should be drafted in as wide a sense as possible. Any reference to institutions should be understood as 'including any rights such as those held by institutions'.

The Chairman asked the meeting to avoid drafting points. He judged the sense of the meeting to be in favour of as broad a formulation as possible. He suggested that the formulation be not less wide than that contained in the present draft Convention. The Drafting Committee should take note of this and present for consideration a formulation which would embrace as many persons and entities as possible.
The Chairman then asked the delegates to consider the United Kingdom proposal that a reference to the rules of private international law be included in article 3.

Mr Jones (United Kingdom) stated that the reference to private international law was inserted purely for purposes of clarification.

M. Barile (Italie) affirme que la délégation italienne appuie la proposition britannique d'une référence aux dispositions de droit international privé dans l'article 3; M. Barile reprend sa proposition de l'an dernier et précise que la dernière phrase de l'article 3 n'est pas claire. «Force de loi» ne semblerait se référer qu'à «l'accord» et non pas à «décision judiciaire ou administrative». On devrait faire omission de la virgule placée après «décision judiciaire ou administrative» ou suivre la proposition britannique qui est une formule parfaite.

The Chairman emphasised that delegates should confine themselves to a discussion of the particular point at issue, in particular whether there should be an explicit reference in article 3 to the rules of private international law.

Mr van Boeschoten (Netherlands) pointed out that the practice of the Hague Conference was to exclude an explicit reference to the rules of private international law which were to be understood as included in a convention unless expressly excluded.

Mr Dyer (First Secretary at the Permanent Bureau) agreed with Mr van Boeschoten that where no explicit reference was made to the rules of private international law, they were included in a convention by implication.

The Chairman took the sense of the meeting to be that the rules of private international law of Member States be included in article 3 of the Convention. He then proposed a vote on whether or not there should be an explicit reference to these rules.

Vote

The proposal in Working Document No 2 that article 3 contain an explicit reference to the rules of private international law of Member States was rejected by a vote of 12 against and 4 in favour. An informal hand vote was taken.

The Chairman then directed the attention of the meeting to the United States and the United Kingdom proposals concerning 'agreements which are valid under the law of that State'.

Miss Selby (United States) expressed her opinion that the language in the draft Convention was too technical and that there should be more flexibility. She noted that there was no great distinction between the United States and United Kingdom proposals.

Mr Jones (United Kingdom) admitted that the word 'valid' was borrowed from the United States proposal. The final paragraph of the United Kingdom proposal was intended to clarify article 3; the existing language raised problems since a judicial decision must necessarily be part of the 'operation' of law.

Mr Savolainen (Finland) agreed with the comments of Miss Selby and Mr Jones. However, he felt that the word 'valid' raised problems since the concept of validity varied greatly between Member States and could therefore give rise to various interpretations in the application of the Convention. The word could also be understood to bear on the merits of a custody award.

Mr Dyer (First Secretary at the Permanent Bureau) felt that problems arose when attempts were made to enumerate various points, as the United Kingdom proposal had done. For example, the proposal was silent on the matter of self-executing constitutional provisions, which applied in certain Member States.

The Chairman asked that the matter be referred to the Drafting Committee.

Mr Walsh (Ireland) asked whether the word 'enforceable' might be substituted for 'valid' in the United Kingdom proposal.

The Chairman referred to a distinction between the United Kingdom and United States proposals which concerned the distinction between 'validity' and the phrase 'having the force of law'.

Mr Walsh (Ireland) disclaimed any intention to return to the original text of article 3. In his view, 'having the force of law' had a more limiting connotation than 'enforceable at law'.

M. Barile (Italie) exprime sa préférence pour la version britannique qui permet de comprendre plus largement la notion de «décision judiciaire ou administrative» et de l'étendre aux décisions rendues par un Etat étranger, contrairement au texte du projet.

Mr Yadin (Israel) felt there was no need to deal with the question of how valid or enforceable an agreement may be.

M. Batiffol (France) propose de remplacer «ayant force de

loi dans cet Etat» par «en vigueur dans cet Etat»; cette formule clarifierait ainsi la disposition.

Mr Dyer (First Secretary at the Permanent Bureau) suggested that the phrase '*ayant force de loi*' be regarded as equivalent to '*en vigueur*', as proposed by Mr Batiffol.

Miss Pripp (Sweden) suggested that the last sentence of the United Kingdom proposal concerning article 3 be deleted and that the word 'legally' be placed before the word 'attributed' in the first paragraph of the proposal.

The Chairman noted that Miss Pripp's suggestion had created problems at the meetings held in November 1979.

Miss Selby (United States) stated that the present formulation of article 3 did not give agreements the force of law. In her opinion *enforceable* agreements were in a narrower category than *valid* agreements, since the latter may not be enforceable. She was strongly opposed to the phrase 'an agreement which is enforceable'.

Mr Eekelaar (Commonwealth Secretariat) suggested that the final paragraph of the United Kingdom proposal should not be regarded as an exhaustive formulation of sources of rights. Other sources of rights were not excluded.

M. Barile (Italie) exprime son désaccord avec la proposition de M. Batiffol; une décision judiciaire ou administrative peut avoir été rendue dans un Etat et avoir «force de loi» (*ex jure*) dans un autre Etat sans pour autant avoir été exécutée dans ce dernier.
Il fait référence à ses précédentes interventions.

Mr van Boeschoten (Netherlands) found problems with the final sentence of the United Kingdom proposal, which he felt to be too narrow. He noted that custody rights may be vested in a person by rules of unwritten law or common law. A broader term than 'statute law' was therefore needed.

Mr Eekelaar (Commonwealth Secretariat) referring to the word 'may' in the text of the proposal, repeated that the list of sources of rights was not exclusive. It should be understood that only *some* sources were enumerated in the proposal.

Mr Jones (United Kingdom) said he had been impressed by the points made by Mr van Boeschoten and Mr Eekelaar. He suggested that the final sentence of the United Kingdom proposal be altered in such a way that it refer to rights which 'may include' rights founded upon statute law etc.

Mr Leal (Canada) felt that the words 'may include', suggested by Mr Jones, made the second sentence of the proposal redundant.

The Chairman commented that questions of substance and drafting were continually being mixed. He reminded the delegates that article 3 of the draft Convention had been so drafted because the Convention deals with *ex lege* custody rights which had to be accounted for. The intention was that the custody rights referred to could be derived from statute, common law, customary law, and agreements *en vigueur* (*i.e.* with legal effect in a State). In response to Mr Dyer's point, he acknowledged that provisions of constitutional law were not excluded. He suggested that the words 'whether through operation of law etc.' be referred to the Drafting Committee.

The meeting was closed at 1 p.m.

Documents de travail Nos 4 à 13
Working Documents Nos 4 to 13

Distribués le 8 octobre 1980
Distributed on 8 October 1980

No 4 – Proposition de la délégation belge

Article premier

Le littera b *devrait être supprimé non seulement parce qu'il ne présente aucune utilité mais aussi parce qu'il touche au fond alors qu'ainsi que le signale le Rapport, No 23* (supra, p. 178) *la Convention ne règle pas et ne cherche pas à régler le problème de l'attribution du droit de garde et du droit de visite.*

Article 4

Selon cet article, la Convention s'applique à tout enfant de moins de 16 ans.
La formule est trop générale étant donné que la Convention ne devrait pas s'appliquer aux enfants émancipés.
Il faudrait dire que la Convention s'applique à tout enfant âgé de moins de 16 ans et qui n'a pas le droit de fixer lui-même sa résidence. En ce qui la concerne, la délégation belge ne serait pas opposée à ce que l'âge soit abaissé à 14 ans, compte tenu des dispositions de l'article 12.

Article 7

Le lettera f *de cet article de même que l'article 17, paragraphe 3 accordent aux Autorités centrales la compétence d'introduire des procédures judiciaires sans qu'elles ne disposent d'un mandat de la personne qui a été dépossédée de la garde.*
En effet, l'article 24 prévoit que ce mandat est facultatif. Il y a là atteinte à la règle selon laquelle nul ne plaide par procureur.
D'autre part, les autorités belges estiment, comme le Rapporteur (Rapport, No 79), qu'il serait souhaitable de supprimer le membre de phrase «et, le cas échéant, de fixer ou de permettre l'exercice du droit de garde ou du droit de visite».
Enfin, il serait utile que les Autorités centrales se tiennent mutuellement informées des difficultés susceptibles de s'élever à l'occasion de l'application de la Convention et s'emploient à lever les obstacles rencontrés. Il faudrait compléter l'article par une disposition en ce sens.

Article 8

Le littera f *mentionne une* «déclaration sous affirmation». *Il s'agit là semble-t-il, d'une mauvaise traduction de l'anglais.*
Il semble qu'une attestation certifiée par une Autorité centrale serait suffisante.

Article 10

Au premier alinéa, il faudrait prévoir que les autorités doivent statuer non pas d'urgence mais statuer sur la remise de l'enfant selon une procédure simple et rapide.
Le deuxième alinéa, tel que libellé, est dépourvu de tout effet contraignant. Il ne présente dès lors, qu'un intérêt très limité et semble pouvoir être supprimé sans inconvénient.

Article 12

L'utilité du littera a *n'apparaît pas dans la mesure où l'article*

3 ne considère un déplacement d'enfant comme illicite que s'il a eu lieu en violation d'un droit de garde exercé effectivement. En outre, on ne voit pas comment ne pourrait pas être de bonne foi, le gardien couvert par une décision judiciaire ou administrative.
Le littera b *est inacceptable.*

Article 13

Cet article devrait être supprimé

Article 14

Il serait préférable de retenir le texte suivant:

Les autorités de l'Etat requis peuvent subordonner le retour de l'enfant à la production d'une attestation judiciaire de l'Etat requérant constatant que le déplacement ou le non-retour de l'enfant était illicite au sens de l'article 3.

Article 15

Cette disposition semble inutile car elle ne fixe pas les conditions dans lesquelles le retour pourrait être ordonné.

Article 17

Le troisième alinéa devrait être supprimé car il touche au fond du droit de garde et du droit de visite.

Article 18

Les autorités belges sont d'avis de supprimer les mots qui se trouvent entre crochets.

No 5 – Proposal of the Canadian delegation
– Proposition de la délégation canadienne

Article 3 (second line)

Add the words 'or access' *after the words* 'breach of rights of custody'.

Article 3 (deuxième ligne)

Ajouter les mots «ou de visite» *après les mots* «en violation du droit de garde».

No 6 – Proposition de la délégation espagnole

Article 5

Au sens de la présente Convention:

a L'exercice effectif du droit de garde comporte les soins de la personne de l'enfant y compris le droit de décider de son lieu de résidence.

En ce qui concerne les institutions cet exercice devra être apprécié d'après les termes de la décision accordant le placement de l'enfant.

No 7 – Proposal of the United States delegation

Amendment to article 5

Add another paragraph to read:

'Judicial or administrative authorities' are courts or administrative bodies with power to make decisions in legal proceedings regarding child custody and access.

Amendment to article 7

Revise the opening lines of the second paragraph to read:

In particular, either directly or through other competent public authorities or private organizations, they shall use their best efforts to: . . .

No 8 – Proposal of the Netherlands delegation

This proposal was replaced by Working Document No 32

It is proposed to substitute the following text for the present wording of article 12:

Article 12

Notwithstanding the provisions of the preceding article, the judicial or administrative authority of the requested State may refuse to order the return of the child if the person who has removed or retained the child establishes that there is a substantial risk that the return would expose the child to serious physical or psychological harm or otherwise place the child in an intolerable situation.

It is further proposed to add the following article:

Article A

A Contracting State may make a reservation that in cases covered by articles 11 and 12 the judicial or administrative authority of the requested State may refuse to order the return of the child on such of the following grounds as may be specified in the reservation:

a if it is found that the effects of the decision are manifestly incompatible with the fundamental principles of the law relating to the family and children in the requested State;

b if the custody rights invoked by the applicant are incompatible with a decision relating to custody given by a judicial or administrative authority in the requested State before the removal or, if the child has been retained, before the commencement of the relevant period of access;

c if it is found that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views;

d if it is otherwise found that the return of the child would be manifestly incompatible with its best interests.

No 9 – Proposal of the United Kingdom delegation

The delegation have observed that changes in article 7 have been proposed by several Governments. The following draft is designed to take account of the main proposals.
Words which have been changed are in italics. In b, *the word* 'further' *has been deleted.*

Article 7

The Central Authorities shall co-operate with each other and promote co-operation among the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention. In particular, either directly or through *other appropriate bodies* in their States, they shall –

a take *all practicable* steps to discover the whereabouts of wrongfully removed or retained children;

b take or promote the taking of such provisional measures as may be necessary to prevent harm to the child or prejudice to interested parties;

c take or cause to be taken all steps appropriate either to secure the voluntary return of the child or to bring about an amicable resolution of the issues;

d exchange, where appropriate *and if necessary in confidence*, information relating to the social background of the child;

e to provide information of a general character as to the law of their State in connection with the application of the Convention;

f initiate or facilitate the institution of judicial or admin-

istrative proceedings with a view to obtaining the return of the child and where appropriate, the determination of issues relating to rights of custody and access;

g where the circumstances require it, provide or facilitate the provision of legal aid and advice including the services of *legal counsel and advisers*;

h provide such administrative *facilities* as may be necessary and appropriate to achieve the safe return of the child.

No 10 – Proposal of the Finnish delegation

Article 3

The removal or the retention of a child is to be considered wrongful where it is in breach of rights of custody attributed to a natural person or legal entity under the law of the State in which the child was habitually resident immediately before the removal or retention.
Such rights may be . . .

[*Article 12, paragraph 1:*

a at the time of the alleged breach the applicant was not actually exercising the custody rights . . .]

No 11 – Proposal of the United States delegation

*Article 7*f

Delete: 'and, where appropriate, the determination of issues relating to rights of custody and access', *as suggested by the Rapporteur.*

No 12 – Proposal of the United States delegation

Amendments to article 12

*Rephrase the exception in article 12*a *to read:*

at the time of the alleged breach the person who removed or retained the child had in effect assumed custody of the child for an unspecified period with the consent or acquiescence of the applicant.

In second exception delete the words 'or acting in good faith'.

*Amend sub-paragraph 1*b *to read:*

there is a substantial risk, supported by the evidence which is supplied by the Central Authority of the State of origin or other competent authorities or persons of that State, that the return would subject the child to severe conditions of neglect, maltreatment, or abuse, other than economic or educational disadvantages.

Addition of a new second paragraph to read:

When a court determines that substantial risk as described in *b*, above may exist, it may refer the matter to the Central Authority of the State of origin and return the child to an appropriate person or public or private institution in that State.

Delete existing second paragraph.

In last paragraph, last line, insert following the words 'Central Authority' *the words* 'or other competent authority'.

No 13 – Proposal of the Finnish delegation

Article 5

For the purposes of this Convention –

a 'rights of custody' are the rights [and responsibilities] relating to the care *and protection* of the person of the child, . . .

Procès-verbal No 3

Séance du mercredi 8 octobre 1980 (matin)
Meeting of Wednesday 8 October 1980 (morning)

The meeting was opened at 10.15 a.m. Mr Anton (United Kingdom) was in the Chair. The Rapporteur was Miss Pérez-Vera (Spain).

The Chairman directed the attention of the delegates to the appointment of members of the Drafting Committee. He nominated Mr Leal (Canada) as Chairman of the Committee, and the Rapporteur, Mr Chatin (France), Mr Jones (United Kingdom), and Mr Savolainen (Finland) as members. All had previously agreed to act, and the meeting accepted the nominations unanimously.

Mr Dyer (First Secretary at the Permanent Bureau) announced that the Drafting Committee would meet on Thursday 9 October, at a time to be fixed by its Chairman.

The Chairman pointed out the strong relationship between (*a*) article 4 and article 12(2) and (*b*) article 3 and article 12*a* as regards the actual exercise of custody rights. He asked that there be simultaneous discussion of the related articles. On the question of actual exercise of custody rights, he referred to Working Documents Nos 1, 2, 5 and 10, and invited the delegates concerned to explain the proposals contained therein.

Miss Selby (United States) stated that two questions arose out of the first concept of the 'actual exercise' of custody rights. In the first place, there was the problem of onus of proof – was it for the applicant to show that such rights had actually been exercised, in terms of article 3, or was it a matter to be raised by the abductor as a defence in terms of article 12? In the second place, it was difficult to determine what was exactly entailed in the 'actual exercise' of custody rights. It could be argued, for example, that a mother holding a right of custody, who gave the children to their grandparents no longer actually exercised her right. This would put the mother in an invidious position. The United States was opposed to a double requirement being imposed upon an applicant who would have to show both a right to custody *and* its actual exercise. However, if the abductor had been given actual custody by the custodial parent, he should be able to use that fact as a defence.
Miss Selby conceded that the problem may be one of clarity of expression and not of substance. However, she was concerned that the Convention avoid giving any opportunity to abductors to indulge in complicated factual proceedings which can be a problem in the United States. If the burden was placed on the applicant, such problems could arise. She proposed therefore that the words 'actually exercised' be deleted from article 3 and be referred to in article 12 as a defence to be used by the abductor. However, this solution could work only in cases where the abductor did not have actual custody.

Mr Jones (United Kingdom) noted that the United

Kingdom proposal in Working Document No 2 differed from the United States proposal by retaining the words 'actually exercised' in article 3. He was particularly concerned to eliminate the possibility of a person demanding custody purely as a harassing tactic, which had occurred in some English court proceedings. He regarded the words 'actually exercised' as a safeguard against this, and was opposed to their deletion unless a satisfactory formula was found during the delegates' discussion of article 12. In this connection, he referred to the United Kingdom proposal in Working Document No 3 that a ground of refusal to return the child in terms of article 12 be the applicant's condoning the child's removal from his custody. If this proposal were adopted by the meeting, the United Kingdom would look favourably upon the subsequent deletion of the words 'actually exercised'. However, as a matter of procedure, the words should be retained pending a full discussion of article 12.
Mr Jones then referred to the words 'or would have been so exercised but for the removal or retention' in Working Document No 2. These were intended to cover a case where a child was removed in defiance of a court order. Without the inclusion of the proposed wording, the beneficiary of the court order would be precluded from invoking the machinery of the Convention.

Mr Dyer (First Secretary at the Permanent Bureau) asked Mr Jones whether the words 'either jointly or alone', presently included in the Convention, had been intentionally omitted from Working Document No 2.

Mr Jones (United Kingdom) replied that no change of substance was intended. It had been agreed at previous meetings that the Convention should include the question of joint custody.

The Chairman commented that this was a separate issue but that Mr Jones' comments would be noted.

Mr Leal (Canada) conceded that the Canadian proposal in Working Document No 5 concerned a separate issue which should be taken up later.

Mr Savolainen (Finland) stated that the Finnish proposal in Working Document No 10 was in essence the same as that of the United States. He suggested that a requirement of 'actual exercise' or any provisions concerning the actual nature of the parties' relationship should be omitted from article 3 and dealt with in article 12*a*. He agreed with Mr Jones that this point be taken up in detail during the discussion of article 12.

M. Jenard (Belgique) rapporte qu'au sujet de l'expression «effectivement exercé», la délégation se rallie à la proposition américaine; il se demande s'il ne faudrait pas distinguer le cas d'attribution judiciaire du droit de garde des autres cas d'attribution.
Dans le premier cas, la situation juridique est réglée et peu importe ensuite que l'exercice du droit de garde soit effectif ou non.
De même à l'article 12 si la garde a été attribuée par une décision judiciaire, la bonne foi «n'a plus d'importance». Il est peu recommandé de tout «mettre dans le même sac». En conclusion la délégation belge considère que les mots «effectivement exercé» compliquent le texte de l'article 3 et souligne l'importance de la distinction des cas d'attribution judiciaire des autres cas d'attribution du droit de garde.

Mr Müller-Freienfels (Federal Republic of Germany) commented that article 3 established definitions and the grounds on which an application for the return of an abducted child should be based. Article 12, on the other hand, permitted a refusal to return a child if the abductor established that the applicant had not actually exercised his custody rights. In the former case, the burden of proof rested with the applicant, in the latter with the abductor. This contradiction could be resolved in two ways, *viz*:
i) The removal of the words 'actually exercised' from article 3. An applicant then would have to prove merely a right of custody in order to invoke the mechanisms of the Convention. Even an applicant who had previously given 'actual' custody of the child to the abductor and who later regretted his action could have resort to the Central Authority and avail himself of the Convention's provisions.
ii) The deletion of the first alternative contained in article 12*a*. In this event, an applicant would always have to prove the actual exercise of his custody rights in order to set the machinery of the Convention in motion. Since the abductor could still use the defence that the rights of custody had not been exercised, the only practical difference between deletion and retention of the first alternative was that in the former case the child could never be returned, while in the latter, the court retained a certain amount of discretion.
In Mr Müller-Freienfels' view, the second alternative was to be preferred. The first went beyond the scope of application of the Convention which was concerned to restore the *status quo ante*. In the ordinary case it was not difficult for an applicant to establish his right to custody. Moreover, in German law, even where a party (*e.g.* mother) with the legal right to custody gives the child to others (*e.g.* grandparents from whom the father abducts the child), she is not regarded as having surrendered her right to custody. Mr Müller-Freienfels concluded by stating that no change should be made to article 3, but he conceded that the Convention should perhaps contain a definition of 'the actual exercise of custody rights'.

M. Espinar (Espagne) estime que les propositions tendant à supprimer la référence à «l'exercice effectif de la garde» risquent d'entraîner des difficultés; d'autre part le droit de garde n'est pas encore défini à ce stade de la Convention puisqu'il faut attendre l'article 5*a*. Enfin la Convention ne définit pas toutes les situations envisageables; le Royaume-Uni exprime bien d'ailleurs l'une d'entre elles, celle où le gardien n'a pu effectivement exercer la garde à cause du fait même de l'enlèvement. La délégation espagnole propose un élargissement de la Convention. Abordant le problème du fardeau de la preuve, M. Espinar propose qu'une présomption d'exercice effectif de la garde soit accordée au titulaire de ce droit.

M. Voulgaris (Grèce) exprime la difficulté qu'il a de choisir entre la proposition du Royaume-Uni et celle du texte actuel; le texte de l'avant-projet se base sur un point de vue substantiel: il faut protéger une situation de fait; «l'exercice effectif» est l'expression de cette idée. La preuve de l'exercice effectif du droit de garde risque de poser un problème insurmontable à celui qui devra l'apporter; peut-être faudrait-il supprimer le mot «effectif» et ne l'utiliser qu'à l'article 12; le défendeur pourrait invoquer cette disposition à titre d'exception.
M. Voulgaris souligne la très grande difficulté qu'un demandeur peut avoir à prouver un tel point de fait.
Tout en se ralliant à la proposition du Royaume-Uni et des Etats-Unis, la délégation grecque tient à ne pas supprimer une partie du texte mais à en modifier le contenu dans le sens mentionné par M. Espinar.

Mr Yadin (Israel) was of the opinion that the notion of 'actual exercise' should be deleted from articles 3 and 12. The Convention was concerned with the consequences of the wrongful removal or retention of a child and the infringement of rights of custody, irrespective of how or whether these rights had actually been exercised. In his

view, the whole notion of 'actual exercise' was not well-taken, and he was opposed to the complicated refinements proposed by the United Kingdom.
Raising a point of drafting, Mr Yadin felt that it was inappropriate to speak of 'breach' of a right of custody, since one did not breach rights but only obligations. He asked the Drafting Committee to take note of this observation.

Mr van Boeschoten (Netherlands) agreed with Mr Müller-Freienfels and Mr Espinar. He was in favour of the present formulation of article 3, and was opposed to the inclusion of the words 'actually exercised' solely in article 12. In his view there was an essential difference between article 3, which defined the scope of the Convention, and article 12 which was concerned with defences. Moreover, the deletion of 'actual custody' from article 3 would base the Convention wholly on the concept of legal custody which could be quite different from actual custody. For example, it was quite possible that after a judicial decision had been given concerning custody, the parties agreed that a child should be sent to stay with the non-custodial parent, thus creating a factual situation quite different from that envisaged by the custody order.

M. Chatin (France) appuie les propositions de l'Espagne et des Pays-Bas. Il remarque, de plus, le caractère essentiel des articles 3 et 12 de la Convention. Il reprend ensuite l'intervention des Etats-Unis: le premier point soulevé par la délégation américaine serait l'attribution du fardeau de la preuve au demandeur. Le second concernerait les modalités de l'exercice du droit de garde.
M. Chatin distingue ensuite les situations envisagées dans l'un et l'autre des articles 3 et 12 respectivement: l'article 3 tout d'abord, est un article de principe qui tend à protéger une situation de fait reposant elle-même sur une situation de droit. La Convention veut protéger le gardien si à une situation de droit correspond une situation concrète; l'article 3 veut tout simplement éviter qu'on ait un titre juridique sans la réalité des faits; c'est en d'autres termes, une «remise en l'état». L'article 3 n'envisage pas la question des preuves.
Quant à l'article 12, M. Chatin relève que l'utilisation d'une terminologie «demandeur» et «défendeur» est inexacte; c'est au «gardien» que le texte de l'article 12 devrait faire référence et non pas au «demandeur». L'article 12 lui, contrairement à l'article 3, pose une règle de preuve: il établit une présomption en faveur du gardien qui ne se voit pas chargé de la preuve de l'exercice effectif du droit de garde.
M. Chatin s'en prend ensuite aux modalités de l'exercice du droit de garde. L'article 4 semble apporter une réponse affirmative à la question de la délégation américaine de savoir si le titulaire du droit de garde peut confier l'exercice de ce droit à un grand-parent, par exemple.
M. Chatin reprend ensuite l'exemple de M. Jones: il s'agit d'un couple sur le point de se séparer, et se trouvant engagé dans une procédure pour divorce en France; le père, voyant que les choses tournent mal, s'en va avec l'enfant dans un pays étranger. Deux mois plus tard le tribunal attribue à la mère un droit de garde provisoire; le délai prévu à l'article 11, ne dépasse pas six mois et la Convention s'applique à cette situation.

The Chairman observed that there should be no extended debate on this point at present, since it would be possible to return to it later. He asked for two more observations.

Miss Pripp (Sweden) agreed with Mr Chatin that it was not necessary or desirable to complicate the text of the Convention with references to 'actual exercise' of custody rights. A custodian could always recover an abducted child, and if the abductor had removed the child with the custodian's consent that did not amount to a breach of custody rights. Of course, if an abductor then refused to return the child, a breach arose.

Mr Holub (Czechoslovakia) pronounced himself in favour of retaining the reference to the 'actual exercise' of custody rights in article 3, but felt that the reference to the same problem in article 12 was superfluous.

The Chairman asked the proposers of the various amendments to reply to the debate.

Miss Selby (United States) conceded that there were good reasons for each approach suggested by the delegates, and that the meeting was to some extent trying to predict what would happen after the Convention had entered into force. She was much impressed by Mr Müller-Freienfels' point concerning the mechanisms of the Convention and the possibilities therein for raising certain defences at a later stage. However, she was still not clear what the term 'actually exercised' really meant. Was it the case that giving a child to its grandparents still constituted 'actual exercise' of a right to custody, whereas giving a child to its father (who then became the abductor) did not? In her view, there should be a definition of 'actual custody' and of the circumstances which would bar the applicant from having the child returned. Finally, on the question of burden of proof it was less important where it lay so long as it was not too heavy.

Mr Jones (United Kingdom) remained convinced, on the basis of what the previous speakers had said, that the words 'actually exercised' should be retained in article 3. With regard to the words 'or would have been so exercised but for the removal or retention' proposed for inclusion in article 3 in Working Document No 2, he acknowledged the force of Mr Chatin's point that the particular case envisaged was covered by the draft Convention as it stood. However, he was not convinced that Mr Chatin's interpretation would be upheld in every case; for example, one could envisage a situation where a mother had the right to custody and the father abducted the child after an interval during which the child had stayed with the father, the mother being physically unable to recover the child. He conceded that the same result as that sought by Working Document No 2 might be obtained at a later stage of the Convention by means of a definition of 'actually exercised' or similar device. He described the United Kingdom proposal for article 3 as a '*mesure conservatoire*', but asked that it be put to the vote.

Mr Savolainen (Finland) stated that the Finnish proposal in Working Document No 10 was withdrawn. He added that on the basis of the discussion he was at this stage in favour of retaining the words 'actually exercised' in article 3.

Le Rapporteur fait observer que la discussion devient confuse; il semblerait que les Etats-Unis et les Pays-Bas ont décidé de retirer leur proposition de supprimer la référence à «l'exercice effectif».
Il s'agit de reconsidérer les véritables intentions de la Convention; on a décidé de protéger l'enfant et non de se limiter à garantir aux parents l'exercice du droit de garde; or, dans un contexte international, il est fréquent que le père et la mère obtiennent des décisions contradictoires dans deux pays différents; la seule protection des parents aboutirait justement à de telles situations. Pour le Rapporteur, «l'exercice effectif» est une notion capitale et il faut maintenir cet élément de texte dans la Convention. Il faudra aussi préciser l'attribution du fardeau de la preuve.

Miss Selby (United States) asked that the meeting proceed to a vote on the United States proposal in Working Document No 1.

The Chairman declared that delegates were free to submit *written* proposals for a definition of 'actual custody', to be contained in article 5. He then proceeded to take a series of votes on various proposals:

Votes

1 *Mr Yadin's proposal to delete all references to the* 'effective exercise of custody rights' *in articles 3 and 12 was rejected by a hand vote of 18 against and 3 in favour.*

2 *The proposal implicit in Working Document No 1, that any reference in article 3 to the actual exercise of custody rights be deleted (leaving on one side for the moment the precise terms of article 12) was rejected by a vote of 14 against (Austria, Czechoslovakia, Denmark, France, Federal Republic of Germany, Greece, Italy, Japan, Luxemburg, Netherlands, Portugal, Spain, Switzerland, United Kingdom), 9 in favour (Australia, Belgium, Canada, Finland, Ireland, Israel, Norway, Sweden, United States).*

3 *The proposal in Working Document No 2 to add to article 3 the words* 'or would have been so exercised but for the removal or retention' *was accepted by a vote of 12 in favour (Australia, Canada, Czechoslovakia, Denmark, Ireland, Italy, Netherlands, Norway, Portugal, Spain, United Kingdom, United States), 11 against (Austria, Belgium, Finland, France, Federal Republic of Germany, Greece, Israel, Japan, Luxemburg, Sweden, Switzerland).*

Mr Jenard's proposal that the reference to actual custody rights be modified to accommodate the situation where a prior decision had been issued was withdrawn.

The Chairman stated that the matter of infringements of sole or joint custody rights would be referred to the Drafting Committee. He then directed the attention of the meeting to the Canadian proposal concerning article 3 contained in Working Document No 5.

Mr Leal (Canada) thought that rights of access should be accommodated more fully within the scope of the Convention. In his view, such rights were not a minor appendage to custody but could at times attain almost the same level of importance as custody rights. He gave two examples which could be regarded as polar opposites:

i) Custody is given to the mother, but the order provides that the child cannot go out of the jurisdiction without the father's consent. If the mother nevertheless leaves the jurisdiction without such consent, that constitutes wrongful removal.

ii) The mother has the right of custody, and the father is given extremely limited rights of access (*e.g.* two hours each Saturday afternoon). If the father returns the child five minutes past the deadline of two hours, it is clear that the full panoply of the Convention ought not to be evoked.

Between these two extremes, there was an infinite variety of cases to be considered. However, it was necessary to have some provision in article 3 concerning a clear case of breach of access and it should be made clear at the outset that rights of access were covered as well as those relating to custody.

Mr Yadin (Israel), in seconding Mr Leal's proposal, noted that article 1*b* mentioned rights of access. In his view, wherever rights of custody were mentioned in the Convention, rights of access likewise be mentioned.

Mr van Boeschoten (Netherlands) referred to Mr Leal's first hypothesis. It coincided with an actual case in which he had been professionally involved. He noted that, in such a case and under the present terms of the Convention, the abducted child would have to be sent back immediately. However, if Mr Leal's proposal in Working Document No 5 were accepted there would be a need for wider grounds of refusal in article 12, and he was opposed to the widening of these grounds.

Mr Holub (Czechoslovakia) felt that it was not possible to include rights of access in article 3. In his view, the purpose of article 3 was to protect custodial parents against the wrongful removal of children, whereas the purpose of article 17 was to protect non-custodial parents who possessed rights of access which had been breached by the custodial parent. He confessed that he was still somewhat puzzled by the precise meaning of the Canadian proposal in Working Document No 5.

M. Jenard (Belgique) remercie la délégation canadienne d'avoir attiré l'attention sur la question du droit de visite qui pose de sérieux problèmes que les Pays-Bas et la Belgique ont rencontrés dans des cas concrets. M. Jenard prend l'exemple d'une mère titulaire d'un droit de garde et d'un père au bénéfice d'un droit de visite; la mère quitte la Belgique pour les USA et le père se voit privé de l'exercice de son droit de visite; il obtient du tribunal que le droit de garde lui soit attribué. La Convention dans sa version actuelle ne s'applique pas au cas de la protection du droit de visite; pourtant, cet aspect est important.

Mr Eekelaar (Commonwealth Secretariat) commented on the potentially very wide scope of Mr Leal's proposal. In the ordinary case, the effect of the proposal would be that, where a custodial parent removed a child and prevented access, the child would have to be returned to the negligent custodian. He felt that the right course in such cases would be for the aggrieved parent to bring proceedings, outwith the scope of the Convention, in the country to which the child had been taken. Nevertheless, he was concerned about cases similar to Mr Leal's first hypothesis, and in particular where joint custody was involved. However, a possible solution to this problem lay in the terms of article 5 which could cover cases where the non-custodial parent had a right to be consulted.

M. Chatin (France) dit que, par principe, la délégation française attribue une grande importance au droit de visite puisqu'il est en fait la contrepartie du droit de garde; il convient donc de protéger ce droit.

Si le gardien outrepasse le droit de garde, la Convention prévoit, à son article 17, un mécanisme pour atténuer les effets d'un déplacement abusif de l'enfant.

Faut-il aller plus loin? Le but de la Convention n'est pas d'accorder au titulaire du droit de visite la possibilité de devenir titulaire du droit de garde, l'inversion de la titularité du droit de garde sortirait des intentions de la présente Convention.

Il faut donc se contenter de la réorganisation du droit de visite prévu à l'article 17.

M. Chatin précise ensuite qu'au titre de la réorganisation du droit de visite prévu par cet article, les charges financières, plus particulièrement les frais de voyage pouvant à l'occasion de l'exercice du droit de visite résulter du déplacement abusif de l'enfant à l'étranger, pourront être mises à la charge du gardien.

The Chairman noted that the meeting had already covered most of the issues raised. He asked that one other delegate speak before Mr Leal replied to the debate.

Mr Walsh (Ireland) agreed that questions of access gave rise to serious difficulties in practice. He cited the case where a Frenchwoman, separated from her Irish husband, was granted custody of the child with whom she wanted to return to France. The husband objected that this would make exercise of his access rights impossible. A solution was found whereby an order was obtained from a French court

to the effect that the child would be returned to Ireland whenever the Irish courts so ordered, subject to prior consultation with both separated parents. However, Mr Walsh doubted whether other courts would prove to be as amenable as the French courts in such circumstances.

M. Jenard (Belgique) reprend l'exemple de M. Chatin et exprime son accord avec lui sur le problème de l'inversion éventuelle du droit de garde qui ne rentre pas dans les intentions de la Convention. Toutefois, le coût entraîné par l'exercice du droit de visite lorsque l'enfant se trouve déplacé à des milliers de kilomètres semble représenter un obstacle pratique à l'exercice de ce droit. M. Chatin n'a pas répondu à cette question.

Mr Leal (Canada) in replying to the debate, made the following points:
1 Joint custody was an unusual concept in Canada where courts tended to grant custody to one parent and access to the other.
2 He instinctively rebelled against unilateral actions by parents who sought merely to wreak revenge on the other spouse. In his view, the meeting must try to remove any possibilities for this.
3 He would be happy to withdraw his proposal if the meaning of article 17 was clarified. In this regard, he commented that this Convention did not deal with the recognition and enforcement of awards of custody and access, and it was inappropriate that one court should have the power to change the prior decision of another court.

The Chairman proceeded to a vote on the Canadian proposal.

Vote

Working Document No 5 was rejected by a vote of 19 against (Australia, Austria, Belgium, Czechoslovakia, Denmark, Finland, France, Federal Republic of Germany, Greece, Japan, Luxemburg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, United Kingdom, United States), 3 in favour (Canada, Ireland, Israel), with 1 abstention (Italy).

M. Barile (Italie) explique son abstention dans le vote; il a de la sympathie pour la proposition canadienne, mais il considère qu'il est impossible de la réaliser dans ses projets. Il fait ensuite référence à l'article 17.

The Chairman thanked Mr Barile but suggested that such points should be made during the discussion of article 17. He then turned to article 4 of the draft Convention.

M. Jenard (Belgique) pose la question de savoir si la Convention s'appliquerait à un cas où une décision judiciaire inverserait le droit de garde.

Le Rapporteur répond à la question de M. Jenard par la négative. La Convention ne s'applique pas mais d'autres dispositions internationales entrent en ligne de compte, notamment la Convention du Conseil de l'Europe sur la reconnaissance et l'exécution des décisions en matière de garde des enfants et le rétablissement de la garde des enfants. Le Rapporteur rappelle que cette Convention a un objectif limité; dans l'exemple de M. Jenard, il n'y a pas de déplacement illicite et la Convention n'a pas lieu de s'appliquer.

The Chairman regretted that no time was left for discussion of article 4. He pointed out that the terms of article 4 were intimately linked with those of article 12(*ii*). These provisions would therefore be discussed jointly.

The meeting was closed at 1 p.m.

Documents de travail Nos 14 à 19
Working Documents Nos 14 to 19

Distribués le 9 octobre 1980
Distributed on 9 October 1980

No 14 – Proposal of the United Kingdom delegation

Article 8

(*i*) *For* 'Any person who claims', *substitute* 'Any person or legal entity who claims'.

(*ii*) *For present* (*e*), *substitute*:
e A certified or authenticated copy of any relevant decision or agreement.

(*iii*) *In* (*f*), *for* 'the contents of the law', *substitute* 'the tenor of the law'.

(*iv*) *Add a new paragraph to the article as follows:*

The Convention shall not preclude a person who claims that there has been a wrongful removal or retention in the sense of article 3 applying directly to the judicial or administrative authorities of Contracting States for the return of the child under the provisions of this Convention.

No 15 – Proposal of the Australian, Canadian and United Kingdom delegations

Article 13

Substitute new text as follows:

In ascertaining whether there has been a wrongful removal or retention within the meaning of article 3 the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions rendered in, the State of the habitual residence of the child without recourse to formal procedures for the proof of that law or for the recognition of foreign decisions.

No 16 – Proposal of the United States delegation
– Proposition de la délégation des Etats-Unis

Article 5 – Insert new b:

'Actual exercise' of rights of custody is presumed unless it is established that the party alleged to have wrongfully removed the child has openly and continuously exercised such rights with the consent or acquiescence of the person or [public or private authority] invoking the Convention.

Change the present b *to* c.

Ajouter à l'article 5 un nouveau alinéa b:

L'exercice effectif du droit de garde est supposé sauf quand il est établi que l'auteur du déplacement ou du non-retour allégué illicite avait publiquement et continuellement exercé ce droit avec l'agrément exprès ou tacite de [la personne ou l'autorité publique ou privée] qui invoque la Convention.

Changer b *en* c.

No 17 – Proposal of the Israeli delegation

Article 4 to be redrafted as follows:

4 The Convention shall apply to any child who was under

the age of . . . years and was habitually resident in a Contracting State immediately before the unlawful removal or retention.

No 18 – Proposition de la délégation belge

Article 3 (compléter)

Le déplacement d'un enfant doit également être considéré comme illicite si le parent qui exerçait le droit de garde au sens de l'alinéa précédent, a, pour empêcher le droit de visite, enlevé l'enfant et que, après l'enlèvement, le droit de garde a été confié à l'autre parent dans l'Etat d'origine.

No 19 – Proposal of the Japanese delegation

This proposal was replaced by Working Document No 26.

*Article 8*bis

If the Central Authority of the Contracting State, where the child is not presumed to be, receives the application referred to in article 8, it shall transmit the application to the Central Authority of the Contracting State where the child is presumed to be.
The Central Authority shall, in transmitting the application in accordance with the preceding paragraph, ensure that the application meets the requirements of the second paragraph of article 8.
If it appears to the Central Authority that the application is manifestly unfounded, it may refuse to transmit the application.

*Article 8*ter

The Central Authority may request further information from the applicant.
The Central Authority which received the transmission of the applicant by virtue of the first paragraph of article *8bis* may request assistance from the other Central Authorities in obtaining further information from the applicant.

Article 12

It is proposed to add the following article in connection with article 12:

Article X

A Contracting State may make a reservation that in cases covered by articles 11 and 12 the judicial or administrative authority of the requested State may refuse to order the return of the child if the custody rights invoked by the applicant are incompatible with a decision relating to custody given by a judicial or administrative authority in the requested State.

Procès-verbal No 4

Séance du jeudi 9 octobre 1980 (après-midi)
Meeting of Thursday 9 October 1980 (afternoon)

The meeting was opened at 3.12 p.m. Mr Anton (United Kingdom) was in the Chair. The Rapporteur was Miss Pérez-Vera (Spain).

The Chairman suggested that the Commission appoint two Subcommittees. With regard to a Forms Committee, he proposed Mr Müller-Freienfels (Federal Republic of Germany) as Chairman and that Messrs Deschenaux (Switzerland), Hergen (United States), Barbosa (Portugal) and Minami(Japan) and Miss Pripp(Sweden) serve as Members. The nominations were accepted unanimously. With regard to the Committee to be formed to deal with 'Application Clauses', *i.e.* articles 27, 28 and 29, but not article Y, of the draft Convention, the Chairman proposed Mr Matić (Yugoslavia), Miss Selby or Mr Pfund (United States), Mr Hétu (Canada), Mr Hjorth (Denmark), Mr Creswell (Australia) and Mr Abou El-Izz (Egypt) as Members. These nominations likewise were accepted unanimously.

The Chairman then referred to articles 4 and 12(2) and their close interrelationship. He directed the attention of delegates to Working Documents Nos 4 and 17.

M. Jenard (Belgique) présente un amendement à l'article 3. Il s'agit du Document de travail No 18. On envisage le cas de la modification d'un droit de garde à la suite d'une rupture d'une convention sur le droit de visite.

The Chairman, in reply to Mr Jenard, noted that the meeting had effectively completed its discussion of article 3. However, he did not wish to preclude Mr Jenard raising the matter and suggested he do so in the context of article 5. He then asked Mr Yadin if the proposal in Working Document No 17 was simply a drafting matter.

Mr Yadin (Israel) acknowledged that his proposal in Working Document No 17 raised mainly a drafting point.

M. Jenard (Belgique) explique la proposition de sa délégation; il indique que cette proposition est liée à l'article 12. Selon lui la Convention ne doit pas s'appliquer aux enfants de moins de seize ans qui ont le droit de fixer leur résidence, notamment lorsqu'ils sont émancipés; il convient donc de préciser la portée de l'article 4. Une deuxième remarque est liée à l'article 12 et concerne la consultation des enfants; M. Jenard propose de ramener l'âge de seize ans à quatorze ans. En effet étant donné l'évolution des moeurs, un enfant de moins de quatorze ans qui ne veut pas retourner chez l'un de ses parents, ne devrait pas y être forcé.

The Chairman, replying to Mr Jenard, commented that in the law of Scotland, girls (but not boys) over the age of 12 were able to fix their own residence. He then asked the delegates to consider the important point as to whether the Convention should cease to apply immediately a child reached his 16th birthday, or whatever age might be decided.

M. Deschenaux (Suisse) indique que la délégation suisse est favorable au maintien de l'âge de seize ans.

The Chairman asked the delegates to consider only the point he had presented for discussion, and in particular whether the Convention should apply to children who, at the time of their removal, were under 16 years of age but over 16 by the time legal proceedings had commenced.

Mr Leal (Canada) acknowledged that this was a narrow but critical point. He felt that courts might well resent a provision whereby the 'guillotine' would fall and cut off legal proceedings on a child's 16th birthday. However, he felt that a solution might lie in article 15, which allowed an extension of time, so that a court could thereby still order the return of a child whenever the application had been made before the attainment of the child's 16th birthday, provided the child himself did not object to being returned. Or course, if the child did object, the general defence under article 12 would apply.

Mr Savolainen (Finland) stated that he had thought that the question was already solved in the present Draft: the Convention shall always cease to apply immediately when the child reaches the age limit of 16 years. However, if the delegates consider that there is any ambiguity in the present text, the text should be clarified. On the question of substance he stated that the adoption of Mr Yadin's proposal in Working Document No 17 that the age of the child *at the moment of abduction* would be decisive, would make it very difficult for Finland to ratify the Convention.

Mr Jones (United Kingdom) was similarly opposed to the proposal in Working Document No 17. He observed that when a child reached the age of 16, he could decide for himself where he should reside, and from that moment could not be constrained to go anywhere. The Convention should cease to apply at whatever point in the proceedings a child's 16th birthday occurred. Article 4 as it stood was clear enough, and any reformulation should be in the opposite sense to that proposed by Mr Yadin in Working Document No 17.

Mr Creswell (Australia) expressed his agreement with the point made by Mr Savolainen and Mr Jones. In the context of custody proceedings, once a child had reached a specified age, jurisdiction over him could no longer be exercised and any prior orders ceased to have effect.

Miss Selby (United States) stated that the United States delegation was prepared to agree that 16 be the operative age. She warned, however, that if the operative age turned out not to be 16, the agreed basis concerning the point at which the Convention should cease to apply would be subject to different considerations.

The Chairman asked Miss Selby if the United States delegation was therefore departing from its earlier written submissions on this point.

Miss Selby (United States) agreed that this was so, so long as the age agreed upon was 16.

The Chairman, acknowledging that the problem would assume a different aspect if the age in article 4 were lowered, asked delegates to confine themselves to the narrow issue raised by Mr Yadin. He then proceeded to a vote on Working Document No 17.

Vote

Working Document No 17 was rejected by a vote of 15 against (Australia, Canada, Denmark, Finland, France, Greece, Ireland, Japan, Netherlands, Norway, Spain, Sweden, Switzerland, United Kingdom, United States), 8 in favour (Austria, Belgium, Czechoslovakia, Federal Republic of Germany, Israel, Luxemburg, Portugal, Yugoslavia), with 1 abstention (Italy).

The Chairman reiterated that the Convention would cease to apply when a child reached the age of 16, and asked that the Drafting Committee make this point clearer in article 4. He then directed the attention of the delegates to the proposal in Working Document No 4 that the Convention should not apply to a child who enjoyed the right to fix his own residence.

Mr Savolainen (Finland) asked under which law a child was to have such a right.

Mr van Boeschoten (Netherlands) commented that Mr Savolainen had raised an important point. However, article 5*a* might allow a partial solution, since thereby a breach of the right to custody could arise only if the *custodian* had the right to fix the child's place of residence.

Mr Matić (Yugoslavia) stated his preference for the operative age to be lowered from 16 to 14 or 15.

M. Barile (Italie) se déclare d'accord avec le Délégué des Pays-Bas; puisque le droit de garde implique celui de décider du lieu de résidence, il n'y a pas de raison de suivre la proposition belge.

Mr Leal (Canada) noted that, *per* article 5*a* the right to custody included the right to fix the child's place of residence. He wondered whether Mr van Boeschoten believed that, where a child had the right to fix his place of residence, the Convention was inapplicable with the result that there was no need for any amendment.

Mr van Boeschoten (Netherlands) replied that what he meant to convey was that when a child had such a right, there could be no breach of custody. This did not imply that the Convention itself would be inapplicable.

Le Rapporteur attire l'attention des délégués sur les effets de l'abaissement de l'âge de seize à quatorze ans: il en résulterait une diminution du champ d'application de la Convention, notamment en ce qui concerne la protection du droit de visite. Le Rapporteur prend l'exemple d'une jeune fille âgée de seize ans qui voudrait rentrer dans son pays mais n'en aurait pas les moyens financiers: la Convention doit trouver application dans un tel cas.

M. Jenard (Belgique) répond à la question de la délégation finlandaise. Il s'agit du droit national, celui de la résidence. M. Jenard prend ensuite l'exemple d'un enfant qui se trouverait dans un Etat où il n'a pas le droit de fixer lui-même sa résidence et se verrait conduit dans un autre Etat où il aurait ce droit. On ne voit pas la raison pour laquelle on le reconduirait dans le premier Etat. Répondant ensuite à la question de la délégation yougoslave, M. Jenard explique que l'âge importe peu.
Il s'adresse ensuite au Rapporteur et lui dit que le droit de visite n'est pas le problème central de la délégation belge: seule la question de ramener l'enfant d'un pays où il a le droit de fixer sa résidence lui-même, dans un Etat où il n'aurait pas ce droit, fait l'objet de la proposition belge.

Le Rapporteur souligne qu'il y a dans l'avant-projet une disposition qui s'oppose à l'idée de forcer un enfant à rentrer dans le pays de sa résidence antérieure, contre son gré, quand il a atteint un âge et une maturité où il se révèle approprié de tenir compte de son opinion.

The Chairman observed that the issues before the meeting were very simple and their implications quite clear, as could be seen from the observations of governments on the draft Convention. He asked that a vote be taken on Working Document No 4.

Vote

The proposal in Working Document No 4 that the Convention explicitly state that it did not apply to a child who had the right to fix his own residence was rejected by a vote of 19 against (Australia, Austria, Canada, Czechoslovakia, Finland, Federal Republic of Germany, Greece, Ireland, Israel, Italy, Japan, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, United Kingdom, United States), 3 in favour (Belgium, Denmark, Luxemburg), with 2 abstentions (France, Yugoslavia).

The Chairman then asked the delegates to consider the precise age which was to be stated in article 4.

M. Jenard (Belgique) affirme n'avoir fait aucune proposition et se prononcerait volontiers sur d'éventuelles interventions.

The Chairman commented that there was no written proposal before the meeting concerning an amendment to article 4 on the matter of age. Since no delegate indicated a wish to lower the age, the Chairman announced that article 4 would be sent to the Drafting Committee in its present form, but subject to the observations made thereon.

Mr Müller Freienfels (Federal Republic of Germany) referred to the close connection between article 4 and article 12, and observed that the meeting could return to this point by a simple majority vote when article 12 fell to be considered.

The Chairman then directed the attention of the delegates to article 5 and referred to the relevant Working Documents thereon, *i.e.* Nos 6, 13 and 18.

Miss Selby (United States) was of the opinion that the United States proposals in Working Documents Nos 7 and 16 were also relevant to article 5.

M. Espinar (Espagne) tient à préciser que l'alinéa *a* de sa proposition s'inspire des mêmes principes que ceux de la proposition finlandaise et qu'il considère utile d'introduire le terme «responsabilité» pour définir «l'exercice effectif». Pour la délégation espagnole, la notion d'«exercice effectif» doit être définie parce qu'elle constitue la notion de base dans une Convention qui se réfère à des situations de fait.

Mr Savolainen (Finland) considered that the main problem here was that the concept of custody could cause problems of interpretation where the custodian was a public institution. It would therefore be useful to adopt a description of custody which would clearly cover such a situation. In his view, it would be wise to use similar wording to that in the Hague Convention of 1961 on the Protection of Minors. The essence of his proposal in Working Document No 13 was to add the words 'and protection' after the words 'relating to the care' in article 5*a*.

The Chairman noted that the simplest proposition before the meeting was to add the words 'and protection', as suggested by Mr Savolainen.

Mr Yadin (Israel) seconded Mr Savolainen's proposal. He added, however, that it was appropriate to speak not only of rights but also of responsibilities concerning both care and protection of the child.

M. Barile (Italie) se déclare favorable à la proposition de la Finlande qui prévoit la distinction entre «*rights*» et «*responsabilities*», parce qu'elle montre le double aspect des droits et des devoirs inhérents à tout droit de garde.

The Chairman referred to the linguistic problems which were arising, and to the difficult task which lay before the Drafting Committee. He asked that the Drafting Committee note Mr Barile's point.

Mr Leal (Canada) was concerned that the result of drawing a dichotomy between care and protection would be to split responsibilities for the child. He noted that responsibility for the 'care' and 'protection' of a child could reside in different persons.

Mr Creswell (Australia) suggested that it might be helpful to use the words 'care or protection' rather than 'care and protection' of the child.

Mr Jones (United Kingdom) found that he was in agreement with part only of Mr Savolainen's proposal. With regard to Mr Yadin's point he acknowledged that a reference to responsibilities as well as rights was desirable, and referred to the statutory definition of legal custody in English law which mentioned 'rights and duties'. However, he was uneasy about the phrase 'care and protection'; 'care' certainly included 'protection' but the converse did not apply since protection was regarded as something less than care. Thus, it quite often happened that a child might be regarded as under the protection of public authority without being placed in its care. Thus he was in favour of adding 'and responsibilities' to article 5*a*, but opposed the addition of words 'and protection' therein.

Mr van Boeschoten (Netherlands) reminded the delegates that it was a breach of custody rights which would set in motion the mechanisms of the Convention, and that a definition of such rights alone was necessary.

Mr Walsh (Ireland) appreciated the points put forward by Mr Savolainen and the fears expressed by Mr Leal. He stressed that the primary concern of the Convention was with the physical presence of a child in one place or another. 'Custody' was therefore the primary concept; the care and protection of a child may or may not be a necessary corollary of custody, and it was therefore appropriate that the meeting confine itself to the problem of the return of an abducted child. To go beyond the concept of the custody would raise too many problems.

Mr Müller-Freienfels (Federal Republic of Germany) felt there would be no practical value in adding the words 'and protection' to article 5. The meeting should not be concerned to give a perfect definition of the right to custody. Instead, it should concentrate upon the real point at issue, *viz.* who had the power to decide a child's place of residence?

M. Batiffol (France) ne conçoit pas la notion de «soins» sans qu'elle englobe celle de «protection»; quant au terme «responsabilité», il risque d'entraîner une certaine confusion, car on ne sait pas s'il s'agit de la responsabilité de l'enfant pour ses actes ou celle en faveur de cet enfant; il ne faut pas compliquer la notion de droit de garde inutilement.

The Chairman confessed that he found himself in some difficulty, and asked Mr Savolainen to reply to the debate.

Mr Savolainen (Finland) admitted that he did not feel strongly about the proposal in Working Document No 13, which merely sought to clarify the main point *i.e.* whether

the concept of custody would cover the special form exercised by public institutions. However, he did not wish to press the matter, and recalled that the discussion on article 3 had in part dealt with the problem. He added that the addition of the word 'responsibilities' was really a drafting point.

The Chairman agreed with the remarks made by Mr Savolainen, and suggested that Mr Savolainen's point regarding 'care and protection' of a child should go to the Drafting Committee.

Mr Savolainen (Finland) informed the Chairman that the words 'and responsibilities' in Working Document No 13, were withdrawn.

Mr Yadin (Israel) was in favour of deletion of the entire definition of 'rights of custody' in article 5*a*.

The Chairman, in reply to Mr Yadin, said that the sense of the meeting was that article 5*a* should be retained, and that it contain a stipulated definition of custody rights. The issue concerning the right to determine a child's residence should be dealt with near the beginning of the Convention. He wondered, however, whether Mr Yadin's point would be met by the substitution of the words 'shall include' for 'are' after 'rights of custody' in article 5*a*.

Mr Yadin (Israel) replied in the affirmative.

Mr Eekelaar (Commonwealth Secretariat) was of the opinion that this was not a drafting point but went to the very substance of the scope of the Convention.
Article 3 sought to protect rights to custody, rights which article 5*a* sought to define. However, the definition did not make it clear whether such rights were to be regarded as separable. It often happened that the right to care for the person of a child was vested in one person, and the right to determine the child's place of residence in another. As it stood, article 5*a* might be construed as failing to give the latter such a right as was to be protected in terms of article 3. There was therefore a need for clarification.

The Chairman suggested that Mr Eekelaar draft an amendment to article 5*a*, and ask one of the delegations representing Member States to present it on his behalf. In the meantime, the Commission would note his remarks. He also asked Mr Yadin to place a written proposal before the meeting to the effect that article 5*a* be amended by substituting 'shall include' for 'or'. He then turned to the United States proposals in Working Documents Nos 7 and 16.

Miss Selby (United States) confessed that she had no strong feelings about the proposals in Working Document No 7. However, she saw a problem in there being too many authorities, each playing different roles which should be clearly distinguished and defined.

The Chairman thought that it was essentially a drafting matter which was also related to later articles.

Mr van Boeschoten (Netherlands) likewise did not feel strongly about the United States proposal in Working Document No 7, but was in favour of the deletion of the words 'legal proceedings' from the proposal since such proceedings might not cover the decisions of administrative authorities. On the whole he felt that the existing language in the draft Convention was clear enough.

M. Espinar (Espagne) se déclare d'accord avec la proposition des Etats-Unis mais estime que, par souci de systématique, cette disposition n'est pas à sa place.

M. Batiffol (France) appuie le point de vue de M. Espinar et propose de repousser l'étude de cette disposition à plus tard, lorsqu'on abordera le problème de l'Autorité centrale.

The Chairman commented that this was a matter for the Drafting Committee.

Mr Leal (Canada), on a point of clarification, asked if the United States delegation would be prepared to delete the words 'legal proceedings'.

Miss Selby (United States) indicated her assent.

The Chairman stated that the proposal would go to the Drafting Committee.

Mr Leal (Canada) announced that Canada proposed to lay Mr Eekelaar's written proposal before the Commission at its next meeting.

The Chairman noted that there were no objections to Mr Leal's proposal, and stated that he was prepared to allow it. He then directed the discussion to Working Document No 6.

M. Espinar (Espagne) souligne que la partie importante de sa proposition est le deuxième paragraphe; il est important de définir la notion d'«exercice effectif» du droit de garde en rapport avec les institutions. Il faut tenir compte des différentes fonctions que ces institutions couvrent dans les différents pays.

The Chairman stated that he would prefer to allow the Drafting Committee to deal with questions of how exactly to define rights of custody, and asked that the meeting proceed to discuss Mr Espinar's second proposal.

Mr Reymond (Recording Secretary) read out the terms of Working Document No 6, which he then translated into English.

M. Barbosa (Portugal) appuie la proposition espagnole. Il émet néanmoins une réserve sur la question de la nécessité d'une «décision» pour placer un enfant dans une institution.

M. Chatin (France) appuie la proposition du Portugal; appliquée au droit français, elle poserait certains problèmes. En effet, seuls les placements forcés, et non pas les placements volontaires, seraient concernés.

M. Voulgaris (Grèce) se demande si la proposition espagnole est vraiment nécessaire puisque l'article 3 couvre déjà ce point; cette dernière disposition règle le conflit en faveur de la loi de la résidence habituelle. Quant à l'article 5, il est le droit substantiel; il n'est pas nécessaire de répéter la règle de l'article 3 à l'article 5.

M. Jenard (Belgique) partage le point de vue de la délégation grecque: pour lui l'article 3 répond à la question.

M. Barbosa (Portugal) revient à la proposition française; pour lui s'il est clair que le placement forcé implique une «décision» et rentre sous le coup de la disposition telle que la délégation espagnole la prévoit, le placement volontaire lui n'a rien à faire avec cette proposition: en effet si le placement est volontaire l'institution ne devient pas directement titulaire du droit de garde et la Convention s'applique au parent qui a confié le droit de garde à l'institution; il demande à M. Chatin d'éclaircir ce point.

M. Chatin (France) précise à nouveau, qu'en droit français, la proposition espagnole ne touche qu'à une partie du problème, le cas des placements forcés.

M. Barbosa (Portugal) affirme qu'une institution à qui on confie l'enfant a des droits définis nécessairement par une décision, à moins qu'il ne s'agisse d'un placement volontaire.

Mr van Boeschoten (Netherlands) felt that Working Document No 6, even if adopted, would require the attention of the Drafting Committee, as otherwise it could be regarded as excluding certain types of cases, *e.g.* where associations were appointed as guardians of children without any decision being taken to place the child in an institution.

M. Espinar (Espagne) se rallie à l'opinion du Délégué des Pays-Bas. Il s'agit d'une question de rédaction.

Mr Jones (United Kingdom) was unsure whether to support or oppose the proposal in Working Document No 6. He felt that two points arose out of it. In the first place, since no institution could ever acquire rights over a child *'en plein droit'*, there must always be some decision vesting rights in an institution. In the second place, where an institution was concerned, it was impossible to decide whether or not it had legal custody or its equivalent without looking at the precise terms of the decision. Thus if a parent was ill, a child might be sent temporarily into the care of a public authority which assumed thereby no permanent custody over the child. However, if a child had been ill-treated by its parents, a court might order that the parent lose all custody rights which would henceforth be vested in a public authority.
In conclusion, he doubted whether the provision proposed by Mr Espinar was necessary.

Mr Walsh (Ireland) emphasised that, for the purposes of the Convention, the right of custody which mattered is that which existed at the time the child was abducted. Where institutions were concerned, the rights vested in them were good against the whole world (except as against the parents themselves), and institutions enjoying the right of custody would have the power to recover custody of an abducted child. He feared that the proposals in Working Document No 6 would exclude the cases mentioned by himself and the French delegates, although such cases happened all the time.

M. Espinar (Espagne) répond aux délégations néerlandaise et française; pour lui «décision» n'est pas nécessairement une décision judiciaire; un «placement forcé» implique une décision mais un placement volontaire entraîne aussi un acte d'admission en tenant compte des conditions prévues pour ces placements.
Contrairement à ce que prétend la délégation grecque, l'article 3 ne couvre pas cette question notamment quand la garde reste dans les mains des parents après un placement volontaire dans une institution. Il se déclare d'accord avec la solution britannique; l'important est de connaître quelle était la situation dans le pays où l'enfant avait été placé; se référer à la «décision», contribue favorablement à cette recherche.

The Chairman asked for a vote on Working Document No 6.

Vote

The proposal in the second paragraph of Working Document No 6 was rejected by a vote of 12 against (Belgium, Canada, Greece, Ireland, Israel, Italy, Japan, Luxemburg, Norway, Sweden, Switzerland, Yugoslavia), 2 in favour (Portugal, Spain), with 10 abstentions (Australia, Austria, Czechoslovakia, Denmark, Finland, France, Federal Republic of Germany, Netherlands, United Kingdom, United States).

The Chairman then announced that article 5*b* was approved by the Commission and he referred it to the Drafting Committee.
The Chairman proposed to defer the discussion of Working Document No 16, and Miss Selby (United States) indicated her assent.
The Chairman then opened the discussion on Working Document No 18 regarding article 3.

M. Jenard (Belgique) reprend son exemple concernant l'article 3. Il s'agit donc d'une procédure en divorce où le droit de garde a été attribué à la mère et le droit de visite au père; la mère entraîne ensuite son enfant aux Etats-Unis. Le père obtient alors un changement du droit de garde mais, en raison de l'éloignement, ne peut pas exercer effectivement ce droit au sens de la Convention; la délégation belge estime que c'est un point que la Convention devrait couvrir puisqu'il n'y pas de raison majeure à s'y opposer.

M. Barile (Italie) demande à la délégation belge de définir ce qu'est «l'Etat d'origine».

M. Jenard (Belgique) précise qu'il y a lieu de soumettre certaines questions au Comité de rédaction; l'Etat d'origine est celui dans lequel l'enfant a été enlevé.

M. Deschenaux (Suisse) exprime l'intérêt que la délégation suisse porte à ce problème; son pays le connaît aussi en pratique. Il refuse, néanmoins, la proposition belge en raison de la rareté de ces cas et de l'impossibilité de prévoir toutes les hypothèses exhaustivement dans cette Convention. Si le titulaire du droit de visite se voit empêché d'exercer son droit, il peut recourir à des voies ordinaires. Il note ensuite qu'une décision des droits de garde à l'un des parents n'empêche pas ce dernier de se déplacer librement.

M. Chatin (France) déclare ne pas saisir toute la portée du cas proposé par M. Jenard et pour tenter de le distinguer du cas exposé la veille par le Délégué du Canada dont l'examen a été renvoyé à l'étude de l'article 17 sur l'organisation du droit de visite, demande quelques précisions complémentaires. La décision d'attribution du droit de garde avait-elle limité l'exercice de celui-ci au territoire national? En l'absence de limitation, le gardien aurait conservé le droit d'emmener l'enfant à l'étranger. Il ne s'agirait plus d'un déplacement au sens de la Convention, mais d'un déplacement abusif que la décision obtenue par le titulaire du droit de visite aurait eu pour objet de sanctionner selon une pratique constante des tribunaux.

M. Jenard (Belgique) répond au Délégué suisse. Il s'étonne tout d'abord que M. Deschenaux propose de recourir à des voies ordinaires alors que la Suisse a signé la Convention de Strasbourg; le but de la proposition belge s'aligne autant avec celui de cette dernière Convention. Il s'adresse ensuite à M. Chatin et prend l'exemple d'un divorce par consentement mutuel: l'enfant est emmené par la mère de sorte que le père ne peut plus exercer son droit de visite; le juge décide que le concours des parents est dans l'intérêt de l'enfant pour son éducation; l'intérêt du père ne fut donc pas considéré dans ce cas.

M. Chatin (France) croit comprendre que l'exemple de M. Jenard est un cas de garde conjointe; la Convention s'applique alors sans équivoque.

M. Jenard (Belgique) écarte le cas de la garde conjointe et souligne qu'il y a eu décision de placement en faveur de l'enfant.

M. Batiffol (France) interprète le problème soulevé par M. Jenard comme celui de la modification du droit de garde; il soulève la difficulté pratique créée par l'éloignement dans

l'exercice du droit de visite. Il s'agit d'un cas d'abus du droit de garde qui ne rentre pas dans le champ d'application de la présente Convention.

The Chairman felt that the foregoing debate had sufficiently clarified the issues, and he proceeded to a vote on Working Document No 18. He asked delegates to note the oral modification to Working Document No 18 made by Mr Jenard, to the effect that the words '*pour empêcher le droit de visite*' were removed, so that the removal of a child by *the custodian* should be regarded as wrongful. The Chairman stressed that the vote would be on Working Document No 18, as modified orally.

Vote

Working Document No 18, as modified, was rejected by a vote of 16 against (Australia, Czechoslovakia, Denmark, Finland, France, Federal Republic of Germany, Greece, Japan, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, United Kingdom, United States), 3 in favour (Belgium, Canada, Ireland), with 5 abstentions (Austria, Israel, Italy, Luxemburg, Yugoslavia).

The Chairman then directed the discussion to article 6 of the draft Convention. He noted that no written proposals for amendment had been received, but he proposed to allow the United States suggestion that 'appropriate' be substituted for 'relevant' in the last sentence of the second paragraph of article 6 to go to the Drafting Committee.

M. Espinar (Espagne) propose de supprimer la référence au cas de l'Etat fédéral et de prévoir que les Etats sont libres de désigner plus d'une Autorité centrale.

The Chairman asked Mr Espinar whether he was proposing the deletion of 'Federal States and' and 'with more than one system of law' from the second paragraph of article 6.

Mr Espinar (Spain) indicated that this was so.

Mr Müller-Freienfels (Federal Republic of Germany) pointed out a misunderstanding apparent in paragraph 71 of the Report of the Rapporteur. He wished to make the point that it was only federal States which were important in this regard.

The Chairman suggested that the substitution of 'or' for 'and' near the beginning of the second paragraph of article 6 might solve the problems raised, and that the matter should go to the Drafting Committee. However, since there was no opposition, he intended to allow Mr Espinar's proposal to be considered by the meeting.

Mr Jones (United Kingdom) opined that the answer to the question whether a State was federated or had more than one system of law was solely within the knowledge of that State. Although he was in favour of Mr Espinar's proposal being considered, he felt that it lacked force.

M. Chatin (France) s'ouvre à la proposition espagnole qui doit répondre certainement à un besoin pratique de cet Etat et se déclare favorable à une formule plus large que celle existant dans le projet de Convention, mais s'oppose à reconnaître aux Etats le droit de créer plusieurs Autorités centrales. Le plaideur se trouverait placé devant une pluralité d'Autorités centrales qui ferait perdre à la Convention son objectif d'uniformité. Il faut préserver, en principe, l'unité de l'Autorité centrale.

M. Jenard (Belgique) se prononce en faveur d'une formule plus large; la Belgique est un Etat régionalisé et, par exemple, la protection de la jeunesse est organisée dans les deux communautés.

M. Barile (Italie) n'accorde d'exception au principe de l'unité de l'Autorité centrale qu'au cas d'un Etat fédéral ou d'un Etat dans lequel plusieurs systèmes de droit sont en vigueur.

M. Espinar (Espagne) estime qu'il est très difficile de laisser au Comité de rédaction le soin de trouver une formule satisfaisante pour le droit espagnol; pour lui, la pluralité d'Autorités centrales n'est pas un obstacle au droit du plaideur mais, bien au contraire, lui permet de saisir rapidement et dans la proximité de sa résidence une Autorité centrale.

M. Deschenaux (Suisse) rappelle que la Commission II, elle aussi s'occupe de questions d'Autorité centrale; il serait opportun que les Comités de rédaction des Commissions I et II se concertent pour définir la notion d'«Autorité centrale».

The Chairman asked that the meeting now vote on Mr Espinar's proposal that the second paragraph of article 6 should apply explicitly to States other than federal States and those with more than one system of law.

M. Chatin (France) est favorable à une reformulation adéquate de la proposition espagnole.

The Chairman voiced his fear that any formula which satisfied Mr Espinar's proposal could exclude States not represented in the Commission. Nevertheless, he felt that the proposal should be put to a vote, so as to decide whether or not the second paragraph of article 6 be made more general in order to meet the special needs of Spain. He suggested that the Drafting Committee consider an appropriate formulation. On a point of procedure, he reminded the delegates that this proposal would be reviewed on its merits after consideration by the Drafting Committee, and that since it was not in written form, article 16 of the Rules of Procedure would not apply to a re-consideration of Mr Espinar's proposal.

Vote

Mr Espinar's oral proposal was approved by a vote of 18 in favour (Australia, Austria, Belgium, Canada, Czechoslovakia, France, Federal Republic of Germany, Greece, Ireland, Luxemburg, Netherlands, Norway, Portugal, Spain, Sweden, United Kingdom, United States, Yugoslavia), 2 against (Italy, Japan), with 4 abstentions (Denmark, Finland, Israel, Switzerland).

The Chairman sent article 6 to the Drafting Committee. He then referred to article 7 of the draft Convention and the relevant Working Documents, *i.e.* Nos 4 and 11 (with regard to paragraph *f*), 9 and 7. He asked that the delegates consider these Working Documents before Friday's meeting, and that the specific amendments to sub-paragraph 2 of article 7 be debated before the discussion focussed upon the more general propositions of article 7.

The meeting was closed at 5.55 p.m.

Documents de travail Nos 20 à 25
Working Documents Nos 20 to 25

Distribués le 10 octobre 1980
Distributed on 10 October 1980

No 20 – Proposal of the United States delegation

Amendment to article 9

Amend to read:

In cases where application is made through a Central Authority, the Central Authority of the State where the child is found shall, prior to the institution of legal proceedings, take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child. Such measures may continue during and after completion of legal proceedings.

Amendment to article 10

Amend the second paragraph to read:

If the judicial or administrative authority concerned has not reached a decision within six weeks after receipt of the petition, the petitioner or the Central Authority of the requested State shall have the right to request a statement of the reasons for the delay. If such a statement is received by the Central Authority of the requested State, that Authority shall inform the petitioner and the Central Authority of the requesting State of its contents.

Amendment to article 11

It is proposed that at the very least 1-year and 2-year limits be substituted for the present deadlines.

No 21 – Proposal of the United Kingdom delegation

Following the decision of the Commission to retain a reference in article 3 to the actual exercise of custody rights the United Kingdom withdraws the provisional proposal in Working Document No 3 and proposes instead the following text. (The reference in square brackets to good faith is included primarily to facilitate discussion.)

Article 12, paragraph 1

Amend to read:

Notwithstanding the provisions of the preceding article, the judicial or administrative authorities of the requested State are not bound to order the return of the child if the person or other body which opposes the return of the child establishes that:

a the applicant or the person who at the time of the removal or retention of the child has the care of the child's person acquiesced in or subsequently condoned such removal or retention [or otherwise is not acting in good faith].

b (as in existing text)

No 22 – Proposal of the Finnish delegation

Article 12, paragraph 2

The judicial or administrative authorities may also refuse to order the return of the child if they find that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views. *This paragraph shall not, however, apply where the child has not attained the age of [10-8] years.*

No 23 – Proposal of the United Kingdom delegation

Article 9

Omit the words 'Prior to the institution of legal proceedings'.

No 24 – Proposal of the Australian delegation

Article 8

In the first paragraph omit the words –

'Who claims that there has been a breach of his custody rights';

and in their place insert the words –

'Claiming that a child has been wrongfully removed or retained in breach of his custody rights'.

No 25 – Proposal of the delegation of the Federal Republic of Germany
– Proposition de la délégation de la République fédérale d'Allemagne

Article 11, paragraph 3

The judicial or administrative authority shall also order the return of the child after expiration of the time period set forth in article 11, paragraphs 1 and 2, unless it is demonstrated that the child is now settled in his new environment and his return would cause excessive prejudice.

Article 11, alinéa 3

Les autorités judiciaires ou administratives ordonnent également le retour de l'enfant même après l'expiration des délais fixés à l'article 11, alinéas 1 et 2, à moins qu'il ne soit établi que l'enfant soit habitué à son nouveau milieu et que son retour lui cause un préjudice disproportionné.

Documents de travail Nos 20 à 25

jurisdictions, it was possible for courts to obtain information which they were not bound to disclose to the parties. A provision concerning confidentiality was necessary, since otherwise a court or an authority might feel unable to disclose certain facts to the court or authority in the State to which a child had been abducted. He gave, as an example, the situation where a parent, described as mentally unbalanced in a medical report submitted to the court which entrusted custody to the other parent, abducted the child to another State and proceeded to make wild accusations concerning the previous decision on custody. If the authorities in the first State, fearing a breach of confidentiality, felt unable to transmit the medical report, the authorities in the second State would then be unable to form a proper appreciation of the abductor's statements and might refuse to return the child.

The Chairman, raising a typographical point, noted that the word 'in' had been omitted from the text of Working Document No 9.

M. Chatin (France) demande la traduction de la proposition de M. Jones.

Mr Savolainen (Finland) seconded Mr Jones's proposal, for the reasons given by the Swedish Government in its observations. He felt, however, that there was a problem concerning the phrase 'information relating to the social background of the child', and asked that other types of information be covered *e.g.* information concerning the biological descent of a child.

Mr Walsh (Ireland) commented that the United Kingdom proposal raised an extremely important point. In Ireland, for example, any decision reached on the basis of confidential information not disclosed to one of the parties would be quashed immediately, on request. It was essential that both parties be apprised of all facts on which a decision was based.

Mr Dyer (Secretary at the Permanent Bureau) stated that Mr Walsh had raised a problem which concerned a good many other States. However, the point at issue concerned material to be exchanged between *Central Authorities*, irrespective of whether such material was admissible in court or not. Mr. Walsh's point also related to article 26 of the draft Convention, concerning the admissibility of documents.

Mr Yadin (Israel) referred to confidentiality as a very complicated problem, and felt that the concept needed expansion. Was the intention to free a particular Central Authority from provisions in its internal law which prevented it from disclosing certain information or was it rather that the *requesting Central Authority* keep information confidential?

M. Chatin (France) pense que la proposition de M. Jones doit être considérée dans le cadre général de la Convention. L'échange de documents confidentiels par exemple, comme cela a été cité, la communication de rapport d'expertise psychiatrique ou de rapport d'enquête sociale, demandes dans le cadre de l'application de l'article 12*b* de la Convention, peuvent être obtenus par voie de commissions rogatoires, émanant des autorités judiciaires. A ce stade de la procédure, il n'est pas possible de se prévaloir du caractère confidentiel d'un document pour en refuser la communication. L'examen de ces documents sera effectué par l'autorité judiciaire en suivant les formes de l'instruction judiciaire.
En l'absence de procédure judiciaire et dans le cadre des activités administratives des Autorités centrales pour la remise volontaire des enfants, il n'apparaît pas à M. Chatin qu'il puisse y avoir lieu à échange de documents confidentiels.

M. Jenard (Belgique) voit un danger dans cette proposition; si les documents confidentiels doivent être gardés secrets face aux tiers, il n'en est pas de même pour les parties qui ont droit à la consultation du dossier; il y aurait, dans le cas contraire, une atteinte aux droits de l'homme.

Mr Jones (United Kingdom), replying to the debate, said that he was impressed by the points made by Mr Walsh and Mr Jenard. Indeed, the position in the United Kingdom was exactly the same as that in Ireland. He referred to a recent case in England, where the Court of Appeal had refused to have regard to a child's opinion which had been expressed to the Court of First Instance on the basis that it would not be disclosed. However, the purpose of an exchange of information was not to examine the merits of a case but only to see if grounds existed, in terms of article 12, on which a consideration on the merits could be based. In his view, confidentiality was necessary for this limited purpose, since serious harm could otherwise be done to the objects of the Convention in particular cases.

Miss Pripp (Sweden) conceded that the general principle in Sweden and elsewhere was that information should be disclosed. However, sometimes it was necessary to keep information secret *e.g.* information concerning a child's whereabouts. The United Kingdom proposal was therefore useful and indeed essential.

The Chairman asked that only speakers with substantially new points to make should intervene in the debate.

Mr Müller-Freienfels (Federal Republic of Germany) proposed that the question should be left to the internal law of each Member State.

Mr Leal (Canada) expressed his agreement with Mr Walsh, and added that so far as Canada was concerned the same points concerning exchange of information would apply to administrative authorities as applied to courts. He noted some confusion in the debate between the notions 'in confidence' and 'in camera', and pointed out to delegates that the latter was not the point at issue.

M. Barile (Italie) émet une réserve: l'échange d'un rapport confidentiel pourrait être contraire au principe des débats contradictoires, prévu dans la Constitution italienne.

The Chairman reminded the meeting that the issue concerned the co-operation of Central Authorities *inter se*, and not with judicial proceedings.

Mr van Boeschoten (Netherlands) suggested that the word 'appropriate' in the present draft Convention sufficiently covered the point raised by Mr Jones. A Central Authority could request the other Central Authorities concerned to keep certain information secret and if no such assurance was forthcoming, could then withhold such information.

M. Voulgaris (Grèce) distingue clairement le principe contradictoire tel qu'il existe devant une autorité judiciaire, des mesures administratives et conservatoires où ce principe ne s'applique pas; toutefois, en cas de mesure administrative ou conservatoire, l'intéressé a le droit de connaître le fondement de la décision dont il fait l'objet. Pour ces deux raisons, la délégation grecque s'opposerait fermement à cette proposition.

Mr Savolainen (Finland) referred to the important point raised by Mr van Boeschoten. Provided 'appropriate' could be so interpreted, the existing text was satisfactory. However, this point should be mentioned in the Report.

Procès-verbal No 5

Séance du vendredi 10 octobre 1980 (matin)
Meeting of Friday 10 October 1980 (morning)

The meeting was opened at 10.10 a.m. Mr Anton (United Kingdom) was in the Chair. The Rapporteur was Miss Pérez-Vera (Spain).

Mr Dyer (First Secretary at the Permanent Bureau) indicated that Mr Rizk Salem (Egypt) and not Mr Abou El-Izz (Egypt) would serve on the Subcommittee dealing with 'Applications Clauses'.

The Chairman directed the attention of the delegates to article 7 and the relevant Working Documents thereon, *i.e.* Nos 4, 7, 9 and 11. He asked that the more general points raised in Working Document No 11 be deferred until the sub-paragraphs of article 7(2) had been looked at, and opened the discussion on Working Document No 9.

Mr Jones (United Kingdom) described Working Document No 9 as basically a British interpretation of the observation made by Member States concerning article 7. The amendments proposed concerned only the words which were in italics. The omission of an amendment put down by another delegation did not imply United Kingdom opposition thereto.

The Chairman asked delegates to discuss and vote upon one sub-paragraph at a time. He noted that no change was proposed to the first paragraph of article 7.

Mr Jones (United Kingdom), referring to the proposed words 'other appropriate bodies' in article 7(2), explained that their object was to meet the point raised by the United States that article 7 should cover voluntary bodies and private associations.

The Chairman noted that the United States delegation seconded the United Kingdom proposal.

M. Chatin (France) appuie la proposition du Royaume-Uni visant à élargir le réseau des moyens par lesquels l'Autorité centrale pourra agir. Il affirme qu'il s'agit là d'une proposition excellente; la formule retenue doit être la plus large possible pour englober notamment en France l'intervention des huissiers de justice qui jouent un rôle important pour la remise volontaire des enfants.

The Chairman, in the absence of any opposition, referred the opening lines of article 7(2) to the Drafting Committee, and turned to article 7(2)*a*.

Mr Jones (United Kingdom) interpreted 'all practicable steps' to mean that the Central Authorities should do everything feasible to discover the whereabouts of an abducted child. He conceded that in some circumstances it would be impossible to discover those whereabouts, but was concerned to ensure that a really determined effort be made by the Central Authorities. He described the proposal as basically a drafting amendment.

Miss Selby (United States) seconded Mr Jones's proposal.

Mr Yadin (Israel) suggested that 'reasonable' should be substituted for 'practicable', and asked that the matter be referred to the Drafting Committee.

The Chairman sent sub-paragraph *a* to the Drafting dicated that Mr Rizk Salem (Egypt) and not Mr Abou El- that Working Document No 9 had omitted the word 'further' which occurred in the draft Convention, and noted that the word raised a presumption which might or might not be true in a particular case.

M. Chatin (France) estime que «autres préjudices» concerne «droit de visite» et non le «droit de garde»; les Autorités centrales doivent assurer le bon exercice du premier de ces deux droits.

Mr Walsh (Ireland) supported Mr Jones's view, and remarked that the word 'further' begged the question.

Mr Savolainen (Finland) noted the slight disparity between the existing English and French texts. He suggested the formulation 'harm to the child or other prejudice to interested parties'.

M. Espinar (Espagne) pense que c'est une question de rédaction; «autres préjudices» est défini par cette phrase et représente les préjudices subséquents à un préjudice antérieur, à savoir le déplacement.

Mr Dyer (Secretary at the Permanent Bureau) in reply to Mr Espinar stated that the presumption, rebuttable in part, underlying the Convention, was that abductions were harmful to children and caused prejudice to interested parties. He sought to emphasise the concept of 'further harm', which effectively expressed something of the spirit of the Convention.

Mr Jones (United Kingdom) felt that it was logically inappropriate to mention 'further prejudice'. He agreed that the Convention contained a general presumption that abductions were harmful. However, in his opinion it was not a very important point, and he indicated that he would not object to a formulation similar to that contained in the present French text of sub-paragraph *b*. He asked that a vote be taken.

Mr Walsh (Ireland) seconded the United Kingdom motion that the proposal be put to a vote.

M. Chatin (France) remarque que la proposition de M. Jones, telle qu'il l'a modifiée, est grandement améliorée.

The Chairman asked the meeting to indicate by a show of hands its approval or rejection of the amendment to sub-paragraph *b* proposed in Working Document No 9.

Vote

The amendment to sub-paragraph b of article 7 proposed in Working Document No 9 was approved, on a show of hands, by a large majority, and referred to the Drafting Committee.

Mr Jones (United Kingdom), speaking to the proposed amendment of sub-paragraph *c* of Working Document No 9, said that it sought to take account of the points made in the written observations of Sweden. He noted that in some

The Chairman felt unable to accept Mr van Boeschoten's interpretation of 'appropriate'. However since the meeting was presently concerned with the proposed amendment by the United Kingdom, he asked that the proposal of Working Document No 9 that the words 'and if necessary in confidence' should be put to the vote.

Vote

Working Document No 9, in so far as it related to the addition of the words 'and if necessary in confidence' *was rejected by 15 votes against (Austria, Belgium, Canada, Egypt, France, Federal Republic of Germany, Greece, Ireland, Israel, Italy, Luxemburg, Netherlands, Switzerland, United States, Yugoslavia), 8 in favour (Australia, Czechoslovakia, Denmark, Finland, Norway, Portugal, Sweden, United Kingdom), with 2 abstentions (Japan, Spain).*

The Chairman then referred to the proposed amendment, in Working Document No 9, to sub-paragraph *e* of article 7(2).

Mr Jones (United Kingdom) acknowledged that the alteration proposed was slight, but he felt that the present words were too restrictive regarding the types of information to be provided. It was possible that information concerning the law of the State might not relate to the application of the Convention while still being relevant to matters covered by the Convention.

Mr van Boeschoten (Netherlands) indicated his support for the United Kingdom proposal.

The Chairman sent sub-paragraph *e* of article 7(2) to the Drafting Committee. He then referred the delegates to sub-paragraph *f* and to Working Documents Nos 4 and 11.

M. Jenard (Belgique) s'exprime au sujet du Document de travail No 4. Selon la délégation belge, le «droit de garde» doit rester tout à fait en dehors du champ d'application de la Convention à défaut de quoi on se heurterait à de grandes difficultés. Il est donc favorable à la suppression de la partie de la phrase «et, le cas échéant, de fixer ou de permettre l'exercice du droit de garde ou du droit de visite».

Miss Selby (United States), referring to Working Document No 11, felt it was more appropriate for the Rapporteur to speak on this point.

The Chairman, since there was no opposition to the proposals in Working Documents Nos 4 and 11, suggested that the words after 'child' in sub-paragraph *f* be deleted.

M. Chatin (France) ne voit pas d'objection à la proposition de modifier le texte, mais bien à celle de le supprimer tout bonnement; premièrement, il considère que l'on ne devrait pas parler de «fixer le droit de garde», question qui demeure en dehors du champ de la Convention.
Secondement, il estime que les compétences de l'Autorité centrale comportent le droit de *saisir* les autorités judiciaires pour fixer le droit de garde ou de visite.

The Chairman interpreted Working Document No 11 as proposing a simple deletion, with no substitution.

M. Chatin (France) demande qu'on traduise le texte de l'amendement proposé pour l'article 7*f*.

Mr Dyer (First Secretary at the Permanent Bureau) read out the terms of Working Document No 11.

M. Chatin (France) répète sa proposition et se déclare favorable à la suppression de la référence au droit de garde, mais insiste qu'on ne supprime pas celle touchant le droit de visite.

Mr Leal (Canada) expressed agreement with Mr Chatin. The reference to *rights of access* should not be deleted from article 7; otherwise, discussion of article 17 would be pre-empted.

Mr Dyer (First Secretary at the Permanent Bureau) noted a disparity between the English and French text of sub-paragraph *f* in the draft Convention. The English text made no reference to the 'exercise' of the rights of custody and access, and he suggested that it should conform to the French text.

Mr Yadin (Israel) wanted no distinction to be made between custody and access. However, he was in favour of the insertion of 'exercise' in sub-paragraph *f* of the English text.

Mr Jones (United Kingdom) confessed to experiencing some difficulty now with the United Kingdom proposal concerning sub-paragraph *f*, in view of the points made by Mr Chatin. He noted that article 7(2)*f* would depend to some extent on the final form given to article 17, and that sub-paragraph *f* was relevant also to the provisions concerning legal aid and advice. He thought it inappropriate to vote on the question of deletion at this point, and suggested that article 16 of the Rules of Procedure be suspended so as to allow the matter to be re-considered after the meeting had discussed article 17 and the provisions on legal aid and advice.

The Chairman, in the absence of any opposition to Mr Jones's suggestion, suspended article 16 of the Rules of Procedure to allow later reconsideration of sub-paragraph *f*. He proceeded to ask for a vote on the following proposals:

Vote

Working Document No 11 was rejected by a vote of 13 against (Australia, Canada, Egypt, France, Greece, Ireland, Israel, Luxemburg, Netherlands, Norway, Sweden, United Kingdom, Yugoslavia), 11 in favour (Austria, Belgium, Czechoslovakia, Denmark, Finland, Federal Republic of Germany, Japan, Portugal, Spain, Switzerland, United States), with 1 abstention (Italy).

*The proposal from the floor to retain the present formulation in article 7(2)*f*, subject to the deletion of any reference to custody rights, was approved by a vote of 20 in favour (Australia, Austria, Belgium, Canada, Czechoslovakia, Denmark, Finland, France, Federal Republic of Germany, Ireland, Japan, Luxemburg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, United States, Yugoslavia), 5 against (Egypt, Greece, Israel, Italy, United Kingdom).*

The Chairman noted that the proposal to align the French and English texts by including in the latter a reference to the 'exercise' of custody and access rights, either fell or could be regarded as a matter for the Drafting Committee. An informal hand vote showed overwhelming support for such alignment.

Le Secrétaire général se félicite de la présence des Représentants du Saint-Siège et du Maroc; il félicite, ensuite, M. Aina, du Nigéria, représentant ici le Commonwealth.

The Chairman then turned to article 7(2)*g* and the proposal in Working Document No 9 that the words 'and advisers' be added.

Mr Jones (United Kingdom) explained that 'legal counsel' had a technical meaning in some countries which it was not intended should apply in the Convention. He wanted to

make it clear that the provision of legal advice as well as the conduct of legal proceedings was covered by sub-paragraph *g*.

The Chairman commented on the purely drafting point raised by the substitution of 'where the circumstances require it' for 'where appropriate'. Since Mr Creswell had indicated his support for the proposal and there being no opposition, he sent the proposal regarding sub-paragraph *g* to the Drafting Committee, and then referred to the proposals concerning sub-paragraph *h*.

Mr Jones (United Kingdom) described this proposal as also a drafting amendment. The word 'arrangements' implied that a Central Authority would itself have to organise everything, whereas it might well be that some other body, or even the party entitled to custody, would deal with such matters. 'Facilities' was more general in scope.

Mr Dyer (First Secretary at the Permanent Bureau) commented that such an amendment to the English text would not necessarily affect the existing French text.

Mr Yadin (Israel) stated that the word 'administrative' should be omitted.

The Chairman sent the points made by Mr Yadin and Mr Jones to the Drafting Committee. He asked whether the United States delegation still insisted on the amendments proposed in Working Document No 7.

Miss Selby (United States) conceded that the United States amendment was very similar to that proposed by the United Kingdom regarding article 7(2)*a* in Working Document No 9. In her view, it was most desirable that the Convention make it clear that it was for the Government of each Member State to take appropriate measures to secure the return of a child. In this connection, she referred to the general proposition in article 2 of the draft Convention, and explained that 'best efforts' indicated clearly that the particular matter was one for individual governments. She was concerned that article 7, although establishing a wide range of activities which could be undertaken by the authorities of each State, should not be understood as setting forth an exhaustive list. Moreover, the activities listed in sub-paragraphs *a* - *h* should be understood as a statement of powers, not obligations as might be understood from the present use of the words 'shall' and '*doivent*'.

Mr Leal (Canada) supported Miss Selby's proposal. However, he foresaw that considerable changes in the Draft would be required.

The Chairman agreed that there were drafting difficulties but in the absence of any opposition in principle, he suggested that the United States proposal go to the Drafting Committee.

Mr Yadin (Israel) expressed his belief in the maxim 'if in doubt, strike it out'. He asked that the word 'competent' be struck from the United States proposed amendment to article 7 in Working Document No 7, since a party should not have the ones of determining competence.

The Chairman replied that the deletion of 'competent' had been previously agreed upon.

M. Chatin (France) souhaite trouver une formule satisfaisant la délégation américaine; il propose que l'on reprenne, ici, l'expression utilisée sans la Convention de 1970 sur l'obtention des preuves, qui déclare que «l'Autorité centrale assure la garde».

Miss Selby (United States) admitted that she was not wedded to any particular language, which the Drafting Committee could more properly deal with. However, she suggested the words 'will undertake to' instead of 'shall use their best efforts to'.

The Chairman demurred, since the suggested formulation smacked of compulsion. He asked whether 'all appropriate methods', in the view of the United States delegation, could be placed in the heading to article 7(2).

Miss Selby (United States) stated that this would be acceptable, but asked that 'shall' be changed to 'will'.

The Chairman commented that the United States interventions had been very helpful and that they should go to the Drafting Committee.
He then turned the attention of the meeting to a consideration of article 8 and the relevant Working Documents, *i.e.* Nos 14 and 19.

M. Jenard (Belgique) rappelle que le Document de travail No 4, introduit par la délégation belge comporte encore une remarque concernant l'article 7; il serait utile que les Autorités centrales se tiennent mutuellement informées des difficultés susceptibles de s'élever à l'occasion de l'application de la Convention et s'emploient à lever les obstacles rencontrés. Il faudrait compléter l'article par une disposition allant en ce sens.

The Chairman noted that Mr Jenard's proposal was not for a new article and indeed was not in the form of a specific proposal. He asked whether it should be understood as a proposal for a new paragraph to be added to article 7.

M. Jenard (Belgique) insiste sur le maintien de sa troisième remarque.

The Chairman stated that the meeting had already discussed at an earlier session the duty of Central Authorities to cooperate amongst themselves.

M. Barile (Italie) appuie la proposition de M. Jenard.

M. Jenard (Belgique) apporte un nouvel argument à sa proposition; partant du fait que les compétences de l'Autorité centrale seront généralement confiées par les Etats au Ministère de la Justice, et non pas au Ministère des Affaires Etrangères, il serait bon de soutenir sa proposition.

M. Barile (Italie) renforce l'argument de M. Jenard et déclare qu'il est bon de donner un pouvoir accrû aux autorités administratives, vu que les autorités diplomatiques sont souvent paresseuses.

Mr Jones (United Kingdom) supported Mr Jenard's proposal in principle. He recalled that it had been embodied in the Strasbourg Convention. However, he foresaw difficulties both with regard to its formulation and to devising a satisfactory means of consultation within the context of the Hague Conference. Although the development of appropriate machinery would make it unnecessary to include anything more than a general statement on this point, he felt that it should be covered in a separate article, since it would otherwise prove difficult to draft. Since this was much more than a drafting point, he asked that the Secretariat make some observations.

Mr Savolainen (Finland) declared himself to be strongly in favour of Mr Jenard's proposal in principle. There should be a mechanism for consultation, which would be applicable to all Hague Conventions which involved Central Authorities.

Procès-verbal No 5

It should not be limited to this particular Convention.

M. Chatin (France) appuie la proposition de M. Jenard et précise que cette proposition est intéressante à un double titre. Au plan multilatéral elle a déjà été retenue par la Convention du Conseil de l'Europe dans son article 28. Cette Convention prévoit que le Secrétaire général du Conseil de l'Europe provoquera des réunions périodiques des Autorités centrales. La même disposition vient d'être également retenue par la Quatrième commission de la Conférence de La Haye sous la forme d'une Recommandation émanant de l'Assemblée plénière de la Conférence. Au plan bilatéral la proposition belge permettrait aux Etats dont les relations de coopération sont nombreuses d'harmoniser ces relations et de les personnaliser grâce à des rencontres régulières de leurs Autorités centrales. M. Chatin félicite M. Jenard de sa proposition.

Mr Dyer (First Secretary at the Permanent Bureau) reminded delegates that practical mechanisms had existed for some time. He referred in particular to the two Special Commissions of 1977 concerning the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters and the Special Commission of June 1978 regarding the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. Central Authorities played an important role in both Conventions. The Special Commissions had proved extremely useful in reviewing the operation of the Central Authorities and in bringing together those responsible for their functioning, who were thereby able to exchange opinions.
Mr Dyer was keen that this practice become more general, and referred to the Recommendation adopted by the Fourth Commission that such meetings be convened even in connection with Conventions in which Central Authorities had no part to play. Moreover, the attendance of non-Member States at such meetings gave them the opportunity to see how The Hague Conventions worked in practice. Mr Dyer concluded his remarks by emphasising that workable mechanisms already existed within the framework of the Hague Conference, and that their operation should not be restricted to the workings of Central Authorities.

M. Jenard (Belgique) souligne encore que les contacts entre Etats seraient utiles sur le plan des relations bilatérales.
Dans une optique multilatérale, M. Jenard prévoit même que des Etats, qui n'auraient pas ratifié la présente Convention, pourraient être invités à se réunir avec les Autorités centrales; la remarque de M. Dyer ne semble pas entièrement pertinente. M. Jenard considère ensuite l'avantage financier de prévoir cette disposition dans la présente Convention plutôt que dans une résolution ultérieure.

The Chairman asked that delegates should not spend too much time on this particular point. In his view, there were two aspects to the matter raised by Mr Jenard, but that it was difficult to proceed without a written proposal.

M. Jenard (Belgique) explique l'origine de sa proposition; elle s'inspire de l'article 3, alinéa 2, lettre *c*, de la Convention de Strasbourg.

The Chairman asked Mr Jenard if he wished to confine himself, for the purpose of a vote, to article 3(2)*c* of the European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children (the 'Strasbourg Convention'). Mr Jenard indicated his assent.

Article 3(2)c of the Strasbourg Convention was read, as follows:

2 With a view to facilitating the operation of this Convention, the Central Authorities of the Contracting States:

. . .

c shall keep each other informed of any difficulties likely to arise in applying the Convention and, as far as possible, eliminate obstacles to its application.

The Chairman proceeded to a vote on whether the Convention should include a provision along the lines of article 3(2)*c* of the Strasbourg Convention.

Vote

The proposal, arising out of Working Document No 4, that article 7 contain a provision similar to that in article 3(2)c of the Strasbourg Convention was accepted unanimously, Finland abstaining.

The Chairman stressed that concrete proposals should be put in writing for discussion by the meeting. He then turned to article 8 and Working Documents Nos 14, 19 and 24.

Mr Creswell (Australia) described Working Document No 24 as containing a drafting point, but he felt it desirable that article 8, for the purposes of consistency, should relate back to the definition of 'wrongful removal or retention' in article 3.

Mr Jones (United Kingdom) stated that Working Document No 14 arose out of the previous discussion concerning 'legal entities'. Whatever conclusion was reached by the Drafting Committee could be embodied in article 8. However, he felt it desirable to make the amendment now, subject to later modification by the Drafting Committee, if necessary.

The Chairman announced, that since the matters raised concerned drafting, they should go to the Drafting Committee. He noted that no written proposals had been submitted concerning the matters covered by article 8(1) and (2)*a-d*.

Mr Jones (United Kingdom) described Working Document No 14 as an attempt to meet the points made by the United States delegation. It was clear that the significance of the phrase 'certified copy' varied from State to State. The real point at issue concerned 'authentication', since it was necessary to ensure that the copy sent was genuine. Thus the words 'or authenticated' would remove certain procedural difficulties.

The Chairman noted that the United Kingdom proposal omitted the words 'having the force of law' which were presently included in article 8(2)*e*.

Mr Jones (United Kingdom) viewed these words as superfluous since the weight to be given to a document was immaterial in this context.

Mr Leal (Canada) seconded Mr Jones's proposal and agreed with his view concerning the phrase 'having the force of law'.

Mr Dyer (First Secretary at the Permanent Bureau) expressed his agreement with Mr Leal. However, there was a problem regarding the addition of the words 'or authenticated', and he referred to article 19 of the draft Convention concerning legalisation and similar formalities.

M. Chatin (France) distingue le régime des actes publics de celui des actes privés. Pour les actes publics la Convention prévoit une dispense totale de légalisation. Par exemple les décisions judiciaires qui seront communiquées pour l'application de la Convention n'auront pas à être authentifiées.

Par contre les actes privés et notamment les copies ou photocopies de documents publics devront comporter matériellement une mention qui les officialise pour assurer leur libre circulation.
Il considère la proposition de M. Jones comme tout à fait recevable.

The Chairman asked whether any delegate opposed Mr Jones's suggestion in principle.

M. Chatin (France) propose qu'on apporte un complément à l'article 19 et qu'on prévoie qu'en cas de doute sur l'authenticité d'un document la vérification puisse être effectuée par l'intermédiaire des Autorités centrales.

The Chairman asked Mr Chatin to consider submitting a written proposal. Since there was no objection in principle to Mr Jones's proposal, he sent it to the Drafting Committee, and opened the debate on sub-paragraph *f* of article 8.

Mr Jones (United Kingdom) observed that the French text was clearer at present than the English. The intention of the Convention was that only information concerning the general principles of the law of custody accompany the application, not an exhaustive treatise.

M. Jenard (Belgique) relève que l'article 8*f* présente une certaine confusion: lorsqu'il s'agit d'une demande faite par une personne à sa propre Autorité centrale et non à celle d'un autre pays, il semble que c'est au Ministère de la Justice d'accorder ou non l'authentification. L'Autorité centrale n'interviendrait qu'en cas de rapports entre deux Etats au sujet de la délivrance d'un certificat de coutume.

The Chairman noted that this point had been discussed at an earlier stage.

Mr van Boeschoten (Netherlands) raised the point that the Convention envisaged the possibility of an applicant sending requests to various Central Authorities, not only to that of the child's habitual residence. He added that there was nothing in Dutch law corresponding to the French *certificat de coutume*, and that the Netherlands would require this point to be covered.

Mr Yadin (Israel) pronounced himself in favour of deleting the word 'tenor' proposed by Working Document No 14. He noted that the relevant law was that which applied in the concrete case.

The Chairman asked Mr Yadin whether words such as 'relevant to the case in question' should in his opinion be added. Mr Yadin indicated his assent.

Mr Savolainen (Finland) wondered whether some of the problems presently being dealt with by the Second Commission might touch upon the point at issue.

Mr Dyer (First Secretary at the Permanent Bureau) recalled that he had participated in the preparatory work for the Second Commission but that he was not familiar with its present deliberations. However, he would be glad to investigate the point raised by Mr Savolainen.

The Chairman asked if any delegate wished to object to the widening of sub-paragraph *f* along the lines proposed in Working Document No 14.

Miss Selby (United States) thought that the proposal in Working Document No 14 effectively *narrowed* the scope of sub-paragraph *f*. She was unhappy with the suggested word 'tenor' since it was not commonly used in American law, and she suggested that 'substance' might be substituted.

The Chairman suggested that the sense of the discussion be referred to the attention of the Drafting Committee. He then turned to Mr Yadin's proposal and asked that it be put to the vote.

Mr Jones (United Kingdom) requested an opportunity to oppose the substance of Mr Yadin's proposal, and this was granted. In his view, the question concerned the document which should accompany an application and which an applicant had the discretion to include or not, as he wished. He was concerned to avoid imposing unreasonable burdens on applicants. He gave as an example the abduction from England of an illegitimate child by its putative father. The mother would wish to include in her application for the recovery of the child an extract specifying that custody was vested solely in her. She should be able to do this without being required to elaborate upon its relevance to the particular case. He was therefore very much opposed to any substantive alteration of sub-paragraph *f*.

Mr van Boeschoten (Netherlands) concurred with Mr Jones's remarks. He feared that Mr Yadin's amendment, if passed, would require an applicant to provide effectively a full legal opinion at the outset of the case.

Mr Schneider (Holy See) doubted the wisdom of circumscribing the types of evidence to be given, since it remained a matter for the applicant to decide whether to provide them or not.

Mr Yadin (Israel) disclaimed any intention of placing too heavy a burden on an applicant. The matter seemed to him to be one of drafting. As for the example presented by Mr Jones concerning an illegitimate abducted child, the Convention should require merely that the applicant state the outline of the law governing the custody of an illegitimate child.

The Chairman disagreed that Mr Yadin's proposal was necessarily a drafting matter, and he asked for a vote to be taken on it.

Vote

The proposal of Mr Yadin (Israel) that the words occurring after 'qualified person' *in article 8(2)f be deleted and replaced by the words* 'concerning the law of that State relating to the case in question' *was rejected by a vote of 12 against (Finland, France, Greece, Japan, Luxemburg, Netherlands, Norway, Portugal, Spain, Switzerland, United Kingdom, United States), 7 in favour (Australia, Canada, Czechoslovakia, Ireland, Israel, Sweden, Yugoslavia), with 4 abstentions (Austria, Belgium, Denmark, Federal Republic of Germany).*

The Chairman then referred to Working Document No 4 and the difference between the present French and English texts of article 8.

M. Jenard (Belgique) propose de renvoyer ce point au Comité de rédaction; il demande ce que signifie «déclaration sous affirmation».
Le seul objectif est d'alléger la tâche du requérant en simplifiant le texte.

The Chairman intimated that Working Document No 19 would be discussed at a later meeting.

The meeting was closed at 1.05 p.m.

Procès-verbal No 5

Documents de travail Nos 26 à 35
Working Documents Nos 26 to 35

Distribués le 11 octobre 1980
Distributed on 11 October 1980

No 26 – Proposal of the Japanese delegation

This proposal replaces the proposal contained in Working Document No 19

*Article 8*bis

If the Central Authority of the Contracting State which receives an application referred to in article 8 has reason to believe that the child is in another Contracting State, it shall transmit the application to the Central Authority of that Contracting State.
The Central Authority shall, in transmitting the application in accordance with the preceding paragraph, ensure that the application meets the requirements of the second paragraph of article 8.

No 27 – Proposal of the Canadian delegation
– Proposition de la délégation canadienne

Article 8 (new paragraph)

The transmission of an application by the Central Authority of the State of the habitual residence constitutes *prima facie* evidence that the rights of custody were actually exercised within the meaning of article 3.

Article 8 (nouvel alinéa)

La transmission d'une demande par l'Autorité centrale de la résidence habituelle constitue une preuve *prima facie* que le droit de garde était exercé effectivement au sens de l'article 3.

No 28 – Proposition des délégations de la France et du Royaume-Uni
– Proposal of the French and United Kingdom delegations

Article 19

L'article 19 pourrait être complété de la manière suivante:

En cas de doute sur l'authenticité d'un document, la vérification peut être effectuée par l'intermédiaire des Autorités centrales.

Article 19

If there is a doubt as to the authenticity of a document, verification may be effected through the Central Authorities.

No 29 – Proposition de la délégation belge

Cette proposition est remplacée par la proposition contenue au Document de travail No 35.

No 30 – Proposal of the Australian delegation

Article 11

Omit the first paragraph and insert the following in its place –

Where a child has been wrongfully removed or retained and an application for the return of the child has been made to the judicial or administrative authority of the State where the child has been located within 1 year from the date of the wrongful removal or retention, the authority shall order the return of the child forthwith to the State of his habitual residence immediately before that date.

No 31 – Proposal of the Danish delegation

Article 12

In the first paragraph insert a new litt. *c –*

c it is found that the return of the child is manifestly incompatible with the fundamental principles of the law relating to the family and children in the State addressed.

Article 17

Insert a new fourth paragraph –

When taking decisions on access the competent national authority of the child's habitual residence applies its own legislation concerning as well the extent as the conditions for the right of access and concerning the execution of such decisions.

In case the proposals fall, it is proposed as a subsidiary possibility that a State can make a reservation to the same effect as proposed above, or – concerning the rights of access – that the Convention does not apply to such rights.

No 32 – Proposal of the Netherlands delegation

This proposal replaces the proposal contained in Working Document No 8 and takes account of the British proposal contained in Working Document No 21.

I It is proposed to amend article 12 to read as follows –

Article 12

Notwithstanding the provisions of the preceding article, the judicial or administrative authorities of the requested State are not bound to order the return of the child if it is found –

a that the applicant or the person who at the time of the removal or retention of the child had the care of the child's person acquiesced in or subsequently condoned such removal or retention (or otherwise is not acting in good faith);

b that there is a substantial risk that the return would expose the child to serious physical or psychological harm or otherwise place the child in an intolerable situation.

II It is further proposed to add the following article in connection with article 12 –

Article X

A Contracting State may make a reservation that in cases covered by articles 11 and 12 the judicial or administrative authority of the requested State may refuse to order the return of the child on such of the following grounds as may be specified in the reservation –

a if it is found that the effects of the decision are manifestly incompatible with the fundamental principles of the law relating to the family and children in the requested State;

b if the custody rights invoked by the applicant are incompatible with a decision relating to custody given by a judicial or administrative authority in the requested State before the removal or, if the child has been retained, before the commencement of the relevant period of access;

c if it is found that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views;

d if it is otherwise found that the return of the child would be manifestly incompatible with its best interests.

No 33 – Proposal of the Netherlands and United Kingdom delegations

Article 11

Substitute for the existing text the following –

Article 11

Where a child has been wrongfully removed or retained in terms of article 3 and, at the date of the petition/application to the judicial or administrative authority of a Contracting State a period of less than [9 months] [one year] has elapsed from the date of the wrongful removal or retention, the authority shall order the return of the child forthwith.

Notes

1 This proposal envisages the deletion of paragraph 2 of the existing text.

2 The words 'where the child is located' *in paragraph 1 of the existing text are deleted since the child (unknown perhaps to the petitioner or applicant) may at the date of the application have been removed to another State (even a non-Contracting State), yet it is possible by an order of the court addressed to place pressure on the kidnapper.*

No 34 – Information Document submitted by the United States delegation

October 4, 1976 – H. born to father and mother in California, U.S.A. and has dual citizenship, i.e. *American by reason of birth, and Dutch through Dutch father.*

January 24, 1979 – Judgment of divorce after parties had continuously lived in various locations in California, U.S.A. Mother awarded custody of H. and father allowed normal rights of visitation. Husband employed as bus driver and wife as hospital technician.

April 3, 1979 – Father departs from U.S.A. to Holland with H. to attend funeral of father's mother and visit with family. Trip to be for two (2) months, and was with mother's consent. Return of father and H. expected by June 3rd.

August 18, 1979 – Mother assumed father and son were enjoying summer in Holland and only became concerned when no appearance by August. On the 18th she called and was told by father that he intended to remain in Holland with H.

August 22, 1979 – Complaint filed with Criminal Division of the County District Attorney in California and letter for help to U.S. Embassy in Holland.

September 4, 1979 – Inspector assigned to investigation.

October 2, 1979 – Investigation report completed and filed – requesting issue of criminal complaint for child stealing.

October 7, 1979 – Letter from U.S. Consul in the Netherlands advising need for Dutch lawyer.

October 16, 1979 – FBI report on father received.

October 24, 1979 – Formal complaint issued by District Attorney.

October 26, 1979 – Warrant for arrest of father issued by judge.

November 21, 1979 – Letter from California District Attorney to District Court in Holland advising of presence of father and H. in a town in his district, of custody judgment and of felony warrant and asking for assistance and contact with local Prosecuting Attorney, and letter to U.S. Consul.

December 18, 1979 – Letter from Netherlands Public Prosecutor indicating absence of treaty and no power to effect warrant for arrest. Request for help sent to Council for Child Protection in the local town asking for their intervention.

December 27, 1979 – Letter from U.S. Consul suggesting need of Dutch lawyer and of need to file petition for custody in local court. Also suggests use of American Branch of International Social Service in New York, U.S.A.

January 4, 1980 – Letter to International Social Service asking for help.

January 10, 1980 – ISS indicates they will provide help.

February 14, 1980 – Second letter from Public Prosecutor in the Dutch town enclosing report of Council for Child Protection (in Dutch and requiring translation) suggesting they cannot help and need to retain an Advocaat-Procureur. Report sent to Consulate in California for translation. Report reflects position of father that he had legal guardianship of H., and has contacted a lawyer as well as referred to Bureau voor Rechtshulp. Father is unemployed and looking for work.

February 25, 1980 – Phone call from ISS in New York indicating who would be handling case for ISS in response to letter of February 12, 1980 from Netherlands Branch giving detailed report and suggesting need to file an application for legal guardianship by mother.

March 3, 1980 – Letter from ISS in New York enclosing report and requesting documents.

March 4, 1980 – Status of case reported to local Judge of the Municipal Court and order for return of child requested.

April 4, 1980 – Order for return of H. issued by the Court and order and other items of case sent to ISS in New York.

June 19, 1980 – Further report from ISS in Netherlands that application for guardianship was filed by father asserting that H. now speaks fluent Dutch and has lived in Netherlands for over a year. Father is employed and leaves H. with friends during the day. The Board for Protection of Children has advised Cantonal Judge against granting father's request. The Field Officer of Justice has been asked to comment.

July 1, 1980 – Detailed reply of mother for ISS to give to Cantonal Judge.

July 8, 1980 – Letter from ISS indicating they only exchange information, but cannot give active assistance.

July 11, 1980 – Court hearing held by Cantonal Judge. No representation for mother.

July 22, 1980 – Decree by Cantonal Judge granting temporary guardianship to both father and to his present fiancee.

August 12, 1980 – Letter from ISS advising that Board is appealing the Decree. Mother told Court took adverse view of her not retaining attorneys or appearing in person. Mother advised to come quickly to Netherlands.

September 9, 1980 – Mother advised District Attorney that she was unable to go to Netherlands because of lack of funds, family responsibility (two young girls – one from prior marriage and one from ill sister) as well as job obligations. Assistance from local legal aid requested and denied because she is employed.

October 15, 1980 – Hearing set for appeal. Mother flying to Netherlands to be present. All available funds to be used for air transportation.

Documents de travail Nos 26 à 35

No 35 – Proposition de la délégation belge

Cette proposition remplace celle contenue au Document de travail No 29.

Article 12

Nonobstant les dispositions de l'article 11:

A Lorsque la garde de l'enfant a été confiée au demandeur par une décision judiciaire rendue dans l'Etat où l'enfant avait sa résidence habituelle avant son déplacement, le retour de l'enfant pourra ne pas être ordonné si la personne qui a déplacé l'enfant établit que, selon les autorités compétentes de l'Etat où la décision a été rendue, il existe des circonstances nouvelles d'une nature telle que le retour de l'enfant l'y exposerait à un grave danger. Il en est de même lorsque la garde résultait d'une convention ou lorsque selon le droit de la résidence habituelle elle était attribuée de plein droit au demandeur seul.

B Dans les autres cas, le retour de l'enfant pourra ne pas être ordonné si la personne qui a déplacé l'enfant établit que son retour l'exposerait à un grave danger.

C En tout cas, le retour pourra ne pas être ordonné si l'enfant, âgé de plus de 10 [12] ans, établit qu'il existe des motifs sérieux pour s'opposer à son retour.

Procès-verbal No 6

Séance du samedi 11 octobre 1980 (matin)
Meeting of Saturday 11 October 1980 (morning)

The meeting was opened at 9.40 a.m. Mr Anton (United Kingdom) was in the Chair. The Rapporteur was Miss Pérez-Vera (Spain).

The Chairman turned the attention of delegates to the Japanese proposal in Working Document No 26 concerning article 8*bis*.

Mr Dyer (First Secretary at the Permanent Bureau) read out the terms of Working Document No 26.

Mr Minami (Japan), explaining Working Document No 26, felt that the procedures governing the transmission of applications ought to be clarified. Thus, where an applicant knew where an abducted child was located, the Central Authority receiving the application should transmit it to the Central Authority of the State where the child was supposed to be living and request the latter to take appropriate steps. On the other hand, where an application did not indicate the whereabouts of a child, the Central Authority which received the application should have the main responsibility of discovering them; after they had been ascertained, the application should be transmitted to the Central Authority of the State of the child's whereabouts. He conceded that the second paragraph of Working Document No 26 might be regarded as superfluous in theory, but he was concerned to ensure that applications met the requirements set out in article 8*bis*.

Mr Deschenaux (Switzerland) and **Mr Walsh** (Ireland) seconded the proposal in the first paragraph of Working Document No 26.

The Chairman stated that the issue was relatively simple, and he asked that two delegates speak in favour and two delegates against the Japanese proposal.

M. Deschenaux (Suisse) appuie la proposition japonaise, même si l'on doit considérer que ce point va de soi; l'article 8*bis* répond au souci de perdre un minimum de temps.

M. Jenard (Belgique) émet quelques réserves sur la réalisation pratique de cette proposition, notamment en ce qui concerne l'obstacle des langues; il faudrait aussi selon lui informer l'autorité requérante.

Mr Savolainen (Finland) was not opposed to the proposals in Working Document No 26. However, he feared that they could create a problem with regard to the time-limits established in article 11. An applicant's rights to recover a child might well depend upon the application being sent initially to the correct Central Authority, and it was very important to ensure that a Central Authority which had been wrongly seised of the matter should act most expeditiously in sending the application to the appropriate Central Authority.

The Chairman noted that article 11 referred to 'the judicial or administrative authority' of the State where the child is located.

Mr Leal (Canada) suggested the substitution of 'may' for 'shall' in the third line of the text of Working Document No 26, since a requested State, after determining that a child was not located therein, might wish to return the application to the requesting State. The proposal could also result in considerable problems regarding the burden of translation.

The Chairman observed that the proposal in Working Document No 26 was not so much intended to impose a duty on Central Authorities as to advise Central Authorities on the directions in which they should move after receipt of an application.

Mr Minami (Japan) accepted the suggested substitution of 'may' for 'shall', and agreed that the requested Central Authority should be able to inform the requesting Central Authority that the child was not located in its territory.

Mr Yadin (Israel) was favourably disposed towards the proposal in Working Document No 26. However, he doubted whether the Convention itself should be burdened with such provisions and he thought that some machinery should be devised concerning the Procedural Rules for the application of the Convention. He stressed that such Rules should not appear in the Convention itself.

Le Rapporteur essaye de mettre de l'ordre dans les propositions précédentes; l'Autorité centrale, qui ne serait pas celle de la résidence habituelle de l'enfant, a de toute façon pour mission de transmettre la requête à l'Autorité centrale du lieu de résidence supposé de l'enfant; cependant, la délégation japonaise semble toucher plutôt la question de la transmission de la requête par l'Autorité centrale à une autre Autorité centrale qui, elle-même, devrait la transmettre à une tierce Autorité centrale présumée mieux placée.

The Chairman pointed out to the delegates that the discussion merely concerned whether some indication be given to Central Authorities with regard to what they should do. There must be a basic presumption that Central Authorities would in general act reasonably.

Mr Dyer (First Secretary at the Permanent Bureau) concurred that the proposal in Working Document No 26 could be useful as an indication to Central Authorities. He found Mr Yadin's idea that procedural points be placed outwith the framework of the Convention very interesting. This was a novel suggestion with regard to the workings and co-operation of Central Authorities, for which there was as yet no set of agreed rules.

M. Espinar (Espagne) demande une explication: il distingue la requête adressée à l'Autorité centrale du lieu de la résidence habituelle de l'enfant du cas où la requête a été adressée à une autre Autorité centrale. Si la proposition japonaise vise le premier cas il serait d'accord, dans le deuxième cas il ne voit pas l'utilité de cette proposition.

Mr Walsh (Ireland) wondered whether the words 'has reason to believe' in Working Document No 26 meant anything more than merely 'believes'. At the same time, he conceded that a more subjective connotation might be intended.

Mr Minami (Japan), addressing himself to the first paragraph of Working Document No 26, felt that article 20 dealt with the point raised by Mr Leal concerning translation, but suggested that the Convention contain a paragraph corresponding to those in the draft Convention on legal aid. In reply to Mr Espinar, he confessed that he did not know the best answer, but he was not sure that a requested Central Authority, in the event that it was unable to find a child, should be entitled to return the application to the requesting Central Authority.

The Chairman announced that the points raised by Mr Walsh would go to the Drafting Committee. He asked that the meeting proceed to a vote on paragraph 1 of Working Document No 26, subject to the substitution of 'may' for 'shall' and to the understanding that a requested Central Authority should inform the requesting Central Authority or the individual applicant (in the case of a direct application) that the child could not be found.

Mr Savolainen (Finland) stated his preference for 'shall' instead of 'may'.

M. Barile (Italie) propose *'shall'* plutôt que *'may'*.

Mr Savolainen (Finland) asked that the original proposal in Working Document No 26 be put to the vote and suggested that the words 'directly and without delay' be added after the word 'application'.

M. Chatin (France) estime que la proposition japonaise touche aux systèmes de recherche de l'enfant qui sont au nombre de deux. Premièrement le système international du type *Interpol* qui est indépendant des Autorités centrales; et deuxièmement celui de recherche régionale où les Autorités centrales ont alors une fonction essentielle.

The Chairman asked the meeting to proceed to a vote on the first paragraph of Working Document No 26 amended by Mr Savolainen.

Vote

Working Document No 26, first paragraph, subject to the addition of the words 'directly and without delay' *after the words* 'it shall transmit' *was approved by a vote of 11 in favour (Czechoslovakia, Denmark, Finland, France, Ireland, Israel, Italy, Japan, Luxemburg, Norway, Switzerland), 5 against (Canada, Egypt, Greece, Sweden, United Kingdom), with 9 abstentions (Australia, Austria, Belgium, Federal Republic of Germany, Netherlands, Portugal, Spain, United States, Yugoslavia).*

The Chairman noted that some delegates who had voted in favour of the above proposition might also wish to vote in favour of the substitution of 'may' for 'shall'. He therefore asked that a vote be taken on the first paragraph of Working Document No 26 as amended by the substitution of 'may' for 'shall'.

Vote

Working Document No 26, first paragraph, 'may' *being substituted for* 'shall', *resulted in a tied vote of 9 in favour (Belgium, Canada, Czechoslovakia, Greece, Luxemburg, Portugal, Switzerland, United Kingdom, Yugoslavia), 9 against, (Austria, Denmark, Egypt, Finland, Japan, Netherlands, Norway, Spain, Sweden), with 7 abstentions (Australia, France, Federal Republic of Germany, Ireland, Israel, Italy, United States).*

Under the Rules of Procedure, the issue was put to the vote a second time.

Vote

Working Document No 26, first paragraph, 'may' *being substituted for* 'shall', *was rejected by a vote of 10 against (Czechoslovakia, Denmark, Egypt, Finland, France, Ireland, Japan, Netherlands, Norway, Spain), 8 in favour (Belgium, Canada, Greece, Luxemburg, Portugal, Sweden, United Kingdom, Yugoslavia), with 7 abstentions (Australia, Austria, Federal Republic of Germany, Israel, Italy, Switzerland, United States).*

The Chairman, in announcing that the first paragraph of Working Document No 26, as amended by Mr Savolainen's proposal would be sent to the Drafting Committee, asked the delegates not to spend too much time on this matter and to concentrate on essentials.

Mr Walsh (Ireland) seconded the proposal contained in the second paragraph of Working Document No 26.

Mr Yadin (Israel) considered the second paragraph to be superfluous, since it would add nothing new to the contents of an application.

M. Espinar (Espagne) se rallie au point de vue de M. Yadin.

Mr Dyer (First Secretary at the Permanent Bureau), commented that the provisions of article 23 were sufficient concerning this point.

The Chairman put the proposal in the second paragraph of Working Document No 26 to a vote.

Vote

Working Document No 26, second paragraph, was rejected by a vote of 21 against (Australia, Austria, Belgium, Canada, Czechoslovakia, Denmark, Egypt, Finland, France, Federal Republic of Germany, Greece, Israel, Italy, Luxemburg, Netherlands, Portugal, Spain, Sweden, United Kingdom, United States, Yugoslavia), 3 in favour (Ireland, Japan, Switzerland), with 1 abstention (Norway).

The Chairman then turned to the Canadian proposal in Working Document No 27.

M. Jenard (Belgique) donne l'appui à la proposition canadienne.

Mr Leal (Canada) explained that the addition of a new paragraph to article 8 sought to meet the difficulties which had been encountered during the discussion of article 3 as regards the 'actual exercise' of custody rights. He wanted, so far as possible, to avoid the situation of applications being returned to requesting authorities and to facilitate the acceptance of applications by the receiving Central Authorities. Thus, the fact of transmission by the requesting Central Authority should imply the *prima facie* approval of the application, although of course the defences under article 12 would be available to the abductor.

The Chairman asked Mr Leal whether his proposal would also apply to the stage of judicial proceedings in the State addressed.

Mr Leal (Canada) indicated that this would probably be so, but stressed that he proposed only a *prima facie* presumption.

Mr van Boeschoten (Netherlands) expressed considerable doubts concerning the proposals in Working Document No 27. He felt it inappropriate that the sole statement of a Central Authority should raise any presumption. In his view, a Central Authority was to be regarded as more or less the agent of the petitioner and from the point of view of the law of evidence, the statement of an agent could never amount to a presumption.

Mr Yadin (Israel) recalled that he had been strongly opposed to the inclusion of the concept of the 'actual exercise' of custody rights in article 3. He felt that the proposal in Working Document No 27 was really a *non sequitur*, since there was no relationship between the transmission of an application and the proof of facts concerning the actual exercise of custody rights. He added that presumption should be based on grounds other than the transmission of application.

M. Espinar (Espagne) ne s'oppose pas en principe à la proposition canadienne; il précise qu'à l'article 8, la présentation des documents complémentaires est facultative, mais que ceux-ci ont une fonction importante; il se déclare favorable à l'établissement d'une présomption, mais d'une autre manière que ne le propose la délégation du Canada. La transmission de la requête n'est pas un bon point de référence pour l'établissement de la présomption.

Mr Savolainen (Finland) referred to the Finnish Government's comments, in the context of article 14, concerning the expeditious functioning of the Convention. He observed that a requested Central Authority might, for example, find it very difficult to ascertain who exactly was the custodian of a child, in terms of the law of the child's habitual residence. In his view, the Convention should contain an express provision to the effect that, in all cases, the requested State should not be obliged to order the return of a child until it had received a document concerning custody rights from the requesting State. In this event, the proposal in Working Document No 27 would lose most of its force.
Mr Savolainen also declared that the Hague Conference should not be used as a vehicle for harmonizing the internal laws of Member States, and in particular the laws of evidence.

M. Chatin (France) entend bien que l'on précise ce point; il invoque néanmoins la pratique: avant tout, il convient de lutter contre les voies de fait, déplacement ou non-retour; et la requête a pour but de montrer que ces voies de fait se sont effectivement réalisées. En France, on ne trouve point d'exemple où le parent kidnappeur ait contesté la matérialité de la voie de fait; c'est l'établissement de ce dernier point qui est primordial.

M. Voulgaris (Grèce) s'associe à l'amendement du Canada; la présente Convention tend à protéger une situation de fait; une présomption est nécessaire à cette fin; il faut aider le requérant dans ses débuts de preuve du caractère illicite de l'acte; de toute façon, il n'y a pas ici de décision de substance, mais bien plutôt une mesure conservatoire accordée en vertu de certains indices.

Mr Müller-Freienfels (Federal Republic of Germany) agreed that the burden of proof should not be too heavy. He felt that the main problem concerned attempts to discover the whereabouts of the abducted child, since a Central Authority could spend a great deal of time trying to do so. He suggested a formulation to the effect that the requesting Central Authority should state that actual custody resided in the applicant, but which would not go so far as to raise a strong presumption in that regard.

Mr Walsh (Ireland) found himself in agreement in principle with the proposal in Working Document No 27, but suggested that 'shall raise a presumption' instead of '*prima facie* evidence' might be a better formulation.

M. Deschenaux (Suisse) entend bien accorder à l'Autorité centrale la compétence de refuser d'emblée une demande manifestement erronée il ne conteste pas que, lorsque la première autorité transmet la requête à une seconde Autorité centrale, elle ait déjà opéré un contrôle; cependant, l'article 23 prévoit déjà cette situation et il ne semble pas nécessaire de répéter ce point à l'article 8.

Miss Selby (United States) was concerned that a clear presumption concerning the exercise of custody rights be expressed. The presumption should apply in three different circumstances, *viz.* (1) where an application was by way of the Central Authority of the State of habitual residence of the child, (2) where an application was made to the Central Authority of the State where the child was located, and (3) referring to paragraph (*iv*) of Working Document No 14, where an applicant goes directly to Court. She noted that Working Document No 27, as presently drafted, would exclude the second and third situations. Although she was opposed to Central Authorities being involved in the 'screening' procedures, she was strongly in favour of allowing a presumption regarding the actual exercise of custody rights, in terms of article 3, subject possibly to confirmation on the matter of legal custody.

Mr Dyer (First Secretary at the Permanent Bureau) warned delegates that the Hague Conference traditionally avoided touching upon laws of evidence. However, he found the idea expressed in Working Document No 27 very useful, but felt that its appropriate formulation had not been thought through. He referred to article 26 of the draft Convention, which dealt with evidential matters and which had been put in square brackets at the request of the Permanent Bureau. Since the issue could well affect later articles, he suggested that article 16 of the Rules of Procedure be suspended, so that the matter could be reconsidered at a later date by a simple majority vote.

Mr Aina (Commonwealth Secretariat) observed that many Commonwealth countries had Codes of Evidence which established minimum requirements for the making of *prima facie* presumptions in certain circumstances. In his view, it was not appropriate for the Hague Conference to try to change the law of these countries by this Convention.

Le Rapporteur ne se prononce pas contre l'idée de la proposition canadienne puisque cette dernière va de pair avec l'article 12 qui tend à mettre le fardeau de la preuve à la

charge du défendeur; cependant, au regard de l'informalité d'une requête à l'Autorité centrale, il serait abusif d'en tirer une présomption *juris tantum.*

Mr Holub (Czechoslovakia) stated that he was in favour of the proposal in Working Document No 27, which sought to create an obligation on the part of Central Authorities of the State in which a child had its habitual residence to ascertain if there were 'actual exercise' of custody rights. The practical effect of Working Document No 27's acceptance would be that the requirement laid down in article 7(2)*a* would be fulfilled upon the application by the Central Authority of the State of the child's habitual residence.

Mr Leal (Canada) expressed his gratitude for the meeting's helpful comments regarding Working Document No 27. He then proceeded to make the following points:
1 Although article 23 of the draft Convention was relevant, it did not cover the situation where a party applied to the Central Authority of the State of *his* residence. Such a Central Authority could act either as a screening mechanism or as a 'post office'. In his opinion, it should attempt to ascertain that there was in fact a case to be dealt with. If satisfied that there was no case due to there being no actual exercise of custody rights, it could remit the application to the applicant who would then have the option of approaching another Central Authority or going directly to court.
2 It was not his intention that the Central Authority in the requesting State act as the applicant's agent. He would be strongly opposed to any proposal to that effect.
3 He would be happy to accept Mr Walsh's words 'raises presumption', but he emphasised that there must be a presumption, although he conceded that another mechanism might be found.

The Chairman suggested that delegates might wish to make fuller proposals regarding the points covered in Working Document No 27 at a later stage. He assured them that this would not be held to conflict with article 16 of the Rules of Procedure.

Mr Leal (Canada) indicated his willingness to withdraw Working Document No 27, provided a similar alternative proposal was presented.

The Chairman, with Mr Leal's assent, proceeded to a vote.

Vote

Working Document No 27 was rejected by a vote of 13 against (Australia, Austria, Denmark, Egypt, Finland, Federal Republic of Germany, Japan, Netherlands, Norway, Portugal, Sweden, Switzerland, United Kingdom), 5 in favour (Canada, Czechoslovakia, France, Greece, Ireland), with 7 abstentions (Belgium, Israel, Italy, Luxemburg, Spain, United States, Yugoslavia).

The Chairman repeated the point that the rejection of Working Document No 27 was without prejudice to a later discussion of the points raised therein.

M. Schwind (Autriche) explique son silence au cours de cette semaine; premièrement, la délégation autrichienne n'était pas représentée dans les Commissions spéciales et, d'autre part, l'Autriche n'est pas spécialement intéressée à cette Convention. Il remarque que l'accumulation des détails sur les compétences de l'Autorité centrale ralentirait considérablement la procédure de celle-ci; d'une part, les détails correspondant au droit interne des Etats sont inutiles et, ceux qui n'y correspondraient pas, offrent des obstacles à la ratification; il recommande aux délégués de ne pas s'attarder sur des points trop secondaires.

The Chairman thanked Mr Schwind for his intervention. Mr Schwind was one of the most distinguished delegates at the meeting, and had attended sessions of the Hague Conference since 1951.
The Chairman pleaded with delegates not to concern themselves excessively with detail since otherwise they could prejudice the signing of the Convention. He then asked Mr Minami whether he wished the proposal in the first paragraph of Working Document No 26, as amended by Mr Savolainen and approved by the meeting, to take the form of a third paragraph to article 8, or whether the matter should simply by referred to in the Report.

Mr Minami (Japan) said he was happy for the matter to be mentioned in the Report.

Mr Jones (United Kingdom) referring to the proposal in paragraph (*iv*) of Working Document No 14, commented that it incorporated the substance of article 25 of the draft Convention, which would therefore fall if the United Kingdom proposal were accepted. He explained that it was more logical to refer to these matters in article 8, the present wording of which possibly raised the doubts which the United Kingdom proposal was intended to resolve. On a drafting matter, concerning the present wording of article 25, he suggested that 'preclude' was preferable to 'prevent', while a reference to 'wrongful removal or retention' should replace the reference to 'breached' rights.

Mr van Boeschoten (Netherlands) supported Mr Jones's proposal.

Mr Matić (Yugoslavia), on a point of clarification, noted that article 25 of the draft Convention was concerned with normal judicial or administrative proceedings in the State to which the child had been abducted, and did not refer to the rules of this Convention. The United Kingdom proposal in Working Document No 14, on the other hand, referred to the Convention, and was based on the principle that Central Authorities should be involved.

Mr van Boeschoten (Netherlands) welcomed the solution proposed by the United Kingdom in Working Document No 14. Moreover, in his view, article 25 was intended to convey the point that the Convention would apply in the event of a direct application being made for the recovery of a child. However, he recalled that the Report mentioned the possibility of doubt on this score, a doubt which the proposal in Working Document No 14 would remove.

Mr Yadin (Israel) agreed with the substance of the United Kingdom proposal, but he felt that it more properly belonged in article 23.

The Chairman referred to the comments of certain governments which questioned whether judicial authorities would be bound by the terms of article 11 in the event of direct applications. Working Document No 14 merely sought to make it clear that article 11 would apply however an application was made. However, the Drafting Committee was the appropriate place to determine this, and since there was no opposition to the United Kingdom proposal, he referred it thereto. He then turned the attention of the meeting to article 9 and Working Documents Nos 20 and 23.

Miss Selby (United States) felt that there was no substantive difference between the proposals in Working Documents Nos 20 and 23, and indicated that she was prepared to withdraw Working Document No 20.

Mr Jones (United Kingdom) pointed out that Working Document No 20 was, on the contrary, quite different in its

terms to Working Document No 23, since it retained the words 'prior to the institution of legal proceedings'. The inclusion of these words, for both legal and practical reasons, would make the whole Convention unworkable so far as the United Kingdom was concerned. He explained that, under the law of England, it was impossible for public authorities to intervene in a matter without the consent of the parties, unless specific authority was given by law. Thus a Central Authority would be unable to act prior to the presentation of a formal petition by one of the parties. Secondly, even if it were legally possible for a public authority to intervene, it would be highly undesirable, since the result would be an open invitation to the abductor to flee the jurisdiction. Since no legal proceedings had been instituted, he could not be constrained from so doing. In conclusion, Mr Jones emphasised that retention of the present words in article 9 would be fatal, and suggested that the provision either not be mandatory or that a reservation on the part of States be allowed. He also recalled that the previous Session agreed that article 9 should not preclude such *mesures conservatoires*, and moreover that it had not intended to retain the present words.

The Chairman noted that Working Document No 20 was narrower in its terms than the United Kingdom proposal in Working Document No 23.

Miss Selby (United States) indicated that she was prepared to withdraw Working Document No 20, since the intention had been to present a proposal similar to that made by the United Kingdom. However, she did envisage that voluntary measures would be taken before legal proceedings were started.

M. Jenard (Belgique) met en lumière la relation très étroite qui existe entre l'article 9 et l'article 7*d*; si l'on supprimait les mots «avant l'ouverture de toute procédure judiciaire ou administrative», les articles 9 et 7*d* se recouvriraient complètement; il propose de ne pas compliquer la Convention par des dispositions répétatives.

Le Rapporteur explique que, si l'article 9 paraît superflu, la Commission a néanmoins voulu lui donner un sens: on a voulu montrer qu'il y avait une possibilité d'un accord amiable et qu'il pouvait intervenir à tout moment.

M. Chatin (France) s'oppose à cette proposition; il fait valoir que l'article 7 représente un catalogue des compétences des Autorités centrales. L'article 9, lui, tend à montrer la possibilité d'une «remise volontaire». Au contraire de l'exemple belge, où les remises volontaires aboutissent souvent à un échec, la France se flatte des bons résultats obtenus dans les procédures de remise volontaire de l'enfant. M. Chatin souligne ensuite que la remise volontaire peut être administrative ou intervenir à l'occasion d'une procédure judiciaire; il n'y a donc pas superposition des articles 7 et 9 qui se complètent et se précisent mutuellement.

M. Barile (Italie) ne s'accorde pas entièrement à la proposition de M. Chatin. En outre, il ajoute que la disposition des Etats-Unis serait plus claire que celle de M. Jones.

The Chairman noted that the United States proposal in Working Document No 20 had been withdrawn.

M. Espinar (Espagne) reprend la proposition de M. Jones et l'appuie; il faut toutefois maintenir la procédure de conciliation dont l'économie est un avantage certain. L'article 7*b* permet d'empêcher de «nouveaux dangers»; M. Espinar verrait une solution dans la fixation d'un délai en vue de trouver un accord amiable.

The Chairman stressed that delegates should submit *written* proposals for amendments, and confine themselves to considering the deletion of certain articles and the acceptance/rejection of proposed amendments.

M. Barbosa (Portugal) ne voit pas d'opposition entre les articles 9 et 7*d*; pour lui les mesures en vue d'obtenir une solution amiable ne devraient pas s'arrêter avec l'introduction d'une procédure judiciaire; il propose de laisser ce point au Comité de rédaction.

The Chairman asked that the Drafting Committee note Mr Barbosa's observations.

Mr Leal (Canada) asked Mr Jones if an English Central Authority would be precluded under the law of England from conducting conciliation proceedings. He observed that article 9 merely stated that, before a Central Authority in the requested State began legal proceedings, it should attempt to initiate efforts at conciliation.

M. Voulgaris (Grèce) se rallie à la proposition britannique de supprimer la première phrase de l'article 9; pour la délégation grecque, la conciliation doit se poursuivre après l'ouverture de la procédure judiciaire. L'amendement proposé permet d'ajuster la portée de l'article 9 à celle de l'article 7*d*.

Miss Selby (United States) envisaged cases where it would not be appropriate to take any steps until legal proceedings had been instituted. She suggested that the words 'independently of the institution of legal proceedings' might meet the objection raised by the United Kingdom.

Mr Jones (United Kingdom) explained that the United Kingdom was not proposing the deletion of article 9. He emphasised also that acceptance of Working Document No 23 would not prevent the initiation of conciliation proceedings in any country where they were thought to be desirable. In reply to Mr Leal, he agreed that certain bodies could attempt to initiate conciliation proceedingss before legal action had begun, but pointed out that article 9 referred to a Central Authority (*i.e.* a *public* authority), and imposed a duty on such authority which in England could not be discharged at that stage. Moreover, under the Convention the lawyer to represent the applicant would not normally be appointed until after a petition had been filed and so could not take part in earlier conciliation proceedings. Thus, from the point of view of the United Kingdom, it was essential to delete the words 'prior to the institution of legal proceedings'.

M. Jenard (Belgique) s'adresse à M. Chatin: faisant référence à la remarque de ce dernier sur les délégués qui n'ont pas participé aux Commissions spéciales, M. Jenard souligne que les textes seront néanmoins appliqués à tous les Etats. Il faudrait d'autre part reprendre l'expression de l'article 7*d* et prévoir d'insérer «soit à faciliter toute autre mesure amiable»; M. Jenard illustre ensuite sa proposition par l'exemple du cas d'un enlèvement de deux enfants: l'un d'entre eux serait confié au père l'autre à la mère par un consentement mutuel.

M. Chatin (France) précise que la conciliation en droit français se conçoit tout au long de la procédure judiciaire; il suffirait en fait de supprimer «ou administrative».

The Chairman stated that the observations of delegates would be sent to the Drafting Committee, which would also have regard to the United States proposal in Working Document No 20. Since Mr Jenard had indicated that he did not wish to propose the complete deletion of article 9, the

Chairman asked that the meeting proceed to a vote on the deletion of the words 'prior to the institution of legal proceedings'.

Mr Savolainen (Finland) was opposed to the addition of the words 'amicable settlement' proposed by Mr Chatin, since he thought the terms of the article would then be much too repetitive. He proposed that the whole of article 9 be deleted, and this proposal was duly seconded.

The Chairman asked the meeting to vote on the two following proposals concerning article 9.

Votes

The oral proposal of Mr Savolainen (Finland) that article 9 be deleted from the Convention was rejected by a vote of 16 against (Canada, Czechoslovakia, France, Federal Republic of Germany, Greece, Ireland, Israel, Italy, Luxemburg, Netherlands, Portugal, Spain, Sweden, Switzerland, United States, Yugoslavia), 4 in favour (Austria, Belgium, Finland, Norway), with 4 abstentions (Australia, Denmark, Japan, United Kingdom).

Working Document No 23 was approved by a vote of 17 in favour (Australia, Austria, Czechoslovakia, Denmark, Finland, France, Federal Republic of Germany, Greece, Ireland, Italy, Japan, Luxemburg, Portugal, Sweden, United Kingdom, United States, Yugoslavia), 3 against (Canada, Spain, Switzerland), with 4 abstentions (Belgium, Israel, Netherlands, Norway).

M. Chatin (France) précise qu'il n'a pas fait de véritable «proposition».

M. Jenard (Belgique) demande au Président si l'Autorité centrale ne peut pas prendre d'autres mesures?

The Chairman, in reply to Mr Jenard, observed that a Central Authority could take whatever measures it wished. He then turned to article 10. Since no delegate was prepared to second the United States proposal regarding article 10 contained in Working Document No 20, he proposed that article 10 be referred to the Drafting Committee.

M. Jenard (Belgique) commente la proposition de sa délégation; au premier alinéa il s'agit uniquement d'une question de rédaction. Concernant le second alinéa, M. Jenard doute de la nécessité de ce texte sans effet contraignant.

Mr Schwind (Austria) seconded Mr Jenard's proposal.

M. Barile (Italie) s'oppose à la suppression du deuxième alinéa; cette disposition, même sans effet contraignant, doit être maintenue pour la clarté du texte qui entend montrer que les procédures amiables sont reconnues par la Convention.

M. Chatin (France) rappelle que l'article 10 est un compromis établi au sein de la Commission qui avait envisagé d'octroyer à l'autorité judiciaire un délai de quatre ou six semaines pour statuer; et, à défaut de décision, une remise automatique de l'enfant.
Il répète que le temps est un facteur primordial dans ces procédures. Ce délai préfixé n'ayant pas été retenu par la Commission, il convient de maintenir l'obligation prévue à l'article 10.

M. Jenard (Belgique) se fait le rapporteur des remarques des autorités judiciaires belges et insiste, en accord avec M. Chatin, sur l'importance de la rapidité de ces procédures.

The Chairman sent article 10 to the Drafting Committee, and turned to article 11 and the relevant Working Documents, *viz.* Nos 20, 33, 30 and 25. He observed that considerable problems of principle arose out of the proposals for this article.

Miss Selby (United States) was of the view that the existing time-limits established by article 11 were excessively restrictive, and could give rise to considerable difficulties in practice. She sought to make two points in particular. Firstly, it might prove impossible to locate a child within a certain period of time. Moreover, she did not accept that a child necessarily became integrated within a particular environment after only 12 months; such a relatively short time-limit would merely encourage abductors to keep changing their residence, thereby also helping to defeat the rights of parties seeking the return of children by way of legal proceedings. Secondly, a short time period unduly favoured parties who initiated legal proceedings at once. However, in this regard, it was often difficult to determine exactly when a breach of custody rights occurred. If, for example, one party took a child abroad for an extended vacation with the full consent of the custodian and some time later informed the latter of his intention not to return the child, it was almost impossible to determine at what point rights of custody had been breached. Miss Selby emphasised her concern that people not be forced into adversary proceedings, and suggested that an extension of the time-limits be considered in parallel with the problem concerning a child's assimilation into a new environment.

Mr Creswell (Australia) referred to the proposals in Working Document No 30 to substitute a reference to 'wrongful removal or retention' for 'breach of custody rights', and the proposed extension of the time-limit. He also requested that delegates consider the addition of the words 'to the State of his habitual residence immediately before that date' to the first paragraph of article 11, as proposed in Working Document No 30.

Mr Jones (United Kingdom) pointed out that the time periods in Working Document No 33 had been placed in square brackets, since the question remained open. However, he felt that the precise length of the time period was a separate issue. His main concern was with the rather peculiar existing structure of article 11. In his view, although one could doubt the good faith of an applicant who waited a long time before making an application to recover a child, this was not a matter to be dealt with in article 11. On the contrary, its sole purpose should be to impose a time-limit for the return of a child, the time to run from the moment of an abduction to the date on which a decision on the matter was reached.

Mr van Boeschoten (Netherlands) described the joint United Kingdom and Netherlands proposal in Working Document No 33 as an attempt to simplify the problem of time-limits. He was in favour of a short time-limit. This would not mean that a child could not be returned after expiry of the time-limit, since it could be returned after a full review of the facts of the particular case. Thus, in his view, a time-limit of six months, without any review of the merits, was sufficient. He was willing to consider a longer period, but felt that 12 months would be too long.

The Chairman noted that various issues were involved here, and asked that the meeting concentrate upon the proposal in Working Document No 30 that the words 'to the State of his habitual residence immediately before that date' be added.

Mr Creswell (Australia) noted that the object of the Convention was to achieve the prompt return of the child to the country of its habitual residence immediately before the

wrongful removal or retention, which was the most appropriate place for the resolution of custody disputes before the parties. Thus it was important that the proposed words be added to the first paragraph of article 11, since the existing language was at variance with the purpose of the Convention. He added that the return of a child to the place of its previous habitual residence was particularly important when it had been abducted before the issue of any custody order.

Mr Savolainen (Finland) seconded Mr Creswell's proposal.

Mr Jones (United Kingdom) opposed Mr Creswell's suggestion. In his view, the present formulation of article 11 was desirable precisely because of its existing ambiguity. In the usual case, the child was returned to the parent who applied for his return. However, that parent might no longer be in the State of the child's previous habitual residence, and the Convention should not prohibit the return of the child directly to the applicant, no matter where the applicant happened to be. It was thus essential not to limit the scope of the article on this point.

The Chairman viewed this as a narrow issue, and asked that delegates not remain locked into a number of different premises.

M. Chatin (France) précise la portée de la proposition australienne, qui lui paraît comporter deux aspects. Tout d'abord la volonté de contracter les deux alinéas en un seul. En second lieu une provision concernant la remise de l'enfant dans le lieu de sa résidence habituelle antérieure; le dernier point ne rentre pas dans la ligne des pratiques françaises où il n'est pas rare que l'enfant soit remis directement au parent qui vient le chercher sur place dans l'Etat de refuge, ce qui se produit d'autant plus souvent que le pays de la résidence habituelle de l'enfant est éloigné de la France.

Mr Savolainen (Finland) seconded Mr Creswell's proposal, due to the ambiguity in the present text of article 11. However, he agreed with Mr Jones's view regarding the substance of the matter, but added that the Convention should make it clear that there was no obligation on a Member State to return a child to a non-Member State.

Mr Creswell (Australia) acknowledged the formidable arguments put forward by Mr Jones. Nevertheless, he was concerned that article 11 should not be interpreted as obliging a judicial or administrative authority in all cases to return a child to the applicant, and suggested that the matter go to the Drafting Committee.

The Chairman, in seeking the sense of the meeting regarding Mr Cresswell's proposal in Working Document No 30, asked for a hand vote thereon.

Vote

Working Document No 30, concerning the proposed addition to paragraph 1 of article 11 of the words 'to the State of his habitual residence immediately before that date' *was rejected, on a show of hands, by a clear majority.*

The Chairman directed the attention of the meeting to Working Document No 34 presented by the United States delegation, and remarked that it was an attempt to demonstrate the lapse of time involved in proceedings concerning the international abduction of children.

The meeting was closed at 12.55 p.m.

Documents de travail Nos 36 à 40
Working Documents Nos 36 to 40

Distribués le 13 octobre 1980
Distributed on 13 October 1980

No 36 – Proposition de la délégation italienne
– Proposal of the Italian delegation

Article . . .

(à insérer dans les clauses finales)

Les dispositions de la présente Convention ne peuvent être écartées dans les Etats contractants que si leur application est manifestement incompatible avec l'ordre public.

Article . . .

(to be included among the final clauses)

The provisions of the present Convention may be disregarded in Contracting States only when their observance would be manifestly contrary to public policy.

No 37 – Proposition du Rapporteur appuyée par la délégation française
– Proposal of the Rapporteur supported by the French delegation

Article 11

L'article 11, alinéa 1, serait complété in fine *de la manière suivante en ajoutant les mots en italiques:*

ordonnent son retour immédiat *au reçu de la décision, de l'accord ou de l'attestation sur la loi qui est produite conformément aux dispositions de l'article 8.*

shall return the child forthwith *upon receipt of the decision, the agreement or the certificate or sworn declaration as to the applicable law produced in accordance with the provisions of article 8.*

No 38 – Supplementary information submitted by International Social Service on Working Document No 34

January 11, 1980 – International Social Service – American Branch (AB) refers the case to ISS – Netherlands Branch (NB).

January 1980 – Consultation initiated between NB and local Board for the Protection of Children (BPC).

February 12, 1980 – Social report on father and son H. from BPC shared by NB with AB, furthermore:
– asking for social report on mother;
– recommending that mother obtains legal counsel in the Netherlands, so as to apply for guardianship under Netherlands law.

N.B. Contrary to the understanding apparently existing in California (see Doc. trav. No 34 – February 14th 1980) the father did not have legal guardianship.

April 2, 1980 – Father applies to local cantonal judge for temporary guardianship (art. 296.297 of the Neth. Civil Code (NCC)).

April 3, 1980 – Californian judge orders immediate return of child to mother in California.

April 15, 1980 – Social report on mother from Californian Social Services Department recommending towards return of child to mother, shared with local BPC through ISS.

June 1980 – BPC recommends negatively towards father's application for temporary guardianship – not because child would not receive good care in the Netherlands, but seen the American judgment granting custody to mother.

NB shares with AB contents of supplementary report from BPC in which it is a.o. said that if mother really seriously wants the child back, she could come and collect him, as then father would have to hand the boy over to her.

July 22, 1980 – Against the recommendation of BPC Cantonal Judge grants temporary guardianship to father. BPC inform NB that they will appeal against this decision with District Court.

August 4, 1980 – BPC confirm their appeal petition to NB. They further report that father has applied to District Court for legal guardianship (art. 161.162 NCC).

August 7, 1980 – NB report accordingly to AB again recommending the mother to come to the Netherlands.

September 11, 1980 – NB receive telex from AB that mother arrives around October 15th; can NB arrange for legal aid?

October 9, 1980 – Telephone communication from BPC to NB that by order of the District Court of October 8th:

– temporary guardianship order from Cantonal Judge has been annulled;
– District Court recognizes Californian order granting custody to mother.

BPC further reports that:

– father's application for guardianship has been kept pending till mother's arrival;
– legal aid for mother obtained through 'Bureau voor Rechtshulp'.

NB telexes accordingly to AB.

October 10, 1980 – NB shares with BPC telex from AB that mother comes to the Netherlands between October 16 and 22. Consultation with mother's lawyer.

October 13, 1980 – BPC informs NB that Court hearing has provisionally been scheduled for October 17th, 1980.

Final remarks

Legal matters having been clarified, it is expected that the Court, when hearing both parents their lawyers and BPC, will focus on social aspects and the interest of the child.
Probably the Court will especially consider what an eventual departure with mother at short notice may mean to H. According to the social reports, the boy has now for some 1 1/2 years been with father, where apparently he integrated quite happily.

No 39 – Proposal of the Canadian delegation
– Proposition de la délégation canadienne

Article 11

a Where . . .

b Where the judicial or administrative authority referred to in paragraph *a* believes that the child has been taken to another State, it may stay all proceedings.

Article 11

a Lorsque . . .

b Lorsque l'autorité judiciaire ou administrative visée à l'alinéa *a* croit que l'enfant a été amené dans un autre Etat, elle peut surseoir à toutes procédures.

No 40 – Proposal of the Canadian delegation
– Proposition de la délégation canadienne

Article 12

In the event that article 11 should be amended to provide a period in excess of 6 or 9 months, it is proposed to add the following paragraph to article 12:

12 (. . .)

a

b

c the applicant did not take any measures to seek the return of the child within 6 months after the wrongful removal or retention.

Article 12

Dans le cas où le délai de l'article 11 serait supérieur à 6 ou 9 mois, il est proposé d'ajouter l'alinéa suivant à l'article 12:

12 (. . .)

a

b

c le demandeur n'a rien fait pour obtenir le retour de l'enfant dans les 6 mois à compter du déplacement ou de la rétention illicite.

Procès-verbal No 7

Séance du lundi 13 octobre 1980 (après midi)
Meeting of Monday 13 October 1980 (afternoon)

The meeting was opened at 3.10 p.m. Mr Anton (United Kingdom) was in the Chair. Miss Pérez-Vera (Spain) was Rapporteur.

The Chairman welcomed Mr McClean (Commonwealth Secretariat) and invited him to intervene in the debates. He noted that Mr Jenard (Belgium) was unable to attend, and that he had been replaced by Mr van Keymeulen.
The Chairman referred to the intention of several States to sign the Convention immediately after the signing of the Final Act. It was therefore important that the text of the Convention be in its final form before the Plenary Meeting to be chaired by Mr Schultsz on the afternoon of Friday 24 October. Thus there was not much time left for discussion both of the issues of principle and of the submissions by the Drafting Committee, and he asked the delegates to concentrate upon issues of substance. In this regard, he noted that it would not be possible for the Commission to meet on Friday 17 October.
The Chairman directed the attention of delegates to the second paragraph of article 10 and to Working Document No 20 thereon. He suggested that discussion be reopened on this proposal, since there may have been insufficient

opportunity for the meeting to consider it fully at the last meeting. There being no opposition to this suggestion, he read out the text of the relevant portion of Working Document No 20.

Miss Selby (United States) conceded that Working Document No 20 did not raise any major issue regarding article 10(2). However, in her view, it proposed three improvements, *viz.*:
1 it would cover cases where no Central Authority was involved;
2 it would provide a mechanism which would help remind an applicant of the need to submit a request;
3 it was phrased more in terms of an applicant's right rather than a Central Authority's duty, which she felt might be more appropriate, given the number of cases in which a court alone was seised of the matter.

The Chairman, since the proposal was seconded by a number of delegates and met no opposition, sent Working Document No 20, in so far as it dealt with article 10, to the Drafting Committee. He then asked the meeting to continue with discussion of article 11 and the relevant documents thereon *i.e.* Nos 20, 33, 30, 25, and 37. With regard to Working Document No 25, he thought it might more appropriately be considered after article 12 had been dealt with.

Mr Müller-Freienfels (Federal Republic of Germany) asked that Working Document No 25 be discussed within the framework of article 11. He also asked that the phrase 'two years' be added after the words 'return of the child' in Working Document No 25.

Working Document No 25 was read.

Mr Dyer (First Secretary at the Permanent Bureau) noted that the words 'two years' should be put in brackets.

The Chairman asked that delegates consider first the proposal in Working Document No 33 to delete article 11(2), thus substituting a uniform period after which the child should be returned.

Mr Jones (United Kingdom) referred delegates to his comments on this point made at the previous meeting. Under the existing text of article 11, the time period would run from the date of abduction or retention to the time at which the judicial or administrative authority in the requested State was about to decide whether or not to return the child. This raised the possibility of procedural devices being used to delay proceedings after an authority had been seised of the matter, so that the time-limit expressed in article 11 would expire. The proposal in Working Document No 33 was designed to prevent that, by providing that the time period should run from the date of wrongful removal or retention to the date of application to the judicial or administrative authority. If this proposal were adopted, any ensuing delays would not affect the return of the child. Moreover, deletion of the words 'where the child is located' would work to the applicant's advantage by allowing pressure to be put on the kidnapper to reveal the whereabouts of the child.
As regards the working of the time period, which was really a separate issue from the framework of the text itself, Mr Jones noted that while the date of wrongful removal or retention could normally be ascertained without too much difficulty, considerable difficulty might be encountered as regards the date of 'discovery' of the child. It was possible, for example, that an applicant knew the country to which the child had been abducted but not the child's precise location therein. It was therefore desirable to adopt a different '*terminus ad quem*' in article 11.
Mr Jones pointed out finally that the wording of the proposed amendment in Working Document No 33 covered both applications to Central Authorities and direct applications to judicial authorities.

The Chairman requested delegates to address themselves to the question whether article 11 should consist of two paragraphs, or whether the second paragraph of article 11 should be deleted.

Mr Savolainen (Finland) felt it desirable that the contents of Working Document No 33 be made as clear as possible. In particular he wondered whether the date envisaged might even be that on which a petition was filed in the State of the child's habitual residence after an 'internal' abduction which has subsequently become an 'international' abduction.

Mr van Boeschoten (Netherlands) confessed that Working Document No 33 had not envisaged the possibility of a '2-stage' kidnapping, (*i.e.* from the internal to the international level). He agreed with Mr Savolainen's construction, and conceded that it might be necessary to make it clear that the period concerned would run from the moment at which a child was removed to another country, *i.e.* an 'international abduction'.

M. Voulgaris (Grèce) demande à la délégation allemande le sens de sa proposition.

The Chairman emphasised that the discussion concerned merely the question whether there should be a single time period or a period with a provision for extension, as in the existing text of article 11.

M. Barbosa (Portugal) appuie la proposition des Pays-Bas et du Royaume-Uni; l'esprit de la Convention veut empêcher que l'enfant acquière des liens plus profonds avec le pays où le kidnappeur l'a emmené. D'autre part cette proposition permet aussi de préciser le moment à partir duquel le délai commence à courir.

M. Chatin (France) appuie volontiers la proposition: cette dernière a pour effet d'éviter le délai trop court du paragraphe No 1 d'une part et de lever l'équivoque du point de départ du délai prévu au paragraphe No 2 d'autre part.
M. Chatin préfère le délai d'un an à celui de neuf mois.

Mr van Boeschoten (Netherlands) said that the words had been placed in square brackets simply because the Netherlands was in favour of a shorter time period than that proposed by the United Kingdom.

The Chairman commented that the issue of principle, *i.e.* whether there should be one or two time periods, should not depend on the precise time-limit involved. He proposed to put to the vote the proposal in Working Document No 33.

Mr Leal (Canada) respected the Chairman's point of view, but stated that some delegates had difficulty in deciding the issue of principle independently of the precise length of the time period.

The Chairman acknowledged that this was a problem, and suggested that it would be best to proceed by way of an indicative vote on the principle, after which the time period could be considered.

M. Chatin (France) rappelle au Président que la disposition suivante permet de renvoyer l'enfant, indépendamment de tout délai.

The Chairman asked for a hand vote on the proposal in

Working Document No 33 that the second paragraph of article 11 be deleted, so that there should be a single period for ordering the return of a child.

Vote

Working Document No 33, in so far that it proposed the deletion of the second paragraph of article 11, was approved by a hand vote of 20 in favour, 3 against.

The Chairman then directed the attention of the meeting to the precise length of the single time period envisaged, and in this connection referred to Working Document No 20.

Miss Selby (United States) sought to make three points in particular:
(*i*) A parent might take some time in deciding that there had been a wrongful removal or retention of a child, thus placing in doubt the precise date of the wrongful act. A short time period would aggravate such a problem.
(*ii*) An aggrieved parent might not have a lawyer, and might spend a lot of time deciding what to do. Such parents would be at a disadvantage if the time-limit were too short.
(*iii*) A short time period would deter voluntary efforts to secure the child's return. This was clear when one considered that a time-limit would run on the commencement of adversary proceedings, which would inevitably have a negative impact on attempts to secure a settlement of the dispute.
Miss Selby added that the question of the child's possible assimilation into a new environment had also to be considered. She felt, however, that eighteen months should be the minimum period envisaged, since it would not entail an undue risk of a child being assimilated into a new environment. One had also to consider the difficulty of locating a child and the abductor. For the above reasons, a longer time period was preferable.

M. Deschenaux (Suisse) rapporte le point de vue favorable de sa délégation à la proposition de prévoir un délai unique; la présente Convention a un caractère d'urgence; il convient donc de replacer l'enfant le plus vite possible dans sa situation antérieure.
En voulant modifier la position de l'enfant après deux ans, on risque d'aboutir au résultat qu'on voulait éviter.
Avec le délai de deux ans, l'enleveur aura tout loisir de trouver une solution pour se soustraire à l'application de la Convention.

Mr van Boeschoten (Netherlands) expressed his agreement with Mr Deschenaux. The period of between six and twelve months envisaged in Working Document No 33 was based on the assumption that the child had not been assimilated into a new environment. He feared that, if the time period were much longer, article 12 would have to contain broader grounds of review than the Netherlands delegation would like.

M. Voulgaris (Grèce) aimerait qu'on limite le délai à un an: ce délai s'impose au tribunal pour qu'il agisse vite; toutefois l'article 15 donnerait, après l'écoulement d'une année, le pouvoir au tribunal de renvoyer l'enfant. L'article 15 semble donc suffire.

Mr Savolainen (Finland) informed the delegates that the Finnish delegation was now willing to accept the period of one year. However, since the question of the appropriate time-limit was of crucial importance, he suggested that some flexible mechanism be introduced into the Convention so that it could be changed, in the light of experience, after the Convention had been brought into force.

The Chairman asked that Mr Savolainen submit a written proposal to that effect.

Mr Walsh (Ireland) intimated his support for the proposal in Working Document No 33. In his view, a period of one year was almost too long, since even a period of less than one year could result in a child's forming strong attachments to his new environment. Moreover, the time-limit did not take account of the delay inevitably encountered in the appeals process. He considered it was very important that the time period adopted did not allow a child to form new attachments.

M. Chatin (France) examine la question de la durée: il envisage tout d'abord le cas d'un contentieux judiciaire sans recherches; l'enfant étant localisé, le délai d'un an est tout à fait suffisant. Par contre, s'il faut retrouver l'enfant, le délai devient trop court. M. Chatin fait remarquer qu'en France cette deuxième situation est très rare; il ne faut pas oublier non plus que le requérant donnera certaines informations sur le lieu où l'enfant est supposé se trouver. Enfin la Convention apportera une aide supplémentaire aux recherches.

Mr Holub (Czechoslovakia) was in favour of the deletion of the words 'where the child is located' in the first paragraph of article 11, as suggested in Working Document No 33. This would mean that an aggrieved parent could send the application of petition to any Member State, irrespective of whether the child was located in that State or not. The problem of searching for the child would then not be a problem, since even after eleven months had elapsed, a parent could send his application to another Contracting State and still bring himself within the time-limit.

The Chairman asked that the meeting vote on the precise period involved before considering the technical point raised by Mr Holub.

M. Espinar (Espagne) s'oppose à la fixation d'un délai trop long; dans le cas contraire, le but de la Convention d'éviter l'enracinement de l'enfant serait manqué.

M. Barile (Italie) considère que le délai d'un an est justifié notamment lorsqu'on se rappelle qu'il existe aussi l'article 15.

Miss Selby (United States) emphasised that the primary purpose of the Convention was to deter abductions. It did not follow that the establishment by a child of roots in another place should necessarily be a defence to the abduction.

The Chairman proceeded to put the issue to a vote. Due to the variety of different time periods involved, the delegates would be asked to indicate firstly whether they favoured a period of one year or less, or whether they favoured a period longer than one year. Only then would the precise period be voted upon.

Mr van Boeschoten (Netherlands) intervened to say that he could withdraw his proposal for a nine month time period if the delegates agreed that a period of one year should apply.

The Chairman, since no delegate supported a period of less than one year, asked the meeting to vote in favour of the proposition that the time period be one year.

Vote

Working Document No 33, in so far as it proposed a time period of one year, was approved by a vote of 21 in favour (Australia, Austria, Belgium, Czechoslovakia, Denmark,

Finland, France, Greece, Ireland, Israel, Italy, Japan, Luxemburg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, United Kingdom, Yugoslavia) to 4 against (Canada, Federal Republic of Germany, United States, Venezuela).

The Chairman reiterated that the meeting had decided two important points,

viz. (*i*) there should be one single time period in article 11;

(*ii*) the period should be one year.

He then turned to the technical problems concerning how the time period should run.

Mr Holub (Czechoslovakia) supported the proposals in Working Document No 33, because they implied that in practice, the time spent in *searching* for a child would not be included within the time period of one year. As he understood it, even after eleven months had elapsed, an applicant could seise a Central Authority or judicial authority of any Member State (irrespective of whether or not the child was located therein), so that the search for the child would begin then.

The Chairman intimated his doubts concerning Mr Holub's interpretation of Working Document No 33.

Mr van Boeschoten (Netherlands) made the following points in answer to Mr Holub. Firstly, the proposals in Working Document No 33 contained no rules with regard to jurisdiction. While an applicant could approach any judicial or administrative authority which had jurisdiction, the Convention itself did not confer such jurisdiction, and it was therefore not true that the applicant could seise *any* judicial or administrative authority of the matter. Secondly, although an applicant could approach the authorities of a State where the child was not located, any decision obtained thereby might not be enforceable in the State where the child was ultimately found. Finally, Working Document No 33 related the time period involved to the decision of the authority which had in fact been approached by the applicant. It was not the case that the deadline would be complied with by an applicant approaching *any* authority within the twelve month period, since an applicant was required to approach the correct authority from which a decision was sought, within the time-limit.

Le Rapporteur se veut favorable à la fixation d'un seul délai. D'autre part, en ce qui concerne la possibilité de demander le retour de l'enfant à tout Etat contractant, même si elle existe, on doit supposer, en bonne logique, qu'elle sera utilisée seulement au regard de l'Etat où l'on considère que l'enfant a été emmené. Autrement la décision prise par un juge d'un pays où l'enfant ne se trouve pas, n'aura vraisemblablement qu'un effet de pression morale.

Mr Leal (Canada) agreed with the concerns expressed by Mr Holub and the Rapporteur. He feared that as things stood, an applicant would seek to guard against all eventualities by applying to *all* Member States. In his view, the Convention should require that applications be made more selectively. With regard to the problem of a child's removal from the State in which he was thought to be located, he stated that the Canadian delegation had made a proposal to cover it, and felt that the simple solution would be for proceedings to be stayed in the State to which the application had been made in the first instance.

M. Chatin (France) prend l'exemple d'un couple de parents de nationalités différentes: la plupart du temps la nationalité du kidnappeur donne une indication importante sur le lieu où ce dernier s'est rendu avec l'enfant. Le cas de l'enlèvement «tous azimuts» est tout à fait exceptionnel.

Mr van Boeschoten (Netherlands), in reply to Mr Leal, repeated his point that the Convention did not confer jurisdiction on *any* court, and that it would be governed in part by the rules of procedure in each Member State. In reply to the Rapporteur's observations, he raised the possibility of an applicant approaching the authorities of a State in which a child was not located but in which the abductor had assets. This would often turn out to be the country in which the abduction took place.

The Chairman thought this was a narrow point and asked that two other speakers intervene in the debate.

Mr Jones (United Kingdom) felt that Mr van Boeschoten's intervention covered the point. However, he admitted that a possible ambiguity arose out of any reference to the State in which an abductor was located or had assets. He suggested that the Drafting Committee consider whether it was necessary to make the matter clearer and, if so, the means by which this should be done.

Mr Dyer (First Secretary at the Permanent Bureau) endorsed the observations of the Rapporteur. He noted that the Convention would not apply to cases which were confined to one country but that it provided a means by which pressure could be applied on a kidnapper who did not have sufficient ties with such a country. He felt that a dangerous situation would arise if a deprived parent could continue an application indefinitely merely by filing an application in a State of the child's habitual residence within the period of one year, since the whole matter could thereby drag on for years. He was therefore in favour of retaining the phrase 'where the child is located'.

The Chairman noted the technical defects in article 11 (*e.g.* the use of the phrase 'breach of custody rights'), but asked that the proposal for deletion of the phrase 'where the child is located' from the first paragraph of article 11 be put to the vote.

Vote

Working Document No 33, in so far as it proposed the omission of the words 'where the child is located' *was rejected by a vote of 14 against (Australia, Belgium, Canada, Denmark, France, Italy, Japan, Luxemburg, Norway, Portugal, Spain, Sweden, Switzerland, Yugoslavia), 6 in favour (Czechoslovakia, Finland, Ireland, Netherlands, United Kingdom, United States), with 5 abstentions (Austria, France, Federal Republic of Germany, Israel, Venezuela).*

The Chairman then referred to Working Document No 37, which he asked should be discussed within the context of article 11, as amended.

Le Rapporteur distingue, d'une part, les mécanismes nécessaires au déclenchement du fonctionnement de la Convention et, d'autre part, ceux qui permettent d'obtenir une décision judiciaire sur le rapatriement de l'enfant; il semble qu'une simple requête ne puisse pas entraîner une présomption en faveur du requérant; l'exigence d'une «attestation» au sens de l'amendement proposé par le Rapporteur et appuyée par la France est nécessaire à l'établissement de cette présomption. Il conviendra ensuite au présumé kidnappeur de prouver que le requérant n'exerçait pas effectivement son droit de garde.

The Chairman opened the debate on Working Document No 37, which had been duly seconded.

M. Barile (Italie) estime que le juge peut connaître lui-même la loi applicable. L'exigence d'une «attestation» n'est pas toujours nécessaire.

Mr van Boeschoten (Netherlands) pointed out a contradiction between the proposal for article 11 contained in Working Document No 37 and the present text of article 8. Working Document No 37 sought to impose an obligation on an applicant to produce certain documents whereas article 8 provided that such production was optional.

Le Rapporteur distingue l'article 8 où la Convention donne un caractère facultatif à la présentation de pièces accompagnant la requête à l'Autorité centrale et l'article 11 où une décision judiciaire ou administrative est en cours.
Le Rapporteur estime qu'il faut ajouter une exigence supplémentaire au requérant pour qu'il bénéficie de la présomption.

M. Voulgaris (Grèce) hésite à se rallier à cette proposition car la situation du demandeur se compliquerait beaucoup; en effet, la Convention se veut favorable à la présomption de l'article 3, à savoir non seulement à celle qui concerne l'exercice effectif du droit de garde, mais également à celle qui concerne le fondement juridique de cet exercice. Pour cette raison l'article 8 de la Convention rend facultative et non obligatoire la reproduction d'une copie de la décision ou de l'accord concernant la garde (lettre *e* de cet article) et d'une «attestation ou déclaration concernant la teneur des dispositions législatives sur le droit de garde dans l'Etat de la résidence habituelle de l'enfant» (lettre *f* du même article). D'ailleurs, aux termes de l'article 14 de la Convention, les autorités saisies peuvent toujours demander aux autorités de l'Etat de la résidence habituelle de l'enfant de tout entreprendre pour obtenir une décision ou une attestation judiciaire qui pourrait prouver le bien-fondé de la demande. Donc, l'obligation du demandeur à laquelle vise l'amendement en question, ne serait pas nécessaire pour la bonne administration de la justice et ferait double emploi avec d'autres mécanismes prévus par la Convention; elle compliquerait, au contraire, la tâche du demandeur, en favorisant ainsi la situation de l'enleveur et ses projets éventuels d'un nouveau déplacement de l'enfant.

M. Chatin (France) soutient le point de vue du Rapporteur, il rappelle que la semaine passée certaines délégations, notamment les Etats-Unis, avaient soulevé quelques problèmes concernant la preuve de «l'effectivité» de l'exercice du droit de garde; ces délégations se demandaient si la preuve n'était pas à la charge du gardien. Le Délégué français répond à ces questions que le gardien ne peut pas se borner à présenter une requête, il doit démontrer la matérialité de l'enlèvement et produire pour cela une attestation dont les conséquences sont purement de fait.

Mr Savolainen (Finland) stated that the proposal in Working Document No 37 fully took account of the concerns of Finland in the context of article 14. He added, that although a number of drafting details remained to be worked out, he was in favour of the substance of Working Document No 37.

Mr Jones (United Kingdom) felt that Working Document No 37 did not take sufficient account of the fact that evidential requirements in common law countries differed from those in civil law countries. With regard to the text of the proposal, he felt that it was unreasonable to require an applicant to produce the *actual* agreement or certificate. Moreover, so far as the applicable law was concerned, some cases would often arise in which it was for the judge to satisfy himself on that point, and he noted that even sworn declarations could provide inaccurate information on the law concerned. As regards the evidential requirements of civil law countries, they could more appropriately be considered in the framework of article 13.

Miss Selby (United States) disagreed that the proposal in Working Document No 37 was related to the issues raised in article 13. In her view, the proposed amendment would be useful in clarifying questions concerning the 'actual exercise' of custody rights. She conceded that a drafting point arose concerning whether judicial notice or proof without a certificate should be allowed, and she suggested the addition of words such as 'or other proof of such facts'. However, it was inevitable that at some point the applicant would have to produce clear evidence on which the claim was based, and the Convention ought to make this clear.

Mr Walsh (Ireland) opined that the proposition in Working Document No 37 belonged more appropriately to article 18. He pointed out that the English translation should read 'shall order the return of the child'.

Mr Creswell (Australia) commented that the proposal in Working Document No 37 imposed an obligation to produce a certificate in every case where the return of the child was sought. This could impose an unjustifiable burden in cases where neither party wished documents to be produced, and he suggested that a judicial authority merely be given the power to request a certificate, within the framework of article 14.

The Chairman suggested that Working Document No 37 be considered more fully within the context of article 13. He stressed that this would be without prejudice to its final place in the Convention. This suggestion was accepted, and the Chairman turned to Working Document No 39.

Mr Leal (Canada) explained that if an application had been made to the State of a child's location but the child had thereafter moved out of the jurisdiction, all judicial or administrative proceedings should be stayed in the first State.

Mr Jones (United Kingdom) seconded Mr Leal's proposal. He felt that it should at least be discussed, and agreed that it would be very undesirable for proceedings to be dismissed at that stage. He asked Mr Leal to clarify his proposal.

Mr van Boeschoten (Netherlands) confessed to a certain doubt about Working Document No 39. It was not clear which procedural law would apply with regard to the stay of proceedings. He added that a Dutch court would simply dismiss the action, since the concept of 'staying' proceedings was unknown in Dutch law.

Mr Yadin (Israel) understood Working Document No 39 as offering an alternative to sending an application to a third State and he supported the proposal on this basis. In his view, the application should either be stayed or sent to the State in which the child was located.

M. Barile (Italie) propose de lier le Document de travail No 26 au Document No 39.

Mr Leal (Canada) acknowledged the contents of Working Document No 26, but distinguished them on the ground that they related to a time anterior to judicial proceedings. The Canadian proposal assumed that judicial proceedings had already been begun within the receiving State and that at some stage during the proceedings the child and abductor had moved on to another Member State or to a third State. In reply to Mr van Boeschoten, he stressed that 'stay' did not imply the surrender of jurisdiction, but only that the proceedings would be halted temporarily and remain pending.

Mr Savolainen (Finland) wondered what the words *'all* proceedings' in Working Document No 39 meant.

Mr Leal (Canada) explained that it meant 'all' proceedings in the State concerned *i.e.* the State referred to in the first paragraph of article 11. He was not opposed however to the addition of the words 'dismissed' after 'stay' in Working Document No 39 if that proved to be helpful.

Procès-verbal No 7

Mr Savolainen (Finland) asked if the proceedings concerned only proceedings relating to the return of the child.

The Chairman felt that Mr Savolainen's question raised a drafting point which should go to the Drafting Committee, and asked that the meeting proceed to a vote on Working Document No 39.

Mr Leal (Canada) read out Working Document No 39, as orally amended.

The Chairman proceeded to the vote.

Vote

Working Document No 39, subject to the addition of the words 'or dismiss the application concerning the return of the child' *was accepted by a vote of 10 in favour (Belgium, Canada, Denmark, France, Greece, Norway, Spain, United Kingdom, Venezuela, Yugoslavia), 2 against (Austria, Federal Republic of Germany), with 12 abstentions (Australia, Czechoslovakia, Finland, Israel, Italy, Japan, Luxemburg, Netherlands, Portugal, Sweden, Switzerland, United States).*

The Chairman then asked the delegates to consider Working Document No 25.

Mr Müller-Freienfels (Federal Republic of Germany) explained that the proposal in Working Document No 25 was related to the ideas expressed in article 15 of the draft Convention and to the time-limit imposed in article 11, but felt that it would most appropriately be included in the form of a new paragraph to article 11. It was concerned to attenuate the consequences flowing from the imposition of a short time-limit of one year, as required by article 11, and to underline the Convention's basic opposition to abduction and help ensure its ratification by as many States as possible. His oral proposal that 'two years' be added after the phrase 'the return of the child' in Working Document No 25 would transform the purely declaratory provision in article 11 into a mandatory requirement that the return of the child be ordered after two years had elapsed after the expiration of the time-limit in article 11. Moreover the main ground for refusal of an application would be that the child was now settled in his new environment. In short, he viewed the proposal as a necessary compromise with the short time-limit proposed in article 11, and in this connection referred to article 16 of the first preliminary draft Convention and Working Document No 37 thereon.

M. van Keymeulen (Belgique) s'exprime en faveur de cette proposition; cette dernière donne aux tribunaux la procédure à suivre une fois que le délai de l'article 11 est échu.

M. Barile (Italie) demande à la délégation allemande de lui expliquer l'expression «préjudice disproportionné». Pour M. Barile il ne doit pas y avoir du tout de «préjudice» à l'encontre de l'enfant.

M. Voulgaris (Grèce) se réfère à l'article 15 qui propose une solution beaucoup plus large que celle de la République fédérale d'Allemagne; il n'appuie donc pas la proposition de l'Allemagne.

M. Deschenaux (Suisse) expose les fonctions différentes de l'article 11 et de l'article 15; l'article 15 est préférable et permet d'agir après les délais prévus à l'article 11.

Mr Leal (Canada) asked whether the proposal in Working Document No 25 was intended to replace the proposals contained in article 15.

Mr Müller-Freienfels (Federal Republic of Germany) acknowledged that it would.

Miss Selby (United States) noted a certain amount of confusion in the discussion. She understood article 15 as a facultative provision which expressly did not limit the power of authorities to order the return of a child at a later stage. It did not confer such a power upon them, but merely implied that they could use whatever proceedings or powers they possessed in domestic law. In particular, article 15 did not leave a residual power in judges after the expiration of the time-limits in article 11. The proposals in Working Document No 25 would therefore go beyond what was envisaged in the present text of article 15.

Mr Savolainen (Finland) shared the doubts expressed with regard to Mr Müller-Freienfels's proposal. The adoption of such a provision could lead to there occurring in the requested State the parallel application of provisions in other Conventions concerning the recognition and enforcement of judgments. In this regard, he mentioned article 10 of the Strasbourg Convention. In addition, there might also be proceedings pending before different authorities in the requested State.

Mr van Boeschoten (Netherlands) found it difficult to decide what should be done with Working Document No 25 before article 12 had been discussed. Were the proposal in Working Document No 25 to be adopted, article 12 would have to be re-phrased. Moreover, the German proposal would lead to the overlapping of the grounds of refusal. At present, article 11 was silent on these grounds, which ought to be treated separately and as a whole.

The Chairman noted that Mr Müller-Freienfels had insisted that Working Document No 25 be discussed at this stage.

Mr Jones (United Kingdom) thought that the proposal in Working Document No 25 was best dealt with in the framework of article 15. However, it had always been his view that the English High Court could always enforce a request for the return of a child even after the twelve months' time-limit had expired, without any express provision in the Convention. Besides, the present formulation of Working Document No 25 was ambiguous. In the first place, was it intended that the two year period should start at the time of the wrongful abduction or retention? Secondly, the words 'and his return would cause excessive prejudice' was too vague, and he suggested that the words 'and his return would be contrary to his (*i.e.* the child's) welfare' would be more appropriate. On the whole, however, he found the proposal very difficult to fit into the Convention's framework, but was in favour of a vote on the principles involved.

M. Barbosa (Portugal) s'oppose à la trop grande complication de la Convention; il ne faudrait pas prévoir des délais à trois niveaux: celui de l'article 11, celui de deux ans proposé par la délégation allemande et celui prévu à l'article 15.

The Chairman asked Mr Müller-Freienfels whether he still held the view that his proposal involved the deletion of article 15.

Mr Müller-Freienfels (Federal Republic of Germany) confessed that this had not been his intention, and he expressed his agreement with Miss Selby. He was prepared to withdraw it for the time being and suggested that it be discussed within the framework of article 15.

The Chairman stated that the proposal in Working Document No 25 would be reconsidered during the discussion of

article 15. He then turned to article 12 of the draft Convention and the multitude of Working Documents which contained proposals thereon, *viz.* Nos 4, 35, 21, 12, 10, 19, 31, 27, 40 and 15. Since it was impossible to discuss article 12 within the framework of the Standing Rules of the Conference, he asked that the various issues be separated and discussed in the order presented in article 12 of the draft Convention. The meeting unanimously agreed that this be done. The first issue raised by the Chairman, as regards the existing *chapeau* of article 12, first paragraph, concerned whether there should be a reference to the onus of proof concerning the establishment of grounds of refusal. He referred delegates to the existing text and to Working Documents Nos 16 and 21. He noted, however, that Working Document No 32 made no reference to the onus of proof.

Mr Holub (Czechoslovakia), on a point of order, referred to the 'public policy' reservation contained in Working Document No 36.

The Chairman felt it was inappropriate to consider the proposal in Working Document No 36 within the context of article 12.

Mr Holub (Czechoslovakia) accepted that the discussion of Working Document No 36 should be deferred.

Mr Savolainen (Finland) pointed out that Working Document No 10 in fact proposed no amendments to article 12.

The Chairman invited Mr van Boeschoten to speak to the Netherlands proposal in Working Document No 32.

Mr van Boeschoten (Netherlands) explained that the proposal was based on a provision of the Strasbourg Convention. On the question of onus of proof, he noted that in the Netherlands a court could place the onus wherever it thought appropriate, and he was concerned to avoid the formulation of rules of evidence which would affect internal law. He added that most proceedings in the Netherlands involving the Convention would be summary proceedings or similar proceedings in which courts enjoyed considerable latitude as regards the onus of proof. It was therefore essential that judicial authorities retain this freedom.

Mr Yadin (Israel) was of the opinion that the Convention should not expressly require that the facts in sub-paragraphs *a* and *b* of the first paragraph of article 12 be established by the abductor. The only relevant point was that these facts be established. Thus, the words 'if it is established' should replace the reference to 'the person who has removed or retained the child establishes'.

The Chairman stated that this referred to the next point for discussion and asked delegates to confine themselves to the question of onus of proof.

Mr Savolainen (Finland) expressed his agreement with Mr van Boeschoten.

The Chairman referred to the considerable debate which had taken place on this point at the previous session, and asked whether any delegate opposed the Netherlands proposal.

M. Chatin (France) rappelle les discussions des deux premières réunions au cours desquelles on a proposé de favoriser la victime des voies de fait, en lui accordant une présomption; si on supprime la référence à l'attribution du fardeau de la preuve à l'article 12, le gardien s'en trouvera chargé dans de nombreux cas.
M. Chatin cite ensuite un exemple de la pratique.

Un enfant se rend de la France aux Pays-Bas, à l'occasion de l'exercice du droit de visite et se voit retenu dans ce dernier pays. Le gardien dépose une requête au juge hollandais, à la suite d'un référé. Pour sa défense le parent qui avait retenu l'enfant, invoque la «vie légère» de la mère; le juge s'est prononcé en faveur du renvoi de l'enfant en France sans que la requête n'ait eu à prouver l'exercice de son droit de garde; ce cas est tout à fait particulier car la plupart du temps la mère est appelée à prouver le bon exercice de son droit de garde; M. Chatin veut montrer par là que la suppression de cette disposition mettrait le gardien dans une situation procédurale très difficile.

Le Rapporteur précise qu'on fait peser sur le ravisseur un fardeau de preuve très lourd; il précise que la procédure va se dérouler néanmoins, en général, dans le pays choisi par le ravisseur.

Miss Pripp (Sweden) commented that, from the Swedish point of view, the administrative or judicial authority should be able to take account of any relevant evidence which arose. The presently strong emphasis on the abductor's burden of proof should therefore be toned down.

Mr van Boeschoten (Netherlands) observed that Mr Chatin's comments regarding the fact of how custody was exercised did not directly concern article 12.

The Chairman asked that the meeting proceed to a vote on Mr van Boeschoten's proposal.

Vote

Working Document No 32, to the extent that it implied that no reference to the burden of proof be made in the chapeau *of the first paragraph to article 12 was rejected by a vote of 12 against (Austria, Belgium, Czechoslovakia, France, Federal Republic of Germany, Greece, Italy, Luxemburg, Portugal, Spain, Switzerland, United States), 11 in favour (Australia, Canada, Denmark, Finland, Israel, Japan, Netherlands, Norway, Sweden, United Kingdom, Venezuela), with 1 abstention (Yugoslavia).*

The meeting was closed at 6.05 p.m.

Procès-verbal No 7

Distribués le 14 octobre 1980
Distributed on 14 October 1980

No 41 – Proposition de la délégation française
– Proposal of the French delegation

Article 12, alinéa a

a A l'époque du déplacement ou du non-retour de l'enfant, le demandeur, l'institution ou l'entité qui a le soin de la personne de l'enfant n'exerçait pas effectivement [ou de bonne foi] le droit de garde sur l'enfant, a consenti ou a acquiescé postérieurement à ce déplacement ou ce non-retour.

Article 12, paragraph a

a At the time of the removal or retention of the child, the applicant, institution or other body which had the care of the person of the child was not actually exercising or [was not exercising in good faith] the custody rights, consented to or subsequently acquiesced in the removal or retention.

No 42 – Proposition de la délégation hellénique

*Article 12*b

Biffer: «ou de toute autre manière ne le place dans une situation intolérable»,

et remplacer par: «autre que de nature économique ou éducative».

Séance du mardi 14 octobre 1980 (matin)
Meeting of Tuesday 14 October 1980 (morning)

The meeting was opened at 9.40 a.m. Mr Anton (United Kingdom) was in the Chair. Miss Pérez-Vera (Spain) was Rapporteur.

The Chairman reopened the discussion on article 12. He asked the delegates to consider, within the context of Working Document No 21, whether the onus of proof should be placed on the abductor or, more broadly, on whoever opposed the return of the child.

Mr Jones (United Kingdom) explained that Working Document No 21 sought to take account of the situation whereby the person who sought the child's return was not the person from whom the child had been abducted.

The Chairman noted that this was the same point which Mr Yadin had raised at Monday's meeting. Since the proposal was seconded and met no opposition, he sent it to the Drafting Committee. He then turned to article 12(1)*a* and Working Documents Nos 4, 21, 12 and 16,10 (which really raised a drafting point) and 32.

M. van Keymeulen (Belgique) s'exprime en faveur de la suppression de l'article 12, alinéa *a.* L'utilité de ces dispositions n'apparaît pas clairement. On ne voit pas comment le gardien au bénéfice d'une décision judiciaire, pourrait ne pas être de bonne foi.

The Chairman stated that the Drafting Committee would take account of the points made in Working Document No 4, and referred again to Working Document No 21.

Mr Jones (United Kingdom) indicated that he would withdraw the proposal in Working Document No 21 if the French proposal in Working Document No 41 were accepted. Working Document No 21 was basically directed at the situation in which arguments for the return of a child were used as a bargaining device. For example, it was quite possible that an applicant who had condoned the abduction or retention of the child might wish to indulge in purely tactical manoeuvres in an attempt to extract a favourable financial settlement.

Miss Selby (United States) felt that the present draft of article 12 went too far beyond the particular case envisaged by Mr Jones. In her view, the critical point to be demonstrated in this context was that the *defendant* had in fact exercised the custody rights, not that the applicant had *not* exercised them. It was therefore better to rephrase article 12(1)*a* along the lines suggested in Working Document No 12, to make it clear that the abductor had in fact assumed custody with the consent or acquiescence of the applicant. She noted that the concept of 'actual exercise' now came to the fore as an exception to be proved by the defendant, and she referred to the definition proposed by Working Document No 16.

Mr van Boeschoten (Netherlands) declared that the proposals in Working Document No 32 sought to balance the concerns of States which sought narrower grounds of refusal with those of States seeking wider grounds. The proposal was addressed to the question of the applicant's acquiescence in, or condonation of the abduction or retention, and was based on the understanding that the concept of 'actual exercise' of custody rights had been taken care of in article 3. He added that he would be willing to reconsider the proposal in the light of Working Document No 41.

M. Chatin (France) préfère attendre que la proposition soit présentée par écrit.

The Chairman observed that all Working Documents on this issue dealt explicitly or implicitly with the question whether there should be a reference to 'good faith' or not, and he asked delegates to turn their attention to this issue.

Miss Selby (United States) stated her strong opposition to article 12's containing any reference to 'good faith'. In the United States, this concept related almost exclusively to 'bargaining' situations, and she feared that its inclusion in this Convention would give judges too much discretion to consider almost any point which might arise.

Mr Müller-Freienfels (Federal Republic of Germany) agreed entirely with Miss Selby's statement. 'Good faith' was too vague, and in Germany belonged purely within the context of property law. For these reasons, he considered that it should be deleted from article 12.

Mr van Boeschoten (Netherlands) referred to the inclusion of the phrase 'not acting in good faith' in round brackets in Working Document No 32. He explained that in the Netherlands the concept of good faith belonged to the law of contract and had no real place in family law. It was also unclear what the expression sought to convey, and he was therefore in favour of its deletion. He added that he did not wish to press the point, but asked that examples of its meaning be given in the Report.

M. Espinar (Espagne) pense qu'il est nécessaire de montrer l'adéquation entre l'exercice du droit de garde et les principes qu'inspire le droit de garde lui-même dans chaque droit. La notion de bonne foi permet d'apprécier cette adéquation dans chaque cas d'espèce.

M. Chatin (France) se déclare impressionné par l'intervention américaine. M. Chatin prend l'exemple d'un gardien qui se dissimulerait sur un territoire étranger; en changeant d'identité le gardien empêcherait ainsi l'exercice du droit de visite; il semble que l'exemple de la dissimulation devrait pouvoir trouver une solution à l'article 17, par conséquent, la notion de bonne foi à l'article 12 n'est pas indispensable.

Mr Yadin (Israel) was in favour of retaining the reference to good faith. However, the present wording of article 12(1) was ambiguous, especially in the apparent linking of *a* and *b*. He felt that the requirement of good faith, which was related to the presentation of an application, should be placed in a separate paragraph, so separating it from the issue of 'actual exercise' of custody rights.

M. Voulgaris (Grèce) dit que, bien qu'il comprenne les hésitations des délégations qui voudraient supprimer la référence à la notion de bonne foi, il ne peut pas pour autant s'y rallier; en faisant une analogie entre la possession des droits réels et l'exercice des droits de garde tel qu'il est conçu par le projet de Convention, il trouve que, dans les deux cas, le recours à la notion de bonne foi est nécessaire pour justifier les mesures de protection. M. Voulgaris prend ensuite l'exemple d'une requête déposée après l'échéance du délai de l'article 11 et tombant sous l'article 15; si l'enfant n'est pas encore enraciné dans son nouveau milieu, la bonne ou la mauvaise foi pourrait avoir une importance décisive, même dans le cas où cette notion serait supprimée dans l'article 12.

The Chairman asked that only two other speakers speak on the issue of good faith.

Mr Walsh (Ireland) requested clarification as to whether good faith was required at the time of the abduction or at the time when the application was made to the judicial or administrative authority.

M. Barile (Italie) distingue deux approches, la première analytique (anglo-saxonne) et la seconde synthétique (des pays de droit romain). Il admettrait la proposition américaine si elle se référait aussi à la bonne foi.

The Chairman repeated his observation that all relevant Working Documents, with the exception of Working Document No 12, made some reference to good faith, and that the question also arose concerning the point at which good faith became relevant. He suggested that, for voting purposes, these issues be separated.

Votes

The oral proposal of Israel that a separate paragraph be added to article 12(1), to the effect that the application had not been made in good faith, was rejected by a vote of 14 against (Austria, Canada, Denmark, Finland, France, Federal Republic of Germany, Luxemburg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, United States), 4 in favour (Ireland, Israel, Japan, Venezuela), with 6 abstentions (Australia, Belgium, Greece, Italy, United Kingdom, Yugoslavia).

Working Document No 12, in so far as it proposed the deletion of any reference to 'good faith' *from article 12(1)*a, *was approved by a vote of 14 in favour (Australia, Austria, Belgium, Canada, Denmark, Finland, France, Federal Republic of Germany, Ireland, Netherlands, Norway, Sweden, Switzerland, United States), 7 against (Greece, Israel, Italy, Luxemburg, Portugal, Venezuela, Yugoslavia), with 3 abstentions (Japan, Spain, United Kingdom).*

Mr Leal (Canada), explaining his vote in favour of the deletion of a reference to 'good faith', emphasised that the Canadian delegation had no wish to promote bad faith. He pointed out to the meeting that the question of bad faith could still be investigated during the final disposition of a case in the State of a child's habitual residence.

Mr Savolainen (Finland) explained that he had voted in favour of deletion, since a reference to 'good faith' would cause difficulties in Finland. However, he noted that deletion would restrict the discretionary powers of judges, and could create pressures to make amendments in other parts of the Convention.

M. Chatin (France) explique que le Document de travail No 41 a pour but d'éclaircir, à l'intention des tribunaux, la notion «d'exercice effectif de la garde» notamment pour les cas de faux déplacements.

Mr Jones (United Kingdom) noted that the words 'or had' should be added after the words 'custody rights', in the English text of Working Document No 41.

The Chairman directed the attention of the meeting to the question whether article 12(1)*a* should contain the words 'was not actually exercising the custody rights'.

Miss Selby (United States) conceded that she was not opposed to such a reference, but asked that it be defined.

M. van Keymeulen (Belgique) pense qu'il ne faut pas insérer le mot «effectivement» aux articles 3 et 12; cumulativement, si on le maintient à l'article 3, il faut le supprimer à l'article 12; dans le cas contraire, M. van Keymeulen voit l'occasion, pour le ravisseur, d'empêcher plus facilement le retour.

M. Espinar (Espagne) reprenant la remarque de la délégation belge, distingue les fonctions différentes des articles 3 et 12; il ne serait donc pas superflu de maintenir le mot «effectivement» dans les deux articles.

The Chairman asked that two other delegates speak on the issue.

M. Chatin (France) se déclare favorable au maintien du terme «effectivement» dans cette disposition car il montre clairement quelle preuve le ravisseur doit rapporter, à savoir la preuve que la garde n'était pas concrètement et réellement exercée. La précision établie par la proposition du Royaume-Uni a enlevé toute équivoque sur ce point.

The Chairman asked that a vote be taken concerning the proposed deletion of a reference to the actual exercise of custody rights.

Vote

Working Documents Nos 21 and 32, in so far as they implied the deletion of any reference in article 12(1)a to the actual exercise of custody rights (the definition of 'actual exercise' *being put aside for the moment), was rejected by a vote of 15 against (Canada, Denmark, France, Greece, Ireland, Italy, Luxemburg, Norway, Portugal, Spain, Switzerland, United Kingdom, United States, Venezuela, Yugoslavia), 9 in favour (Australia, Austria, Belgium, Czechoslovakia, Federal Republic of Germany, Israel, Japan, Netherlands, Sweden), with 1 abstention (Finland).*

The Chairman then turned to the implicit suggestion in Working Document No 16 that the Convention contain a definition of the 'actual exercise of custody rights'.

Miss Selby (United States) described the proposal in Working Document No 16 as containing a 'narrowing' definition. It sought to make clear that 'actual exercise' became relevant at the moment when the applicant gave custody to the *abductor.* Thus, the delegation of custody rights to other persons was not covered by the definition.

Mr Leal (Canada) seconded the United States proposal in Working Document No 16.

Mr Hjorth (Denmark) observed that other cases could arise in which the custodial parent did not actually exercise custody rights. In his view, the definition should cover all cases in which the legal custodian had not in fact exercised his rights of custody.

Mr Creswell (Australia) felt that the definition proposed could possibly clash with the definition of wrongful removal presented in article 3. The legal rights referred to in article 3 could include rights acquired by operation of law and rights held jointly by both parents. In the latter case, he wondered how one of the two custodians could be regarded as *actually* exercising rights of custody.

Mr Jones (United Kingdom) admitted that he was in favour of some attempt at defining the concept of 'actual exercise' of custody rights, since the words 'actually exercised' were ambiguous. The main distinction to be drawn should be between the voluntary and involuntary failure to exercise such rights. For example, the situation where a parent was unable to exercise custody rights due to hospitalization or illness should be clearly distinguished from that in which the parent is wholly uninterested in the child. Since the present text did not make this distinction clear, some attempt at a partial definition should be made.

M. Voulgaris (Grèce) se demande s'il faut définir ce qu'est l'exercice «effectif»; cette notion semble assez claire en soi; l'exercice peut se baser sur une disposition légale, un jugement ou un accord exprès ou tacite; il serait très difficile et dangereux de définir l'exercice effectif.

M. Deschenaux (Suisse) émet quelques réserves sur la proposition de définir de façon générale l'exercice du droit de garde; il rappelle à cet égard le Document de travail No 6 de la délégation espagnole.

M. Batiffol (France) s'associe aux deux précédentes déclarations sur les difficultés d'une définition de la garde effective qui couvre la variété des situations qui ont été évoquées; il met en évidence l'interprétation différente que peuvent avoir les Etats de la notion d'exercice du droit de garde; il cite l'exemple de l'abandon volontaire: certains Etats considèrent que le gardien, qui remet l'enfant à des proches, perd la garde effective; d'autres considèrent qu'il continue à l'exercer immédiatement. Une situation semblable est envisageable lorsque le gardien est hospitalisé et abandonne involontairement l'enfant. Certains Etats considéreront que le gardien perd la garde effective d'autres qu'il l'exerce indirectement. M. Batiffol propose de s'en remettre à la sagesse des juges.

Miss Selby (United States) was concerned that the Convention should limit the discretion of judges within the context of article 12, and should elucidate existing ambiguities. It was therefore necessary to attempt a definition of 'actual exercise'. There were a variety of cases in which a parent effectively failed to exercise custody rights. For example, the custodian might leave a child for a long time with its grandparents, from whom the child was then abducted. Equally, the custodial parent might keep the child locked in a room for long periods. In neither case was custody being properly or effectively exercised. At the same time, the fact of improper or non-existent exercise did not give the other parent the right to abduct the child. However, under the existing text, it was not clear what a judge in the State of refuge might decide in such circumstances, and the point therefore needed clarification. She pointed out also that the judge who would be asked to apply the exceptions in article 12 would not be the only judge to consider the equities of the situation, since the Convention envisaged that the courts of the State of habitual residence of the child should finally deal with the matter.

The Chairman asked that the meeting proceed to a vote.

Vote

Working Document No 16 was rejected by a vote of 14 against (Austria, Denmark, Finland, France, Greece, Italy, Japan, Luxemburg, Netherlands, Norway, Portugal, Sweden, Switzerland, Venezuela), 9 in favour (Belgium, Canada, Czechoslovakia, Federal Republic of Germany, Ireland, Israel, Spain, United Kingdom, United States), with 2 abstentions (Australia, Yugoslavia).

The Chairman turned to the proposal in Working Document No 4 that article 12(1)*a* be deleted.

M. van Keymeulen (Belgique) annonce que la délégation

belge n'insiste pas dans sa demande de la suppression de l'article 12(1)*a*.

The Chairman then referred to the proposals in Working Documents Nos 12, 21, 32 and 41 that an addition be made to article 11(1)*a*. In particular, he asked delegates to consider whether the addition be in the form proposed in Working Document No 12, or in the form proposed by the other three Working Documents.

Miss Selby (United States) intimated that she would withdraw Working Document No 12 in favour of the proposal in Working Document No 41, provided the latter was clarified.

The Chairman asked the United Kingdom and Netherlands delegations if they were prepared to withdraw their proposals in favour of Working Document No 41.

Mr van Boeschoten (Netherlands) assented, subject to the matter of drafting. He was concerned to ensure that article 12(1)*a* should cover cases in which actual custody was exercised by the custodian at the time of the abduction, but in which the custodian, for one reason or another, thereafter acquiesced in or condoned the abduction or retention.

The Chairman noted that the essence of the proposal was to add to article 12(1)*a* a reference to the fact that the custodian consented to, or subsequently acquiesced in, the removal or retention of the child.

Mr Jones (United Kingdom) described Working Document No 41 as having the same underlying intent as Working Documents Nos 21 and 32. The reference to the issue of consent or acquiescence was much narrower than the original reference to 'good faith' in article 12. However, it was necessary to have such a provision so as to avoid giving an opportunity for parties to indulge in harassing tactics.

Le Rapporteur pose une question à la délégation française; il aimerait connaître le but de la proposition française: il croit comprendre qu'il s'agit du cas d'un gardien ayant consenti au déplacement qui n'est dès lors pas d'emblée considéré comme illicite.

The Chairman felt that the point made by the Rapporteur could be dealt with in the Report.

Mr Yadin (Israel), on a point of drafting, observed that the issue of acquiescence and consent should not relate to the time of removal or retention of a child, as was stated by the present text of the proposal.

M. Chatin (France) précise que sa proposition reprend celles du Royaume-Uni et des Pays-Bas; elle tend à montrer que la Convention ne s'applique pas à des cas de «marchandage».

The Chairman asked that the meeting proceed to a vote on Working Document No 41.

Vote

Working Document No 41, subject to the deletion therefrom of the reference to 'good faith' *was approved unanimously, with four delegations abstaining.*

The Chairman referred Working Document No 41 to the Drafting Committee and noted that certain references to it might be contained in the Report. With reference to Working Document No 35, he suggested that it be discussed on the basis that a distinction should be drawn in article 12(1)*a* between, on the one hand, the situation where an anterior decision had been rendered in the State of the child's habitual residence and, on the other hand, the situation where no anterior decision had been issued. He noted that Working Document No 35 proposed that, in the former case, the prospective danger to the child should be assessed in accordance with the law of the State of its habitual residence. In this context, reference should also be made to Working Document No 12.

M. van Keymeulen (Belgique) s'oppose au texte de l'article 12, alinéa 1*b* pour trois raisons: premièrement cette disposition touche dans une grande mesure au fond du droit de garde; en second lieu elle donne un énorme pouvoir d'appréciation aux autorités judiciaires de l'Etat requis dont la compétence internationale dépend de la volonté du ravisseur. Elle présente enfin le danger d'être utilisée à des fins purement dilatoires: enquête, expertise, contre-expertise, etc., qui vont retarder le retour de l'enfant.
Pour la délégation belge, il faut que le principe de l'article 3 soit mieux respecté; on ne conçoit pas en effet qu'une autorité confie la garde d'un enfant là où il est exposé à un danger physique ou psychique. Ce n'est que lorsque les circonstances ont changé qu'on peut invoquer l'argument que le jugement ou l'accord ne correspondent plus à la réalité.
Ensuite, il est assez curieux de faire dépendre le retour de l'enfant d'un juge absolument étranger au lieu où l'enfant réside et on ne saurait s'exposer à ce danger sans s'en remettre aux autorités du lieu où l'enfant a été enlevé. M. van Keymeulen propose le texte suivant: «établir que selon les autorités compétentes de l'Etat où l'enfant a été enlevé, il existe une circonstance nouvelle». Cette proposition vaut pour les décisions judiciaires et les accords en vigueur dans l'Etat d'origine, ainsi que pour les cas où l'un des parents exerçait seul et de plein droit la garde.
Le texte actuel semble convenir aux cas où les deux parents exerçaient le droit de garde et à celui où l'enfant a été volontairement confié à une institution.

The Chairman declared that the proposal in Working Document No 35 fell, due to lack of support. He then turned to the United States proposal in Working Document No 12 to the effect that the judicial or administrative authority of the child's State of refuge should return the child unless allegations of prospective neglect or maltreatment were supported by evidence supplied by the State of the child's habitual residence.

Miss Selby (United States) explained that the proposal in Working Document No 12 was based on the assumption that the abductor would approach the authority most favourably disposed towards his case. The evidence which the abductor adduced would probably be of a second-hand and hearsay nature concerning, for example, the character of the other parent. It was therefore necessary that some hard evidence be extracted from the State of the child's habitual residence. This need not be *officially* supplied, but the Convention must give some indication to a court that it ought not to proceed to dispose of the case on the basis of the incomplete and partial evidence provided by the abductor.

The Chairman commented that the issue concerned whether or not evidence from the State of origin of the child should be produced. He noted that Mr Chatin seconded the proposal of the United States, and that a number of delegates indicated their opposition.

Mr Jones (United Kingdom) was opposed to the proposal in Working Document No 12. A court should not be constrained from having regard to particular evidence concerning prospective harm to the child, on the basis of its provenance. He pointed out that article 12 was based on the presumption that the return of a child should take place and

that substantial and credible evidence would have to be adduced before that presumption could be displaced. In his view, the precise source from which evidence emanated was irrelevant except as regards the issue of credibility.

M. Chatin (France) remercie la délégation américaine d'avoir posé le problème; il est important de se rendre compte que le prétendu ravisseur tentera d'assombrir la situation antérieure de l'enfant pour justifier ses voies de fait. En général, la mère présentera le père comme un alcoolique et, inversement, le père, la mère comme menant une vie légère. Pour le soutien de ces allégations, les parties apporteront des preuves matérielles qu'on ne peut trouver que dans le pays d'origine; la proposition des Etats-Unis est parfaitement logique.

Mr Savolainen (Finland) sought to make three points in particular. Firstly, he reiterated his earlier observation that the Hague Conference, as a matter of principle, did not attempt to harmonise the internal laws of evidence of Member States. Secondly, Finland would have difficulty in accepting any provision which served to restrict the wide discretionary powers vested in Finnish judges. Thirdly, he was unable to approve of the suggestion, implicit in the United States proposal, that certain relevant and indeed conclusive evidence should be disregarded merely because it failed to meet certain other requirements.

M. Espinar (Espagne) pose une question à la délégation des Etats-Unis; il se demande s'il y a une relation entre le dernier alinéa de l'article 12 et la proposition de la délégation américaine. S'il y a identité de ces deux dispositions, M. Espinar s'oppose à la proposition américaine.

The Chairman noted that Mr Espinar had raised a very important point, and asked delegates to consider the last paragraph of article 12 within the context of the points presently under discussion. Since there was no opposition to the proposal of the United States that the words 'or other competent authority' should be added to the final paragraph of article 12, he sent the proposal to the Drafting Committee. He then requested delegates to debate whether the last paragraph of article 12 of the draft Convention should be deleted.

M. Barile (Italie) se déclare opposé à restreindre la preuve selon l'idée de la proposition américaine. La dernière partie de l'article 12 doit être maintenue.

The Chairman announced that, since no written proposal had been presented for the deletion of the last paragraph of article 12, it was approved subject to the amendment proposed by the United States in Working Document No 12, and would be sent to the Drafting Committee. He then redirected the attention of the delegates to the proposal regarding evidential requirements, and asked that a vote be taken. In this regard, he stressed that evidential matters should not be included in the Convention, and that delegates should not strive to attain some elusive ideal in formulating their proposals.

Vote

*Working Document No 12, in so far as it proposed a requirement that evidence be supplied by the State of the child's habitual residence concerning the exceptions contained in article 12(1)*b, *was rejected by a vote of 19 against (Australia, Austria, Canada, Czechoslovakia, Denmark, Finland, Federal Republic of Germany, Ireland, Israel, Italy, Japan, Netherlands, Norway, Portugal, Spain, Sweden, United Kingdom, Venezuela, Yugoslavia), 5 in favour (Belgium, Egypt, Luxemburg, Switzerland, United States), with 2 abstentions (France, Greece).*

The Chairman then referred to article 12(1)*b* and the proposals therefore in Working Documents Nos 12 and 35.

M. van Keymeulen (Belgique) n'insiste pas sur le remplacement des termes «danger physique ou psychologique» par «danger grave» et retire sa proposition.

Miss Selby (United States) expressed her concern that courts should not use the provisions in article 12(1)*b* as a means of entering into the merits of a custody dispute. At present, most States in the United States were increasingly ordering the return of children without an investigation of the merits, and the existing text of article 12(1)*b* of the draft Convention could reverse this trend by its implicit invitation to courts to consider a multitude of points. Thus, a narrower formulation of the allowable exceptions was presented by Working Document No 12, which sought to make the provisions of article 12(1)*b* as clear and as narrow as possible, so as to deter abductions.

Mr Yadin (Israel) felt unable to agree with the United States proposal, which was too specific and left courts with insufficient discretion. However, he also found the present text in the draft Convention to be defective, since it could be read as implying that physical or psychological harm did not amount to an 'intolerable situation' for the child. In his view, a reference purely to 'physical and psychological harm' was sufficient.

M. Voulgaris (Grèce) exprime sa crainte que cette proposition soit trop restrictive et exclue de nombreuses situations; il prend l'exemple d'un parent qui aurait une maladie contagieuse; la proposition des Etats-Unis supprimant le terme «physique» n'engloberait pas une telle situation.

M. Chatin (France) comprend les inquiétudes des Etats-Unis à propos des termes «physique ou psychologique»; en effet, il sera fréquent et aisé de trouver un psychologue, dans le pays où l'enfant a été enlevé, qui prétendra que le retour de l'enfant dans son pays d'origine s'opposerait à son intérêt; la proposition américaine tend à éviter de tels abus.

The Chairman stressed that it was necessary to proceed on the basis of *written* proposals.

Mr Holub (Czechoslovakia), supporting the United States proposal in Working Document No 12, commented that it stated very clearly that 'economic or educational disadvantages' should not be a ground for refusing to return a child.

Mr Müller-Freienfels (Federal Republic of Germany) found himself in general agreement with the United States proposal. He noted that it was often easy to 'prove' psychological harm with the help of doctors, so it was therefore essential to narrow the grounds of exception available under article 12(1)*b*.

Mr Savolainen (Finland) described the existing text of article 12(1)*b* as merely a starting point, and he was in favour of retaining the present wording. However, he was to some extent in favour of expressly excluding economic or educational disadvantages as a ground of refusal.

Mr Creswell (Australia) admitted that the opinions of psychologists or psychiatrists could often be obtained in order to show that a child should stay in the country of refuge, but felt that insufficient attention had been paid to the opening words of article 12(1)*b* which required the establishment of a 'substantial risk' that the child would be exposed to harm.

Le Rapporteur pose une question à la délégation américaine; cette dernière a-t-elle retiré le terme «abus»? Si tel était le cas, la formule en deviendrait beaucoup plus claire.

Mr Jones (United Kingdom), expressing opposition to the United States proposal, commented that he preferred the existing formulation in article 12(1)*b*, which he regarded as more precise and satisfactory. He completely agreed (as had the delegates at the meetings in November 1979) that the mere existence of 'economic or educational disadvantages' should not by itself be a ground for refusing to return a child. However, he failed to see how the existing article 12(1)*b* could be construed as permitting such grounds of refusal, so that in his view their explicit exclusion from the grounds on which a refusal could be based was not necessary. He reminded delegates that a wide variety of terms had been discussed during the second reunion which had concluded that the formulation in the draft Convention was the best that could be achieved. Moreover, it was necessary to add the words 'or otherwise place the child in an intolerable situation' since there were many situations not covered by the concept of 'physical and psychological harm'. For example, where one spouse was subject to threats and violence at the hands of the other and forced to flee the matrimonial home, it could be argued that the child suffered no physical or psychological harm, although it was clearly exposed to an intolerable situation. The present text of article 12(1)*b* should therefore be accepted.

M. El-Mejboud (Maroc) propose d'approfondir la notion de «situation intolérable» qui, selon lui, est trop large et permet des interprétations divergentes entre les Etats.

Mr Leal (Canada) expressed his support for the existing article 12(1)*b*, especially with regard to its reference to 'physical and psychological harm', which was more subjective in its terms vis-à-vis the child than was the United States proposal. He suggested, however, that the Drafting Committee should look again at its precise formulation. As for Mr Jones's example, he felt that the meeting should not concern itself unduly with such situations. Social workers tended to take different views at different times concerning the rights and wrongs in these matters.

Mr Walsh (Ireland) supported the United States proposal in Working Document No 12. He was concerned to ensure that a refusal to return a child should be an exceptional occurrence and based only on very narrow grounds. The present formulation of article 12(1)*b* was too wide and could effectively create a form of extra-territorial jurisdiction which would enable a court to deal with questions which were really for the State of origin to decide. It also took insufficient account of the different social and cultural values which existed between different Member States.

Miss Selby (United States) wished to ensure that the Convention did not encourage courts to substitute their own judgment for that of the authorities in the State of the child's habitual residence. Since this Convention was basically designed to prevent abductions, greater precision was required concerning the grounds of exception permitted under article 12. She agreed with Mr Voulgaris and Mr Yadin that the maltreatment or harm which occurred might not be caused by the parent, and that the concept of psychological harm should be covered. However, the grounds of exception should be limited and, in particular, economic or educational disadvantages excluded, so that a court's discretion to investigate the merits was extremely circumscribed. Hence, the United States proposal also suggested that the words 'severe conditions' be added to article 12(1)*b*. In short, within the context of article 12, the Convention should make explicit what had previously remained implicit.

The Chairman noted that Working Document No 42 could require the return of a child to a destitute parent or, for example, to a parent who belonged to a cult which did not believe in education, so that a child would thereby be deprived of the advantages normally enjoyed by children. He was therefore unhappy about the possible complications implicit in Working Document No 42.

M. Voulgaris (Grèce) explique la proposition hellénique. Le premier but de celle-ci était de faciliter les débats; de plus, l'expression «situation intolérable» ferait double emploi avec les termes «danger physique ou psychologique»; le remplacement de ces expressions par «autre que de nature économique ou éducative» a des effets très importants.
Cet amendement permet d'exclure le terme «éducatif» et d'éviter ainsi qu'un parent ne se réclame de considérations religieuses pour refuser le retour. En second lieu, il offre la possibilité de supprimer les arguments d'ordre «économique» pour ne pas donner l'avantage à la partie la plus riche: si un problème d'ordre financier intervient, les conventions concernant «l'obligation d'entretien» pourront pallier à une carence financière du parent qui a le droit à garde de l'enfant.

Mr Yadin (Israel) stated that he was in favour of the deletion proposed in Working Document No 42, but opposed to its suggested substitution.

The Chairman reminded delegates that their objective was to draft a Convention which could be signed by as many States as possible. The present formulation in article 12(1)*b* was in the nature of a compromise, and he recalled that the reference to an 'intolerable situation' had been proposed by the United States delegation during the meetings in November 1979. He therefore urged delegates to direct their attention to considering provisions which would be acceptable to most States. He then asked that a vote be taken on Working Document No 12 and the exceptions it proposed should be placed within article 12(1)*b*. He confirmed that the United States delegation had no objection to the inclusion of language which would embrace a grave physical danger not arising from the deliberate ill-treatment of a child, and emphasised that the words between the first and second commas of the second proposal in Working Document No 12 were deleted.

Miss Selby (United States) intervened to state that the word 'abuse' should also be deleted.

The Chairman asked that the meeting vote on the proposals in Working Documents Nos 12 and 42.

Votes

*Working Document No 12, in so far as it proposed an alteration to article 12(1)*b *and subject to the deletion of the words* 'supported by the evidence which is supplied by the Central Authority of the State of origin or other competent authorities or persons of that State' *and* 'or abuse', *was rejected by a vote of 12 against (Denmark, Finland, Greece, Israel, Italy, Netherlands, Norway, Portugal, Sweden, United Kingdom, Venezuela, Yugoslavia), 10 in favour (Austria, Belgium, Czechoslovakia, Egypt, France, Federal Republic of Germany, Ireland, Luxemburg, Spain, United States), with 4 abstentions (Australia, Canada, Japan, Switzerland).*

Working Document No 42 was rejected by a vote of 14 against (Canada, Denmark, Egypt, Finland, Italy, Japan, Luxemburg, Netherlands, Norway, Portugal, Sweden, United

Kingdom, Venezuela, Yugoslavia), 6 in favour (Austria, Czechoslovakia, Federal Republic of Germany, Greece, Ireland, Switzerland), with 6 abstentions (Australia, Belgium, France, Israel, Spain, United States).

The meeting was closed at 12.35 p.m.

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Séance du mercredi 15 octobre 1980 (matin)
Meeting of Wednesday 15 October 1980 (morning)

The meeting was opened at 10.05 a.m. Mr Anton (United Kingdom) was in the Chair. Miss Pérez-Vera (Spain) was Rapporteur.

The Chairman directed the attention of delegates to the Canadian proposal in Working Document No 40.

Mr Leal (Canada) expressed his desire to withdraw Working Document No 40, in view of the amendments accepted at the previous meeting.

The Chairman then turned to the Danish proposal in Working Document No 31. He asked that it be discussed along with the proposal in Working Document No 32, article X*a*.

Mr Hjorth (Denmark) explained that the proposal in Working Document No 31 for the addition of a new subparagraph *c* was necessary in the absence of any reservation clause concerning the points raised therein. However, if it were agreed that a reservation clause be included, he would be prepared to withdraw the suggestion in Working Document No 31.

He distinguished Working Document No 31 from Working Document No 32, since the latter was taken directly from the text of the Strasbourg Convention. He noted that the Strasbourg Convention concerned the recognition and enforcement of judgments, whereas this Convention sought the immediate return of an abducted child. He emphasised that the proposed additional clause should operate in only the most exceptional circumstances. However, the fact had to be faced that situations would arise in which courts would be unable to return a child *e.g.* where a prior decision on custody in the State of the child's habitual residence was not based on the principle of the child's welfare. In this regard, he referred to States which required that custody always be given to one parent or the other, and he stated that Danish courts would be unable to return a child to a State which had based a prior custody order on such a principle. It was also necessary to ensure that, in cases of joint custody and those in which no prior decision had been taken, any further decision in the State of the child's habitual residence would be based upon the principle of the welfare of the child.

Mr Dyer (First Secretary at the Permanent Bureau) referred to the established tendency of the Hague Conference to reduce the number of reservations, since they broke up the uniformity of a Convention and complicated its future application. The best Convention therefore was one without reservations or at least with as few reservations as possible. In addition, the text should be relatively uncomplicated, and he suggested that the broad support which the draft Convention enjoyed was due in large part to its clean and uncomplicated wording. He therefore asked delegates to limit any reservations to the minimum.

Mr Walsh (Ireland) commented that the issue of reservations raised a very important point. In Ireland, the constitution contained certain provisions relating to family life. On the one hand, the Irish Parliament had to sanction treaty provisions before they became part of the law of the land, while on the other hand, such laws as were passed must not breach the fundamental provisions of the Constitution. Saving clauses were therefore an inescapable part of any Convention to which Ireland could be a part. In this connection, he gave as an example the situation of an Irish child, who was abducted from its grandparent in America, and taken to its parents who were both resident in Ireland. Since constitutional protections extended both to the parent and to the child, some reservation clauses concerning the fundamental principles of law were necessary.

The Chairman agreed that this was a very important issue. He suggested to Mr Hjorth that the proposal in Working Document No 31 be discussed first as a substantive addition to article 12(1), and that it be considered as a reservation only in the event that it was rejected as a substantive textual addition by the delegates. Mr Hjorth agreed that this be done.

M. Espinar (Espagne) pense que sa délégation ne peut prendre une décision avant qu'on ait abordé les articles 13 et 14; il propose de discuter la question de l'ordre public plus tard.

M. Barile (Italie) se déclare, en principe, d'accord avec le Danemark, mais s'oppose aux réserves. Il demande si sa proposition prévue au Document de travail No 36 doit être présentée maintenant.

The Chairman felt that Mr Barile's proposal should be discussed immediately after Working Document No 31. He noted that Mr Holub had made the same proposal orally, and that it would be appropriate to discuss the inclusion of a simple policy reservation later.

Mr van Boeschoten (Netherlands) explained that the reservation proposed in Working Document No 32 should not be understood as reflecting any desire for reservations on the part of the Netherlands. He reiterated the view of the Netherlands delegation that there be narrow grounds of refusal, with no public policy clause and no reservations. Nevertheless, since there existed a wide gap between delegations which favoured 'narrow' grounds of refusal and those which favoured 'wide' grounds, he felt that it might be useful to offer such reservations as a basis for discussion. As regards the precise wording of a public policy clause, he preferred that contained in Working Document No 31.

Miss Selby (United States) felt that a certain amount of confusion existed concerning the relative breadth and scope of the phrases 'fundamental principles of the law relating to the family' and 'public policy' respectively. She admitted that circumstances arose in which a requested court would find the return of a child to be contrary to its whole legal orientation. In addition constitutional questions also arose in the United States. Nevertheless, it had to be decided exactly how exceptional and fundamental such circumstances were. The words 'relating to the family and children in the State addressed', contained in Working Document No 31, were, in her view, both superfluous and disturbing. They were superfluous in that fundamental principles relevant to the return of a child would inevitably relate to the 'family'; they were dangerous because they referred to principles (*e.g.* State laws concerning the family) which were much less fundamental than constitutional provisions, with the result that the exception could be used with regard to questions which did not assume sufficient constitutional significance.
With regard to the example given by Mr Hjorth, where the law of a State required that custody of a child be given always to the father, she felt that this would be most exceptional. If it were not, such a State should be excluded from the Convention. She added that, although delegates sought the widest possible acceptance of the Convention, the Convention should not be an empty shell, and its effectiveness should not be sacrificed to the desire to embrace as many States as possible.

M. Chatin (France) reprend la proposition d'introduire une disposition générale sur l'ordre public. Il considère que cette disposition trouverait sa place dans une convention qui traiterait de la loi applicable ou de la reconnaissance des décisions judiciaires; mais la présente Convention ne concerne ni l'un ni l'autre de ces cas: l'objectif primordial qui nous préoccupe est d'empêcher les déplacements illicites basés sur des voies de fait; le kidnappeur agit soit par fraude soit par violence et il faut éviter à tout prix de favoriser ses agissements.
Ni la fraude ni la violence ne peuvent être génératrices de droits et nul ne doit pouvoir se faire justice à lui-même; la disposition proposée reviendrait à reconnaître les déplacements illicites et, par-là même, la violence.
La France aurait de la peine à ratifier une Convention qui tenterait de justifier les voies de fait.
M. Chatin prend ensuite les exemples extrêmes auxquels une telle proposition pourrait aboutir: notamment le refus du droit de visite au parent victime de l'enlèvement; l'octroi d'une pension alimentaire à celui qui aurait enlevé l'enfant.

The Chairman acknowledged that it was not really possible to disengage the general 'public policy' reservation from the text of Working Document No 31. However, he asked the delegates to consider first whether a public policy clause should be included in the Convention.

M. Barile (Italie) rappelle que l'exception d'ordre public est contenue dans quelques Conventions de La Haye (voir: article 16, Convention en matière de protection des mineurs; article 15, Convention en matière d'adoption). En outre, elle serait reconnue implicitement par les Etats ou alors ces derniers auraient de la peine à accepter cette Convention.
L'exception d'ordre public proposée par l'Italie est plus large que celle proposée par le Danemark; elle concerne les principes fondamentaux d'un ordre juridique et non pas seulement ceux concernant le droit de famille. Il est inconcevable qu'une Convention puisse contraindre les Etats à mettre à l'écart leurs dispositions fondamentales.

Mr Holub (Czechoslovakia) expressed his full agreement with Mr Barile. He felt that a public policy clause would rarely be invoked, and added that his delegation found itself most favourably disposed towards Working Document No 36. By contrast, the proposal in Working Document No 31 put forward no reason for the refusal to return a child, while that contained in Working Document No 32 involved reservations. In his view, only an ordinary 'public policy' clause should be introduced into the Convention, and there should be no reservations.

Le Rapporteur considère que, si le juge a toute liberté de poser des exceptions à l'application de la Convention, on peut tout aussi bien exclure toutes les dispositions de cette dernière. En effet, par ce biais, dans la pratique, la portée de la Convention pourrait être réduite à celle d'une recommandation.
La présente Convention tend uniquement à permettre le retour de l'enfant et ne concerne pas la loi applicable ou la reconnaissance des décisions judiciaires; donc, il convient de renoncer à prévoir l'exception d'ordre public.

M. Barile (Italie) précise que l'Etat italien applique toujours, en toute bonne foi, les conventions internationales et qu'il n'oppose jamais, en principe, la limite de l'ordre public. Il ajoute que la clause de l'ordre public (Doc. trav. No 36) concerne cette Convention dans son entier, y compris le droit de visite, et non seulement le retour de l'enfant.

Mr Yadin (Israel) was opposed to the proposal in Working Document No 31, which he felt would 'tone down' the Convention. Nevertheless, he was in favour of the proposal in Working Document No 31 being included in a reservation clause. While the ideal Convention might contain no reservation clauses, reality made it inevitable that they occur. The meeting should not sacrifice its aim of involving as many States as possible in the operation of the Convention for the sake of achieving a Convention which contained no reservations.
Mr Yadin also referred to the proposal on article X*d* of Working Document No 32 and suggested that it alone be placed in the reservation clause. Since the best interests of the child were the paramount consideration, he could not conceive how the Convention would fail to mention them at some point. He added that the inclusion of such a provision in a reservation clause would greatly facilitate the signature of the Convention by Israel.

M. Deschenaux (Suisse) appuie les délégations qui se sont opposées à l'insertion de la clause de l'ordre public dans la Convention; la délégation suisse est venue pour signer une Convention qui, dans son projet, ne contenait pas une clause aussi restrictive que celle de l'ordre public. L'article 12 semble suffisant pour permettre au juge de renvoyer l'enfant après un examen objectif du problème. L'article 16 vient compléter cette dernière disposition et prévoit qu'une décision sur le retour de l'enfant ne préjuge pas du fond du droit de garde.

M. Espinar (Espagne) ne voit pas la voie dans laquelle on

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pourrait faire jouer l'exception d'ordre public dans une Convention où l'on ne considère qu'une situation de *fait*. Il n'est pas possible de repousser une constatation concrète des faits en soutenant que cette dernière est incompatible avec l'ordre public; en admettant cette dernière réserve, on devrait complètement modifier les dispositions précédentes.

M. El-Mejboud (Maroc) est favorable à une réserve de l'ordre public car dans son pays la garde est toujours confiée à la mère, une décision octroyant l'exercice du droit de garde au père serait contraire à l'ordre public du Royaume du Maroc.

The Chairman asked that delegates consider Working Document No 31 and the inclusion of a public policy clause simultaneously.

M. Schwind (Autriche) distingue les deux aspects primordiaux de la Convention: la protection du droit de garde pour le parent et la protection de l'enfant. Si ces deux aspects coïncident, les problèmes sont résolus; parfois, cependant, il est difficile de tracer, avec exactitude, les limites entre ces deux intérêts; une formule assez souple est impossible à trouver; l'ordre public vient apporter une solution pratique qui a été d'ailleurs adoptée dans toutes les Conventions de La Haye.

Mr Dyer (First Secretary at the Permanent Bureau) replying to Mr Schwind, stressed that the Secretariat was in principle opposed to reservations, and accepted them reluctantly. He referred to the meetings of the Special Commission in November 1979, which had investigated the public policy question at great length, and had concluded that the Convention should not contain a general public policy clause.

M. Voulgaris (Grèce) se rallie à la proposition visant à refuser d'insérer une réserve de l'ordre public et offre un argument supplémentaire; la variété des législations offre, au kidnappeur, la faculté de se réfugier dans l'Etat qui le protège le mieux. Reconnaître l'exception d'ordre public reviendrait à accepter souvent une telle situation. La présente Convention se doit d'empêcher que, pour des raisons d'ordre public, l'on refuse d'appliquer le droit d'un Etat plus favorable à l'intérêt de l'enfant.

Mr Jones (United Kingdom) pronounced himself to be in favour of the proposal in Working Document No 31, but intimated that he was content that it be contained in a reservation clause. In his view, it was essential that as many States as possible ratify the Convention. He noted that at least three countries, *i.e.* Ireland, Denmark and Morocco, had indicated their inability to ratify unless either the proposal in Working Document No 31 or a general public policy clause were included, either within the body of the Convention or as a reservation. He therefore hoped that even States which objected in principle to such an exception accept a reservation power so as to allow others to participate in the Convention's operation. He added that the failure of a number of States to ratify the Convention would be much more injurious to the interests of children than anything likely to result from the insertion of reservations.
Mr Jones found it difficult to decide on the relative merits of the proposals in Working Documents Nos 31 and 36. He recalled that the debates concerning the Strasbourg Convention had considered the wording in Working Document No 31 to be narrower than any public policy exception. Moreover, he had discovered very few references in English case law to 'public policy' or its equivalent, and very little use appeared to have been of this concept. He was sure that equally little use would be made by courts of the concept of 'fundamental principles of law'. However, the formulation in Working Document No 31 would be more efficacious in cases where it was clear that, if the child was returned, the question of its welfare would not be considered. Such a situation would be contrary to both fundamental principles of law and public policy. He found it impossible to say whether the United Kingdom would have to make use of such a reservation, but doubted whether the terms of article 12(1)*b* would suffice in place of the proposals in Working Documents Nos 31 and 36.
The Convention should also take account of the fact that, while the family law of Member States had converged to some extent in recent times, considerable differences still remained, and Member States should be permitted sufficient flexibility to deal with a constantly developing situation.
Finally, the possible abuse by judges of such reservations or exceptions as were proposed was not a real problem. The adoption of a 'public policy' or 'fundamental principles of law' exception or reservation did not give judges complete freedom. Courts in the United Kingdom certainly recognised the clear distinction to be drawn between fundamental principles and ordinary provisions of law.

Mr Müller-Freienfels (Federal Republic of Germany) agreed with the points made by Mr Chatin and Mr Deschenaux. He reminded delegates that the Convention was designed to oppose the wrongful removal of a child. It was therefore necessary to avoid any articles which effectively acknowledged that an abduction was indeed compatible with the best interests of the child, since this would run directly counter to the limited purposes of the Convention. It should be a Convention to install Central Authorities to act against international child abductions. But these Central Authorities are not institutions outside national boundaries, situated in a supra-national non-legal heaven or hell. Thus they have to follow their national laws and it goes without saying that they cannot act against fundamental principles of their own law. The insertion of explicit references to 'public policy' or 'fundamental principles of law' either as substantive provisions within the text of the Convention or even as reservations would invite embarrassing counter-argumentation. Such a dangerous perfection would be contrary to the spirit of the Convention, which should be maintained: '*C'est le ton qui fait la musique.*'

Mr Schneider (Holy See) felt that a misunderstanding had arisen concerning the scope of a 'public policy' exception. The concept had a wide variety of meanings, and was not confined to the upholding of a State's internal law, since the public policy of a State might require the recognition and application of international law. Indeed, within the context of international child abduction, he could envisage cases in which the application of a public policy exception would provide the strongest guarantee for ensuring the return of a child. He commented that it would be strange if the Convention could effectively override the fundamental principles of international law, which should be regarded as included within the concept of 'public policy'.
With regard to the possible situation of a State, *e.g.* Morocco, applying its internal law (*e.g.* that custody must always be given to the father) so as to prevent the return of a child to the Netherlands, Mr Schneider observed that the Netherlands Government might retaliate by recalling its Ambassador from the State concerned.

Mr Leal (Canada) expressed his concern that certain governments, in their comments on the draft Convention, had indicated that they would apply the public policy exception even in the absence of any express reference to public policy or any inclusion of reservation clauses. He suggested that article 12(1)*b* was itself in the form of a 'public policy' clause, which had the distinct advantage of focussing attention on those matters of which authorities in

the receiving State should take account in deciding not to return a child. He suggested that, instead of inserting another paragraph which referred to family law and children, as proposed in Working Document No 31, a compromise could be arrived at by replacing the present words of article 12(1)*b* by those in Working Document No 32, article X*d*. He emphasised that, throughout the Convention, the best interests of the child ought to prevail.

Miss Selby (United States) intervened to make it clear that the United States delegation did not intend to lend its support to the insertion of a public policy exception. Indeed, it agreed for the most part with the views expressed by Mr Müller-Freienfels.

Mr Hjorth (Denmark) agreed that the purpose of the Convention was to avoid abductions, and that an escape clause should be invoked only where this principle could not be maintained as the primary concern. Thus, it should be confined to those cases where the best interests of the child would not be regarded in the State of the child's habitual residence. The proposal in Working Document No 31 should be viewed purely and simply as an exception, and should not be regarded as allowing the merits of a case to be considered. He added that the exception was also very narrow and would be used in very few cases, since most Member States upheld the basic principle of the best interests of the child, and since, moreover, it was the abductor on whom the onus of proof would rest. He agreed with Mr Jones that the proposal was intended to be narrower in scope than the conventional public policy clause, since it would be used only within the context of family law matters. In this connection, he noted that Danish courts had availed themselves of public policy clauses included in conventions in very few cases, and he was sure that the proposed exception would be used equally sparingly. In his view, the Convention should recognise explicitly the public policy exception, and not leave it to Member States to invoke it as they thought fit. Finally, he disagreed that either article 12(1)*b* as it stood or as substituted by the words in Working Document No 32, article X*b* could operate as a public policy exception since they did not cover the situations envisaged in Working Document No 31.

Mr Dyer (First Secretary at the Permanent Bureau) read out the text of Working Document No 31.

M. Chatin (France) fait valoir une motion d'ordre. Il considère qu'il serait plus logique de voter d'abord sur l'ajoute du Danemark et ensuite sur l'éventuelle inclusion d'une clause générale d'ordre public.

The Chairman announced that, for the purposes of voting, each proposal would be taken in the order tabled, firstly as a proposal for inclusion within the text, and then (in the event of rejection) as a proposal for inclusion as a reservation.
The meeting, by a show of hands, indicated a clear majority in favour of adopting the suggested voting procedure, and the Chairman then turned to Mr Barile's proposal in Working Document No 36 which he noted was in the same terms as article 16 of the Convention concerning the Protection of Minors.

M. Chatin (France) reprenant les termes que le Président lui-même avait employés, demande si l'on va voter sur l'insertion d'une clause générale ou sur une disposition complétant l'article 12?

The Chairman replied that once a matter had been approved in principle, it was really for the Drafting Committee to decide on its particular place within the text of the Convention. He asked that the delegates proceed to vote on the proposal in Working Document No 36 that a general public policy clause appear towards the end of the Convention.

Vote

Working Document No 36 was rejected by a vote of 15 against (Australia, Belgium, Canada, Finland, France, Federal Republic of Germany, Greece, Japan, Luxemburg, Netherlands, Portugal, Spain, Sweden, Switzerland, United States), 8 in favour (Austria, Czechoslovakia, Denmark, Ireland, Israel, Italy, Norway, Venezuela), with 1 abstention (United Kingdom).

Since Mr Barile indicated his desire that Working Document No 36 be withdrawn, in so far as it proposed the insertion of a public policy clause as a reservation, the Chairman asked that a vote be taken on Mr Holub's oral proposal.

Mr Holub (Czechoslovakia) stated that he had nothing to add to the Chairman's formulation of his proposal, with which he was in full agreement.

The Chairman put Mr Holub's oral proposal to the vote.

Vote

The oral proposal of Czechoslovakia that a sub-paragraph be added to article 12(1) stating that 'the return of the child is manifestly incompatible with the public policy of the requested State' *was rejected by a vote of 14 against (Belgium, Canada, Finland, France, Federal Republic of Germany, Greece, Israel, Japan, Luxemburg, Netherlands, Portugal, Spain, Switzerland, United States), 9 in favour (Austria, Czechoslovakia, Denmark, Ireland, Italy, Norway, Sweden, United Kingdom, Venezuela), with 1 abstention (Australia).*

The Chairman then asked that the meeting vote on Mr Holub's proposal, in the form of a reservation.

M. Chatin (France) fait valoir des arguments de logique quant à l'ordre des votes: il conviendrait d'aborder les articles 13, 14 et 15 avant de se déterminer sur les réserves.

The Chairman replied that the issue of public policy had been discussed adequately and in depth, both during the present meeting and during the meetings in November 1979, and that it should now be put to the vote.

M. Chatin (France) exprime le voeu que la détermination sur la question des réserves soit faite à la fin de la discussion sur les dispositions de cette Convention.

Mr Leal (Canada) thought that a critical stage had now been reached. He supported the attempts of the Chairman to reach decisions on the questions before the meeting. However, he felt that time should be taken to ensure that all delegates had had an opportunity to express their views. It was necessary to make the terms of each proposal quite clear, and he shared Mr Chatin's view that the question of reservations should be considered after all substantive provisions of the Convention had been discussed. He suggested, therefore, that proposals for inclusion in the text be put to the vote now, while the question of their possible expression in the form of reservations be postponed.

The Chairman referred to the clear indication given earlier by the meeting in favour of his suggested voting procedure. He asked that the delegates indicate whether they favoured a vote now on whether the proposal of Mr Holub be accepted as a reservation.

The delegates supported the Chairman's proposal that a vote be taken by a hand vote of 12 in favour, 9 against.

Vote

The oral proposal of Czechoslovakia, that the Convention contain a reservation that 'Contracting States may reserve the right not to return a child when such return would be manifestly incompatible with the public policy of the requested State' *was rejected by a vote of 12 against (Austria, Belgium, Finland, France, Federal Republic of Germany, Greece, Luxemburg, Netherlands, Portugal, Spain, Switzerland, United States), 9 in favour (Czechoslovakia, Denmark, Ireland, Israel, Italy, Norway, Sweden, United Kingdom, Venezuela), with 3 abstentions (Australia, Canada, Japan).*

The Chairman then asked that the meeting vote on Working Document No 31's inclusion in the text of the Convention.

M. Chatin (France) aimerait qu'on lui explique ce que la proposition danoise vient ajouter aux propositions précédentes.

The Chairman stated that Mr Hjorth and other delegates had dealt with this point which had become a simple matter of acceptance or rejection.

Vote

Working Document No 31 was rejected by a vote of 14 against (Austria, Belgium, Canada, France, Federal Republic of Germany, Greece, Israel, Japan, Luxemburg, Netherlands, Portugal, Spain, Switzerland, United States), 8 in favour (Czechoslovakia, Denmark, Ireland, Italy, Norway, Sweden, United Kingdom, Venezuela), with 2 abstentions (Australia, Finland).

The Chairman then asked that the meeting vote on Working Document No 31, in the form of a reservation and along the lines suggested in Working Document No 32.

M. Chatin (France) répète qu'il pense qu'on a déjà voté sur ce point.

The Chairman replied that he took the sense of the meeting to be that the issue should be put to a vote.

Vote

Working Documents Nos 31 and 32, in so far as they proposed a reservation that 'Contracting States may reserve the right not to return the child when such return would be manifestly incompatible with the fundamental principles of the law relating to the family and children in the State addressed' *was approved by a vote of 11 in favour (Czechoslovakia, Denmark, Finland, Ireland, Israel, Italy, Netherlands, Norway, Sweden, United Kingdom, Venezuela), 10 against (Austria, Belgium, Canada, France, Federal Republic of Germany, Greece, Luxemburg, Portugal, Spain, Switzerland), with 3 abstentions (Australia, Japan, United States).*

The Chairman then opened the discussion on article 12(2) and the relevant Working Document thereon *i.e.* Nos 22, 35, 12, and 32.

Mr Savolainen (Finland) explained that the proposal in Working Document No 22 was to help ensure that as many States as possible ratify the Convention. The existing text was not altogether satisfactory for certain States which were concerned about the possible misuse of the provision concerning a child's views. In order to eliminate the risk that judges might have regard to the statements of children who were clearly too young to form a proper opinion, he felt that it was advisable to exclude from the article children who were below a certain age. However, he suggested that the age limit be fairly low, and that ten years of age should be viewed as the maximum.

He confessed that he had no strong feelings concerning this proposal, but since certain States had expressed interest in the matter, he thought that it should be presented as a basis for discussion.

M. van Keymeulen (Belgique) explique sa proposition de prévoir un âge minimum à l'article 12. Reprenant le Rapport de Mlle Pérez-Vera, il invoque le risque de créer des troubles psychiques, chez les enfants en bas âge, si on leur demande de se manifester pour ou contre le retour.
D'autre part, un enfant peut ne pas être suffisamment mûr pour se former une opinion quant à son désir de retourner ou non. Pour la délégation belge que l'âge soit de 8 ou 10 ans importe peu en fait.
M. van Keymeulen ajoute encore que le refus de l'enfant de retourner au pays d'où il a été enlevé doit être motivé; en effet, il est facile aux parents d'influencer un enfant en lui faisant miroiter de nombreux avantages et promesses.

Miss Selby (United States), taking into account the strong views expressed by certain States, intimated that the United States delegation was prepared to withdraw the proposal in Working Document No 12 that article 12(2) be deleted. However, such withdrawal was subject to the agreed age being no less than twelve years. She referred to previous discussion of this matter in November 1979, and to the indication in the Report that twelve years was the appropriate age.

Mr van Boeschoten (Netherlands) noted that since the United States proposal in Working Document No 12 had been withdrawn the effect of the Netherlands proposal in Working Document No 32 was necessarily that the existing article 12(2) be deleted.
As at present drafted, article 12(2) effectively made a child's opposition to his return a separate ground of refusal. This was wholly unacceptable, since cases illustrated that children often co-operated in abductions and had strong links with the abductor. It was basically undesirable that a child be pressed to make his views known on this matter, since any decision reached would tend not to have been based on the purest of motives.

The Chairman requested the meeting to consider four issues:
(*i*) the deletion of article 12(2);
(*ii*) the non-application of article 12(2) if the child were under a certain age;
(*iii*) if (*ii*) were approved, the age limit applicable;
(*iv*) the formulation of article 12 suggested in Working Document No 35.

Mr Jones (United Kingdom), with regard to the proposal in Working Document No 35, stated that it was unacceptable to the United Kingdom, since it placed the burden on the child. Although a child was quite often separately represented in legal proceedings in England, he felt that it would be going too far to require the child's counsel effectively to be 'the child', and he feared that the suggestion in Working Document No 35 was therefore impracticable. On the question of age, he was in agreement with the United States Government's comments concerning problems of this kind. In the first place, to require a young child to take such a vital decision regarding his own welfare placed an inordinate burden of responsibility on his shoulders. In the second place, experience showed that children could be pressured, more or less subtly, so that the determination of a child's real views was a matter of considerable complexity. However, he had no fundamental objection to the existing formulation, which required not merely a simple clear-cut decision by the child but also a consideration of a child's maturity and (implicitly) the reasons advanced by the child in support of his objection. There was little use in fixing a

precise age limit since sometimes a 9-year old could advance cogent and genuine reasons for retention, while a 14-year old could be found to raise spurious and shallow arguments against his return.
On balance, Mr Jones felt that the provisions presently in article 12(2) should remain in the text of the Convention. A child's viewpoint was something to be taken into account since it was effectively impossible to force a 15-year old to do something against his will. However, a reservation clause might be sufficient.

Mr Holub (Czechoslovakia) expressed himself in favour of deleting article 12(2). It conferred on every child under the age of 16 the right effectively to determine his own residence, and it was therefore closely connected with the provisions of article 4. Moreover, in his view, all the permitted exceptions should be contained in article 12(1)*b*.

Mr Yadin (Israel) pronounced himself to be in favour of retaining the present article 12(2). He pointed out that the child's wishes were not decisive since the text provided only that the judicial or administrative authorities *may* refuse to return the child after considering what it had to say. The provision merely indicated to the relevant authorities that they should consider the views of the child concerned; in doing so, they should not be fettered by any particular age limit.

Mr Walsh (Ireland) agreed with Mr Yadin, and emphasised the point that article 12(2) did not *require* a child to object to being returned.

M. Deschenaux (Suisse) explique que la disposition de l'article 12 à son paragraphe 2 permet aux juges d'exercer un pouvoir d'appréciation; une limite d'âge de 10 ou 12 ans empêcherait le juge dans l'exercice de son pouvoir discrétionnaire; d'autre part, il est fort probable que les enfants d'âge inférieur à 10 ans puissent déjà se former une opinion sur ce point.

Mr Savolainen (Finland) felt that his proposal in Working Document No 22 had been misunderstood in part. One of its aims was to prevent the theoretical misuse of the existing article 12(2) whereby the authorities in the State of refuge might give a child of two or four years of age the last word, particularly where no other grounds for refusing his return existed. He then intimated that he wished to withdrawn his proposal.

M. van Keymeulen (Belgique) retire la proposition de sa délégation, prévue au Document de travail No 35, seulement en ce concerne la limite d'âge.

The Chairman noted that the United States delegation wished a vote to be taken on the question of the minimum age below which a judge could not have regard to the wishes of the child. Despite Mr Savolainen's withdrawal of Working Document No 22, he felt that the proposal therein should also be put to the vote, given the concerns expressed by a number of delegates.

Votes

Working Documents Nos 12 and 32, in so far as they proposed the deletion of article 12(2), were rejected by a vote of 14 against (Australia, Canada, Denmark, Finland, Ireland, Israel, Japan, Norway, Portugal, Spain, Sweden, Switzerland, United Kingdom, Venezuela), 5 in favour (Austria, Czechoslovakia, Federal Republic of Germany, Netherlands, United States), with 3 abstentions (Belgium, France, Greece).

Working Document No 22 (the precise age limit being disregarded for the moment) was rejected by a vote of 13 against (Australia, Canada, Denmark, Ireland, Israel, Japan, Netherlands, Norway, Portugal, Sweden, Switzerland, United Kingdom, Venezuela), 4 in favour (Belgium, Czechoslovakia, Spain, United States), with 5 abstentions (Austria, Finland, France, Federal Republic of Germany, Greece).

Working Document No 35C proposing a reformulation of the existing text of article 12(2) was rejected by a vote of 17 against (Australia, Austria, Canada, Denmark, Finland, Federal Republic of Germany, Ireland, Israel, Japan, Norway, Portugal, Spain, Sweden, Switzerland, United Kingdom, United States, Venezuela), 3 in favour (Belgium, Czechoslovakia, Netherlands), with 2 abstentions (France, Greece).

The meeting was closed at 12.45 p.m.

Documents de travail Nos 43 et 44
Working Documents Nos 43 and 44

Distribués le 18 octobre 1980
Distributed on 18 October 1980

No 43 – Proposition des délégations espagnole, française, finlandaise et du Royaume-Uni
– Proposal of the Spanish, French, Finnish and United Kingdom delegations

14 bis

Après avoir été informés du déplacement illicite d'un enfant ou de son non-retour dans le cadre de l'article 3, les tribunaux judiciaires ou administratifs de l'Etat où l'enfant a été déplacé ou retenu, ne pourront statuer sur les mérites du droit de garde jusqu'à ce qu'il soit établi que les conditions de la présente Convention pour une remise de l'enfant ne sont pas réunies [ou jusqu'à ce qu'une période raisonnable soit écoulée sans qu'une demande sous cette Convention ait été faite].

14 bis

After receiving notice of a wrongful removal or retention in the sense of article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of any issue concerning rights of custody or access

relating to the child unless or until it has been determined that the child does not fall to be returned under this Convention [or unless an application under this Convention fails to be lodged within a reasonable time following receipt of the notice].

No 44 – Proposal of the Japanese delegation

Article 14

The central, judicial or administrative authorities of a Contracting State may request the Central Authority of the State of the habitual residence of the child to take all practicable steps to obtain a decision or other determination relating to the fact that the child has been removed or retained and that the child's removal or retention was wrongful within the meaning of article 3 of the Convention *if the rendering of such a decision or determination is possible under the law of that State.*

Document de travail No 45

Distribué le 18 octobre 1980

Proposition du Comité de rédaction

PROJET DE CONVENTION SUR [LES ASPECTS CIVILS DE] L'ENLÈVEMENT INTERNATIONAL D'ENFANTS

CHAPITRE I — CHAMP D'APPLICATION DE LA CONVENTION

Article 1

La présente Convention a pour objet:

a d'assurer le retour immédiat des enfants déplacés ou retenus illicitement dans tout Etat contractant; et

b de faire respecter effectivement [l'exercice] des droits de garde et de visite existant dans un Etat contractant, dans les autres Etats contractants.

Article 2

Les Etats contractants prennent des mesures appropriées pour assurer, dans les limites de leur territoire, la réalisation des objectifs de la Convention. A cet effet ils doivent recourir à leurs procédures d'urgence.

Working Document No 45

Distributed on 18 October 1980

Proposal of the Drafting Committee

DRAFT CONVENTION ON [THE CIVIL ASPECTS OF] INTERNATIONAL CHILD ABDUCTION

CHAPTER I — SCOPE OF THE CONVENTION

Article 1

The objects of the present Convention are:

a to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

b to ensure that [the exercise] rights of custody and of access under the law of one Contracting State [are] [is] effectively respected in the other Contracting States.

Article 2

Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available.

Article 3

Le déplacement ou le non-retour d'un enfant est considéré comme illicite:

a lorsqu'il a lieu en violation d'un droit de garde, attribué à une personne, une institution ou toute autre entité, seul ou conjointement, par le droit de l'Etat dans lequel l'enfant avait sa résidence habituelle immédiatement avant son déplacement ou son non-retour; et

b que ce droit était exercé de façon effective, seul ou conjointement, au moment du déplacement ou du non-retour, ou l'eût été si de tels événements n'étaient survenus.

Le droit de garde visé en *a* peut notamment résulter d'une attribution de plein droit, d'une décision judiciaire ou administrative, ou d'un accord en vigueur selon le droit de cet Etat.

Article 4

La Convention s'applique à tout enfant âgé de moins de 16 ans, qui avait sa résidence habituelle dans un Etat contractant immédiatement avant toute atteinte aux droits de garde ou de visite.

Article 5

Au sens de la présente Convention:

a le «droit de garde» est le droit portant sur les soins de la personne de l'enfant, et en particulier celui de décider de son lieu de résidence;

b le «droit de visite» inclut notamment le droit d'emmener l'enfant pour une période limitée, dans un lieu autre que celui de sa résidence habituelle.

CHAPITRE II — AUTORITÉS CENTRALES

Article 6

Chaque Etat contractant désigne une Autorité centrale chargée de satisfaire aux obligations qui lui sont imposées par la Convention.
Un Etat fédéral, un Etat dans lequel plusieurs systèmes de droit sont en vigueur ou un Etat ayant des organisations territoriales autonomes, est libre de désigner plus d'une Autorité centrale et de spécifier l'étendue territoriale des pouvoirs de chacune de ces Autorités. L'Etat qui fait usage de cette faculté désigne l'Autorité centrale à laquelle les demandes peuvent être adressées en vue de leur transmission à l'Autorité centrale compétente au sein de cet Etat.

Article 7

Les Autorités centrales doivent coopérer entre elles et promouvoir une collaboration entre les autorités compétentes dans leurs Etats respectifs, pour assurer le retour immédiat des enfants et réaliser les autres objectifs de la présente Convention.
En particulier, soit directement, soit avec le concours de tout intermédiaire, elles doivent prendre toutes les mesures appropriées:

a pour localiser un enfant déplacé ou retenu illicitement;

b pour prévenir de nouveaux dangers pour l'enfant ou des préjudices pour les parties concernées, en prenant ou faisant prendre des mesures provisoires;

c pour assurer la remise volontaire de l'enfant ou faciliter une solution amiable;

d pour échanger, si cela s'avère utile, des informations relatives à la situation sociale de l'enfant;

e pour fournir des informations générales, concernant le droit de leur Etat favorisant l'application de la Convention;

Article 3

The removal or the retention of a child is to be considered wrongful where:

a it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

b at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph *a*, above, may include those arising through operation of law or by reason of judicial or administrative decisions, or by reason of agreements having legal effect under the law of that State.

Article 4

The Convention shall apply to any child under the age of 16 years who was habitually resident in a Contracting State immediately before any breach of custody or access rights.

Article 5

For the purposes of this Convention:

a 'rights of custody' are rights relating to the care of the person of the child, and in particular the right to determine the child's place of residence;

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

CHAPTER II — CENTRAL AUTHORITIES

Article 6

A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.
Federal States, States with more than one system of law or States having autonomous territorial organizations shall be free to appoint more than one Central Authority and to specify the territorial extent of their powers. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which applications may be addressed for transmission to the appropriate Central Authority in that State.

Article 7

Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.

In particular, either directly or through other bodies, they will take all appropriate measures –

a to discover the whereabouts of wrongfully removed or retained children;

b to prevent, through provisional measures, further harm to the child or prejudice to interested parties;

c to secure the voluntary return of the child or to bring about an amicable resolution of the issues;

d to exchange, where desirable, information relating to the social background of the child;

e to provide information of a general character as to the law of their State in connection with the application of the Convention;

f pour introduire ou favoriser l'ouverture d'une procédure judiciaire ou administrative, afin d'obtenir le retour de l'enfant et, le cas échéant, de fixer ou de permettre l'exercice du droit de garde ou du droit de visite;

g pour accorder ou faciliter, le cas échéant, l'obtention de l'assistance judiciaire et juridique, y compris les services d'un avocat;

h pour faciliter, sur le plan administratif, si nécessaire et approprié, le retour sans danger de l'enfant;

i pour se tenir mutuellement informées sur le fonctionnement de la Convention et, autant que possible, lever les obstacles éventuellement rencontrés lors de son application.

CHAPITRE III — RETOUR DE L'ENFANT

Article 8

La personne, l'institution ou l'entité qui prétend qu'un enfant a été déplacé ou retenu en violation d'un droit de garde peut saisir, pour assurer le retour de l'enfant, soit l'Autorité centrale de la résidence habituelle de l'enfant, soit celle de tout autre Etat contractant.

La demande doit contenir:

a des détails portant sur l'identité du demandeur, de l'enfant et de la personne présumée avoir emmené ou retenu l'enfant;

b la date de naissance de l'enfant;

c les motifs sur lesquels se base le demandeur pour réclamer le retour de l'enfant;

d toutes informations disponibles concernant la localisation de l'enfant et l'identité de la personne présumée avoir l'enfant.

La demande peut être accompagnée ou complétée par:

e une copie authentifiée de toute décision ou de tout accord utiles;

f une attestation ou une déclaration avec affirmation émanant de l'Autorité centrale, ou d'une autorité compétente de l'Etat de la résidence habituelle, ou d'une personne qualifiée, concernant le droit de l'Etat en la matière;

g tout autre document utile.

Article 9

Quand l'Autorité centrale qui est saisie d'une demande en vertu de l'article 8 a toutes raisons de penser que l'enfant se trouve dans un autre Etat contractant, elle transmet la demande directement et sans délai à l'Autorité centrale de cet Etat contractant, et en informe l'Autorité centrale requérante, ou, à défaut, le demandeur.

Article 10

L'Autorité centrale de l'Etat où se trouve l'enfant prendra ou fera prendre toute mesure propre à assurer sa remise volontaire.

Article 11

Les autorités judiciaires ou administratives de tout Etat contractant doivent statuer d'urgence sur la remise de l'enfant.
Lorsque l'autorité judiciaire ou administrative saisie n'a pas statué, dans un délai de six semaines à partir de sa saisine, le demandeur ou l'Autorité centrale de l'Etat requis, de sa propre initiative ou sur requête de l'Autorité centrale de l'Etat requérant, peut demander une déclaration sur les raisons de ce retard. Si la réponse est reçue par l'Autorité centrale de l'Etat requis, cette Autorité doit la transmettre à

f to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case the determination of issues relating to the exercise of rights of access;

g where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the services of legal counsel and advisers;

h to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;

i to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.

CHAPTER III — RETURN OF CHILDREN

Article 8

Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.
The application shall contain —

a details concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child;

b the date of birth of the child;

c the grounds on which the applicant's claim for return of the child is based;

d all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be.

The application may be accompanied or supplemented by —

e an authenticated copy of any relevant decision or agreement;

f a certificate or a sworn declaration emanating from a Central Authority or other competent authority of the State of the child's habitual residence, or from a qualified person concerning the relevant law of that State.

g any other relevant document.

Article 9

If the Central Authority which receives an application referred to in article 8 has reason to believe that the child is in another Contracting State, it shall directly and without delay transmit the application to the Central Authority of that Contracting State and inform the requesting Central Authority, or the applicant, as the case may be.

Article 10

The Central Authority of the State where the child is to be found shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child.

Article 11

The judicial or administrative authorities of Contracting States shall act expeditiously on applications for the return of children.
If the judicial or administrative authority concerned has not reached a decision within six weeks after receipt of the application, the applicant or the Central Authority of the requested State, on its initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State,

l'Autorité centrale de l'Etat requérant ou, à défaut, au demandeur.

that Authority shall transmit the reply to the Central Authority of the requesting State, or the applicant, as the case may be.

Documents de travail Nos 46 à 48
Working Documents Nos 46 to 48

Distribués le 18 octobre 1980
Distributed on 18 October 1980

No 46 – Proposal of the Netherlands delegation
This proposal was replaced by Working Document No 47.

No 47 – Proposal of the Netherlands delegation
This proposal replaces the proposal contained in Working Document No 46.

Article 15

The judicial or administrative authorities of a Contracting State may, prior to an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination, that the child's removal or retention was wrongful within the meaning of article 3 of the Convention, but only where the rendering of such a decision or determination is possible under the law of that State.

No 48 – Proposal of the United States delegation
This proposal was replaced by Working Document No 49.

Procès-verbal No 10

Séance du samedi 18 octobre 1980 (matin)
Meeting of Saturday 18 October 1980 (morning)

The meeting was opened at 9.35 a.m. Mr Anton (United Kingdom) was in the Chair. Miss Pérez-Vera (Spain) was Rapporteur.

The Chairman noted that the Drafting Committee had prepared a draft of the first eleven articles of the Convention, and this would be placed before delegates during the morning's discussions.
He asked that the meeting avoid the problems connected with article 12 for the moment, and that discussion be directed towards article 13 and subsequent articles, with the exception of article 17. Article 17, the questions arising out of article 12, and the articles concerning the inter-relationship of competing custody decrees would be discussed, in that order, after the meeting had dealt with the other substantive provisions of the Convention. This order of proceeding was necessary in order that the Drafting Committee could proceed to consider those articles which were relatively uncontroversial.

M. Chatin (France) se rallie à la proposition du Président de laisser de côté les articles 17 et 12, pour le moment, et d'y revenir plus tard.

The Chairman thanked Mr Chatin, and observed that the sense of the meeting was that the Chair's proposal concerning the order of discussion be adopted. He emphasised that very little time remained and that at least four meetings would be necessary for the discussion of the text proposed by the Drafting Committee. He asked that delegates understand if the debate on certain issues was terminated by the Chair at a comparatively early stage.
The Chairman then opened discussion on article 13 and the relevant Working Documents thereon, *i.e.* Nos 4 and 15.

M. van Keymeulen (Belgique) estime que l'article 13 est superflu, dangereux et ambigu.
Il est superflu dans la mesure où il veut créer une certaine marge d'appréciation afin que les autorités judiciaires ou administratives de l'Etat requis utilisent le droit de la résidence habituelle de l'enfant comme un instrument en se

prononçant sur les demandes visant au retour de l'enfant.
Cette marge d'appréciation existe déjà en vertu des articles 11 et 12 de la Convention: l'article 11 contient la règle selon laquelle l'enfant doit retourner dans son pays de sa résidence habituelle s'il y a eu violation du droit de garde attribué par le droit de ce pays; l'article 12 permet au juge de l'Etat requis de faire obstacle à la règle de l'article 11.
En appliquant les articles 11 et 12, le juge doit tenir compte non seulement de la loi de l'Etat de la résidence habituelle de l'enfant mais aussi des situations de fait qui peuvent empêcher l'application de ce droit.
L'article 13 est dangereux parce qu'il semble ajouter à l'article 12 une nouvelle situation d'exception.
De plus, les mots «tiendront compte» peuvent donner lieu à toutes sortes d'interprétations.
L'article 13 est ensuite ambigu, notamment lorsqu'il prévoit les mots «tiendront compte».
Cette dernière expression a-t-elle pour but d'empêcher des jugements d'exequatur pour l'application de la Convention? Si tel est le cas il faut le dire expressément comme le fait la proposition australienne, canadienne et anglaise.
Pour la délégation belge il ne faut pas étendre la Convention par une disposition relative à la preuve du droit étranger ou à l'exequatur des décisions étrangères.
En conclusion cette disposition est manifestement superflue: premièrement de par la philosophie de la Convention qui ne veut que régler des situations de fait; ensuite par référence à l'article 16 qui prévoit «qu'une décision sur le retour de l'enfant ne préjuge pas sur le fond du droit de garde»; enfin de par l'article 11 qui déclare que «lorsqu'il y a eu violation des droits de garde au sens de l'article 3 . . . les autorités judiciaires ou administratives de l'Etat où se trouve l'enfant ordonnent son retour immédiat».
Toutefois si la Commission est d'avis que cette disposition est nécessaire, la délégation belge propose qu'elle soit remplacée par le texte du Document de travail No 15.

The Chairman announced that the discussion on Working Documents Nos 4 and 15 would proceed simultaneously, and that there should be two interventions from the floor in addition to those by Messrs Creswell, Jones and van Keymeulen.

Mr Creswell (Australia) explained that Working Document No 15 was intended to make it clear that courts in requested States *could* dispense with any onerous formality in taking note of or recognising the law or decisions concerning the conferring of custody rights upon the applicant. It was a purely facultative provision for courts in the requested States, and did not in any respect hear upon the extent to which such courts should *apply* the law on custody in the State of a child's habitual residence.

Mr Müller-Freienfels (Federal Republic of Germany) agreed with the proposal in Working Document No 4. He pointed out that article 3 already required a court to look at the law of the State of a child's habitual residence, so that its effective repetition in article 13 might give rise to difficulties. The words 'have regard to' were very uncertain and vague, and would cause problems to German judges. In his view, no general escape clause was necessary, since article 12 permitted the retention of a child whenever such child was found to be in an intolerable situation.

M. Chatin (France) appuie la proposition contenue dans le Document de travail No 15; cette disposition a un objectif purement matériel visant à faciliter la libre circulation des documents de la Convention.

Mr van Boeschoten (Netherlands) agreed that article 13, as presently drafted, seemed to duplicate the provision in article 3. However, he was not in favour of the simple deletion of article 13, but rather of its replacement by a new text.

Mr Wiese (Norway) seconded the proposal in Working Document No 4 for the deletion of article 13.

The Chairman referred to Mr Dyer's view that the proposals in Working Document No 15 were separable in essence from the terms of article 13. He asked more delegates to speak in favour of the deletion of article 13, since there had been insufficient debate on this point.

Mr Jones (United Kingdom) explained to delegates that the words 'shall have regard to' in article 13 were not intended to have the effect feared by Mr van Keymeulen. They amounted merely to a drafting device commonly used in United Kingdom Statutes, where they bore a special technical meaning. However, he understood that other jurisdiction could interpret these words rather differently, and he was quite happy that such words be deleted.
The proposal in Working Document No 15 was addressed to an evidential problem which would arise in all common law countries, which required that foreign law be proved in evidence like all other facts. Thus, in order to ensure that the Convention operated smoothly in such countries, it was necessary that a provision along the line of that contained in Working Document No 15 be included in the text of the Convention. He stressed that it conferred no extra discretion upon judges, and that it should be regarded as a purely evidential provision.

M. van Keymeulen (Belgique) ne s'oppose qu'à la version actuelle de l'article 13 mais se veut favorable à la proposition prévue dans le Document de travail No 15.

The Chairman reiterated his point that the text of article 13 and the proposal in Working Document No 15 should be regarded as raising separate issues. He asked that the meeting vote firstly on Working Document No 4, and then on the proposal contained in Working Document No 15.

Votes

Working Document No 4 was accepted by a vote of 22 in favour (Australia, Austria, Belgium, Canada, Czechoslovakia, Denmark, Finland, France, Federal Republic of Germany, Ireland, Israel, Italy, Japan, Luxemburg, Netherlands, Norway, Portugal, Sweden, Switzerland, United Kingdom, United States, Yugoslavia), 2 against (Egypt, Spain), with 1 abstention (Venezuela).

Working Document No 15 was approved by a vote of 15 in favour (Australia, Canada, Czechoslovakia, Denmark, France, Ireland, Israel, Italy, Luxemburg, Netherlands, Portugal, United Kingdom, United States, Venezuela, Yugoslavia), none against, with 10 abstentions (Austria, Belgium, Egypt, Finland, Federal Republic of Germany, Japan, Norway, Spain, Sweden, Switzerland).

The Chairman announced that Working Document No 15 would go to the Drafting Committee. He then turned the attention of delegates to article 14 and to Working Documents Nos 4 and 44. He noted that the proposals in these Working Documents should be dealt with separately.

M. van Keymeulen (Belgique) invoque la plus grande clarté du texte qu'il propose; il ressort de façon manifeste de ce texte (Document de travail No 4) que les autorités de l'Etat requis peuvent subordonner le retour de l'enfant à la production de la preuve, émanant des autorités judiciaires de l'Etat de la résidence habituelle de l'enfant, qu'il y a eu violation du droit de garde au sens de l'article 3 de la Convention.

Il est assez logique que les autorités de l'Etat requis ne puissent ordonner le retour de l'enfant si elles estiment qu'au préalable les autorités judiciaires de la résidence habituelle de l'enfant devraient se prononcer sur la violation de leur droit.
Le texte proposé par la délégation belge ne fait pas obstacle non plus à ce que les Autorités centrales prennent des mesures provisoires avant la production de l'attestation judiciaire.
M. van Keymeulen exprime sa préférence pour le texte proposé notamment, lorsqu'en vertu de l'article 25 de la Convention, le demandeur s'est adressé directement aux autorités judiciaires ou administratives de l'Etat requis sans l'intervention des Autorités centrales; dans un tel cas l'article 14 serait encore applicable contrairement à la version de la présente Convention.
Enfin, M. van Keymeulen suggère de biffer le mot «décision».
Il ne voit pas la raison de perdre du temps dans la recherche d'une décision judiciaire.

Mr Savolainen (Finland) announced that he supported the proposal in Working Document No 4, to some extent. He pointed out that a proposal had been made by the Rapporteur which touched on the points made in Working Document No 4.

Le Rapporteur reprend sa proposition.

Mr Reymond (Recording Secretary) read out the proposal in Working Document No 4 relating to article 14.

The Chairman commented that the proposal of the Rapporteur, contained in Working Document No 37, raised issues similar to but not precisely identical with those in Working Document No 4.

Mr Jones (United Kingdom) felt that, although the proposal in Working Document No 4 went too far, while that in Working Document No 37 was also technically defective, the existing text of article 14 was nevertheless unsatisfactory. As he understood it, Working Document No 4 proposed that the authorities in the State of the child's habitual residence should themselves undertake all practical steps to obtain a decision. Although it was not unreasonable for authorities in the requested State to request their counterparts in the requesting State to resolve difficulties concerning situations of fact or law in the latter, it would be excessive to make this a requirement or a condition for the return of the child. However, since it was necessary to ensure that attention was paid to the requests of the requested State, there might be some merit in inserting a provision to the effect that the authorities in the requesting State undertake, at the request of the judicial or administrative authorities in the requested State, to take all practical steps to obtain a decision. He suggested that the Drafting Committee might look at this point.

Mr van Boeschoten (Netherlands) confessed to having some difficulty in accepting Working Document No 4, since the '*attestation judiciaire*' was unknown in the Netherlands where, apart from judicial decisions, it would be impossible to produce a court certificate merely stating the legal situation. Furthermore, the duty of asking for a decision from the State of the habitual residence should be placed on the applicant. It could not be placed upon the authorities of the State of the child's habitual residence if the applicant had not first taken the initiative in obtaining such a decision.

Mr Leal (Canada) commented that Mr van Boeschoten had said exactly what he had intended to say.

The Chairman understood Mr van Boeschoten's point to be that the authorities in the requested State should be able to make the return of the child conditional upon the *applicant* producing a decision from the authorities of the requesting State.

Mr Creswell (Australia) found Mr van Boeschoten's proposal attractive, but felt that a distinction must be drawn between
(*i*) insisting that a decision concerning custody be produced to the court and,
(*ii*) obtaining a decision that the removal of the child was wrongful.
He added that it would be very difficult to obtain a decision from an Australian court with regard to (*ii*).

The Chairman stated that very important issues had been raised in the course of an extremely impressive debate. He proposed that further discussion of article 14 be deferred, pending the submission of written proposals concerning the points raised. He added that Working Document No 44 would be carefully considered in the light of such written proposals.

Mr Minami (Japan) referred to a typing error in Working Document No 44, where the word 'Central' should be in italics.

The Chairman turned to article 15 and the proposal in Working Document No 4 for its effective deletion. He stated that this was also the appropriate point at which to reopen discussion on Working Document No 25.

M. van Keymeulen (Belgique) pense que l'article 15 est superflu. L'article 11 serait suffisant mais, afin de ne pas ralentir le cours des discussions, il retire sa proposition.

Mr Yadin (Israel) opined that article 15 was unnecessary. However, if it were retained, he pointed out that the words at the end of the existing article concerning the expiration of the time-limit were not consistent with the rest of the article and should be replaced by the words 'other than in accordance with the provisions of this Convention'.

The Chairman noted Mr Yadin's proposal that the final phrase of article 15 should read 'otherwise than under the provisions of this Convention'.

Mr Leal (Canada) commented that Mr Yadin's suggestion raised much more than a drafting point. If adopted, it would give courts the power to act wholly outwith the terms of the Convention, and would not merely extend the time available for acting within its terms.

Miss Selby (United States) supported Mr Yadin's proposal. In her view, it was also related to the question of savings clauses vis-à-vis other Conventions.

The Chairman, referring to Working Document No 25, stated that it raised very complex issues. However, the proposal in Working Document No 25 was really severable from the issues raised in the present article 15, and he proposed that discussion of Working Document No 25 be postponed until the end of the debate on article 15.

Le Rapporteur désirerait que l'on discute maintenant de la proposition allemande.

The Chairman suggested that the appropriate approach would be to open discussion briefly on the proposal in Working Document No 25. The debate would be on the text of Working Document No 25 as it now stood.

Procès-verbal No 10

Mr Müller-Freienfels (Federal Republic of Germany) reminded the meeting that the words 'for two years' should be inserted after 'the return of the child' but only in brackets. The proposal should therefore be discussed both on the basis that it contain a reference to the time-limit and that it contain no such reference.

The Chairman announced that Working Documents Nos 4 and 25 would be discussed jointly.

Mr Müller-Freienfels (Federal Republic of Germany) considered the existing article 15 as an extremely weak provision which contained very little substance. Therefore, if delegates decided to retain it in the Convention, its provisions should be expressed more clearly, to the effect that a child should be returned unless it had become settled in a new environment and its return would cause excessive prejudice. This would be in line with the general direction and purpose of the whole Convention, which ought to be emphasised at this point. He asked delegates to note that the proposal referred to 'the judicial or administrative authority' and not to the Central Authority.

Mr Savolainen (Finland) was favourably disposed in principle towards the proposal in Working Document No 25. However, he had strong reservations concerning the exceptions contained at the end of Working Document No 25, since they could raise questions concerning the substantive law relating to the attribution of custody rights. They were linked with the problems raised by the '*status quo*' presumptions *i.e.* whether special emphasis should be placed on the personal relationships or the physical environment of a child. He therefore feared that adoption of Working Document No 25 would lead to the Convention intruding upon the substantive law of custody in Member States.

Miss Selby (United States) noted that the points raised in Working Document No 25 related back to the question of the time-limits discussed earlier. The meeting had decided to set short and fairly arbitrary time-limits, so that a two-stage development was envisaged. In the first place, there was a period during which no assimilation of the child was presumed to have occurred and during which the child's return could be refused only on the grounds set forth in article 12(1)*b*. In the second place, the child's assimilation became an open question during the running of the time period. In this connection Miss Selby referred to the problem of abductors abusing the time-limit by, for example, hiding the child or moving from place to place. Working Document No 25 would add a third stage, during which the child's assimilation in a new environment became an open question *outwith* the time-limits set by article 11.
Miss Selby also noted that Working Document No 25 was not incompatible with Mr Yadin's proposal concerning article 15, since they both dealt with situations arising outside the scope of the Convention.

Mr Yadin (Israel) recalled that he had been unhappy with the one-year period proposed for article 11, which he felt was too short. It meant effectively that the Convention would deal only with the question of abduction itself and not with the later situation of the child. Working Document No 25 sought to retain the existing time period, subject to its extension only in cases where the child was settled in its new environment and its return would cause excessive prejudice. In his view, these two questions should not be combined, so he preferred the present formulation of article 15 to the proposal in Working Document No 25.

The Chairman noted that acceptance of Working Document No 25 would not necessarily involve the deletion of article 15 either in its present form or in the form proposed by Mr Yadin.

Mr Müller-Freienfels (Federal Republic of Germany) stated that he had intended that the proposal in Working Document No 25 replace the existing article 15. However, he had no objection to its being adopted as an addition to article 15.

Mr Yadin (Israel), having reconsidered his proposal with regard to article 15, intimated his wish that the existing text be retained, and that the words 'or otherwise than under this Convention' be added thereto. This would take into account the ideas contained in Working Document No 25 but would not go so far as to make the Convention always apply after the expiration of the time-limits. Thus, it would be made clear both that the Convention would apply after expiration of the time period and that other rules not connected with the Convention were not precluded.

M. Chatin (France) est favorable à la proposition du Document de travail No 25. L'objectif de cette proposition tend à prolonger les effets de la Convention après l'échéance des délais de l'article 11, pour faciliter la procédure de remise de l'enfant.

Mr Müller-Freienfels (Federal Republic of Germany) acknowledged his willingness to delete the words 'and his return would cause excessive prejudice' from Working Document No 25. In his view this was really a drafting matter which should be left to the Drafting Committee. However he suggested that a vote be taken on Working Document No 25 on the basis that these words were deleted.

Miss Selby (United States) thought that article 15's lack of clarity had been remedied by Working Document No 25. She asked delegates to consider the United States situation, in which the size of the country and the existence of 50 different judicial authorities could make it very difficult firstly to find people who might constantly be moving around and secondly to dispose of a matter once they had been found, due to procedural delays. She was worried that the one-year time-limit could be abused by certain people seeking to avoid the application of the Convention. The basic principle must be made clear that a child should be returned, and the proposed time-limit of two years, subject to the exception of the child's assimilation into a new environment, was in her view a necessary clarification.
Miss Selby stressed that the United States delegation wanted other States to benefit from American ratification of the Convention, and that the adoption of the proposal in Working Document No 25 would facilitate its operation in the United States.

Mr Minami (Japan) confessed that he still had some doubt about Working Document No 25. Was it limited to cases where the application had been brought before the expiration of the one-year time period, or did it envisage that the application itself could be brought after such expiration, the return of the child being required in either case? He added that the Japanese delegation could support the proposal only if it was limited to the former situation, since the latter would almost necessarily require that the merits of a case be looked into.

Mr Savolainen (Finland), clarifying his previous intervention, stated that his doubts extended also to the matter of the exceptions proposed in Working Document No 25. Firstly, the test as to whether a child had become settled in a new environment might be interpreted as an instrusion into a State's substantive law on matters of custody. Secondly, such a test belonged necessarily within the domain of social

and family psychology, not of law. He felt that it was an ambiguous and unclear concept which could not be used objectively within a legal context.

Mr Leal (Canada) supported the principle behind Working Document No 25. He noted that since a single time period had been decided upon, it would be necessary to delete the reference to 'paragraphs 1 and 2' of article 11. He then sought to make two points in particular:
1 He agreed with the United States delegation that the adoption of Working Document No 25 would facilitate the application of the Convention in federal States, especially large ones in which persons could move easily within a very large area in an attempt to avoid judicial or administrative authorities.
2 Although he accepted Mr Savolainen's point concerning the exceptions proposed in Working Document No 25, he felt that they effectively distinguished the situation where a child stayed in one place for the period of two years from that where a child was always on the move during that time. However, he was in favour of the deletion of the words 'and his return would cause excessive prejudice'.

The Chairman asked that the proposal be in the form of a single text, as proposed by Mr Leal. He noted that Mr Müller-Freienfels assented to this.

Mr Leal (Canada) read out the text, as amended, of Working Document No 25. He also commented that, if the reference to a two-year period were retained, the existing article 15 would become redundant.

Mr Müller-Freienfels (Federal Republic of Germany) thought that the only problem that remained was whether the two-year time-limit be placed in square brackets or not.

Le Rapporteur s'associe à la proposition japonaise; il serait inopportun d'étendre l'application de la Convention à une requête déposée plus d'une année après la violation du droit de garde. L'intention de la délégation allemande semblait être de vouloir étendre les délais même après l'échéance de ceux prévus à l'article 11, notamment lorsque l'enfant n'avait pas encore été retrouvé.

Mr Holub (Czechoslovakia) asked whether the text of Working Document No 25, if approved, would be inserted in the Convention before that of article 12.

Mr Müller-Freienfels (Federal Republic of Germany) agreed that this would be so.

The Chairman asked that the meeting proceed to a vote on Working Document No 25, as amended.

Vote

Working Document No 25, subject to the deletion of the words 'during the period of two years' *and* 'and his return would cause excessive prejudice', *was accepted by a vote of 14 in favour (Austria, Belgium, Canada, Czechoslovakia, France, Federal Republic of Germany, Ireland, Israel, Italy, Portugal, Switzerland, United States, Venezuela, Yugoslavia), 10 against (Australia, Denmark, Finland, Japan, Luxemburg, Netherlands, Norway, Spain, Sweden, United Kingdom).*

The Chairman then asked whether the discussion of article 15 had been exhausted.

M. van Keymeulen (Belgique) dit que dès lors qu'on admet l'amendement du Document de travail No 25, il y a encore moins de raisons de conserver l'article 15.

The Chairman proposed that the meeting vote on the proposal in Working Document No 4 for the simple deletion of article 15, and on Mr Yadin's oral proposal for the amendment of article 15.

Mr Yadin (Israel) pointed out that, since Working Document No 25 had been accepted without any reference to a time-limit, there should be no reference in article 15 to the expiration of the time-limit set out in article 11. He sought to revert to his original proposal to delete the words 'after the expiration of the time-limit set out in article 11' and to substitute therefore 'otherwise than under the provisions of this Convention'.

The Chairman asked the meeting to vote on Working Document No 4's proposal for the deletion of article 15.

Vote

Working Document No 4, in so far as it proposed the deletion of article 15, was rejected by a vote of 10 against (Canada, Czechoslovakia, Denmark, France, Israel, Japan, Norway, Sweden, United States, Venezuela), 9 in favour (Austria, Belgium, Finland, Federal Republic of Germany, Ireland, Luxemburg, Portugal, Spain, Switzerland), with 5 abstentions (Australia, Italy, Netherlands, United Kingdom, Yugoslavia).

The Chairman announced that the text of article 15, as amended by Mr Yadin, would go to the Drafting Committee. He then turned to article 16. Since no written proposals for its amendment had been received, he referred it to the Drafting Committee.

Mr Leal (Canada) referred the meeting to Working Document No 40.

The Chairman recalled that Working Document No 40 had been withdrawn at an earlier stage, since its proposal was covered in part by the concept of acquiescence referred to in Working Document No 41. Mr Leal agreed that this was so.

Mr Yadin (Israel) wondered whether article 16 assumed a wider meaning now that article 15 had been amended. He felt that the words 'otherwise than under the provisions of this Convention' could bear upon the merits of custody rights.

The Chairman repeated that article 16 would go to the Drafting Committee, along with Mr Yadin's comments thereon. He then opened the discussion on the General Provisions of the Convention, and referred to article 18 and Working Document No 4.

M. van Keymeulen (Belgique) propose de biffer les mots entre crochets à l'article 18.

M. Espinar (Espagne) seconde la proposition de M. van Keymeulen.

M. Barile (Italie) propose de maintenir la phrase qui est entre crochets (s'il n'y a pas de questions de fond à ce propos).

Mr Minami (Japan) pointed out that not only article 18 but other articles in Chapter V of the Convention related to matters being discussed in Commission II. He suggested that the meeting should await the latter's decisions on these questions.

The Chairman stated his understanding that these issues had not yet been resolved in Commission II.

Mr Dyer (First Secretary at the Permanent Bureau) admitted that an effort would have to be made to align the terminology concerning general provisions relating to security for costs etc., with that adopted by Commission II on the same matter. However, substantive provisions concerning legal aid were not necessarily the same as general provisions, and considerations peculiar to child abduction might require that somewhat different legal aid provisions be contained in this Convention.

Mr Holub (Czechoslovakia) pronounced himself to be in favour of the proposal in Working Document No 4. He noted its connection with the question of whether a child should be returned to a parent or merely to a particular State. He pointed out that it was the habitual residence of the *child*, and not of the applicant, which mattered. Thus, the Convention would still apply even where an applicant had changed his habitual residence before the application, and even if, at the time of application, he was not resident in a Contracting State. This made it necessary for article 18 to apply even where an applicant was not in a Contracting State.

Mr Leal (Canada) was opposed to the proposal in Working Document No 4. He referred in particular to the well-established procedure in certain countries, notably Canada, the United Kingdom and Australia, of granting to the winning party his costs. The present text of article 18 made considerable inroads into this principle. Nevertheless, he was prepared to accept that no security, bond or deposit, etc., be required of a resident in a Contracting State, but not that this concession go any further.

M. van Keymeulen (Belgique) retire sa proposition.

Mr van Boeschoten (Netherlands) commented that since the relevant words in article 18 were in square brackets, it was necessary to decide whether to delete the words themselves, the brackets, or both.

Le Rapporteur pense qu'il faut décider de toute façon du sort de la phrase entre crochets: la Convention, historiquement, a pour but d'aider le demandeur dans sa requête; il peut arriver que le requérant quitte un Etat contractant pour un Etat n'appartenant pas à la présente Convention et veuille néanmoins entamer une procédure judiciaire dans un Etat contractant. Il convient de mettre ce requérant au bénéfice de la présente Convention et particulièrement de l'article 18.

The Chairman asked that the meeting proceed to a vote on Working Document No 4, in so far as it related to article 18.

Vote

Working Document No 4, in so far as it proposed the deletion from article 18 of the words in square brackets, was approved by a vote of 11 in favour (Austria, Belgium, Czechoslovakia, Finland, Federal Republic of Germany, Ireland, Italy, Luxemburg, Netherlands, Spain, Venezuela), 7 against (Australia, Canada, Denmark, France, Japan, Norway, Portugal), with 6 abstentions (Israel, Sweden, Switzerland, United Kingdom, United States, Yugoslavia).

The Chairman announced that article 18, subject to deletion of the bracketed words, was sent to the Drafting Committee. He then turned the attention of delegates to article 19 and Working Document No 28.

Mr Yadin (Israel) observed that article 19 had been inserted into the draft Convention while article 13 was well in its old form. Since article 13 had been deleted and replaced by the proposal in Working Document No 15, which dealt with matters of proof and recognition, he asked that the Drafting Committee consider the resultant problem.

The Chairman thought that the proposal in Working Document No 15 was severable from the existing text of article 19. It was still possible to retain article 19 in its present form, even with the text of Working Document No 15 included in the Convention. However, the question of article 19's relation with article 26 was one which should be examined later, but since no delegation objected to article 19 in its present form, it would be sent to the Drafting Committee. He then asked that delegates proceed to discuss Working Document No 28.

M. Chatin (France) rappelle que l'article 8*e* soulevait ce problème; dans la mesure où l'on refuse toute procédure administrative, il peut être utile à l'Etat requis de demander à l'Autorité centrale une rapide vérification.

Mr Savolainen (Finland) conceded that he was not against Working Document No 28 in principle, but he felt that its details ought to be clarified. He wondered whether it would oblige the relevant authority, whenever doubts arose concerning authentication, to use the mechanism proposed.

Mr van Boeschoten (Netherlands) shared Mr Savolainen's doubts regarding Working Document No 28. Moreover, it failed to cover the case where the application was made directly by the custodian without the help of a Central Authority. In his view, courts could be left to deal with the problem of authenticity.

Mr Leal (Canada) pointed out that Working Document No 28 stated only that verification '*may*' be effected through the Central Authorities, and that the provision was therefore not mandatory.

M. Barile (Italie) appuie la proposition de la délégation des Pays-Bas; de toute façon, si l'authenticité du document reste en doute après que l'Autorité centrale a pris une décision, il sera nécessaire d'obtenir une décision judiciaire sur ce point.

M. Chatin (France) retire volontiers sa proposition si elle pose des difficultés aux autres délégations; cette dernière n'avait pour but que de faciliter «la circulation des documents».
Il est évident que les autorités judiciaires conserveraient leur compétence en matière d'authenticité des documents; les Autorités centrales ne seraient qu'un intermédiaire.

The Chairman doubted whether unneccessary provisions should be included in the Convention.

Mr Jones (United Kingdom) stated that he was willing to withdraw Working Document No 28, if Mr Chatin agreed. In his view, there was no need for an explicit reference, concerning verification.

The Chairman repeated that article 19 would go to the Drafting Committee. He observed that no written proposals had been received concerning article 20.

Mr Matić (Yugoslavia) noted that Commission II was considering a similar article, and that the meeting should take account of what was decided there. Indeed he understood that paragraph 2 of article 20 had been drafted somewhat differently by Commission II.

The Chairman referred article 20 to the Drafting Committee, and asked that the Committee take account of the discussion in Commission II regarding a similar provision in its Convention. He then turned to article 21.

Mr Holub (Czechoslovakia) made the same observation as had Mr Matić with regard to article 20. He noted that Commission II had discussed legal aid and advice at length, and commented that legal aid covered assistance given during legal proceedings, while legal advice embraced assistance given before such proceedings had begun. However, Commission II had reached no solution as yet.

Mr Dyer (First Secretary at the Permanent Bureau) recalled that he had worked with the Special Commission on the question of legal aid and advice, and acknowledged that the Drafting Committee and Secretariat would need to work closely with the second Commission so as to align their terminology on this point.

Mr Walsh (Ireland) referred to a possible incompatibility between article 21 and article 18. Article 18 appeared to be confined to the initiation of legal proceedings, and did not extend to their continuation *e.g.* for purposes of appeal. Legal aid was confined to the former and he noted that legal aid systems did not generally provide for security for costs.

The Chairman thought that this was a drafting point. He asked that the Drafting Committee consider whether the provision of legal aid and advice be extended to the continuation of legal proceedings. In the absence of any written proposals, he sent article 21 to the Drafting Committee, with a direction that it take account of the discussion thereon and of the relevant discussion in Commission II.
With regard to article 22, and Working Document No 48, the Chairman observed that a number of governments, in their written observations, had made certain textual points. He referred in particular to the United States suggestion that reference be made to 'governmental agencies' in Contracting States and not to administrative authorities and that 'legal counsel' in sub-paragraph *a* should be changed to 'legal advisers'. He noted also, in the context of sub-paragraph *b*, that Australia had suggested the substitution of 'returning' for 'repatriating'.

M. van Keymeulen (Belgique) annonce qu'en raison de la rapidité avec laquelle la Commission a traité les articles, il se réserve la possibilité de présenter un amendement à l'article 22 lorsque M. Jenard sera de retour.

The Chairman asked that the Drafting Committee take note of the drafting amendments proposed in the observations of governments. He requested the Belgian delegation to submit a written proposal concerning article 22 by Monday.

Mr Leal (Canada) recalled the Canadian Government's comments concerning sub-paragraph *b* of article 22 regarding the payment of expenses. *Who* was to pay?

The Chairman observed that the issue raised by Mr Leal was partly covered in Working Document No 48 which would be discussed at Monday's meeting. He stressed that discussion of article 22 would be resumed along with any written proposals therefor, on Monday. In the meantime, he asked that delegates turn to article 23. Since no written proposals had been received, he sent it to the Drafting Committee.

Mr Holub (Czechoslovakia) pointed out that the Central Authority referred to in the first sentence of article 23 should be the Central Authority of the *requested* State.

The Chairman asked the Drafting Committee to note Mr Holub's comment. He then turned to article 24.

Mr van Boeschoten (Netherlands) referred to the concern expressed by Belgium regarding the possibility of a Central Authority acting without authorisation from the applicant. While disagreeing that this was a problem, since the Central Authority would act only upon receipt of such authorisation, he suggested that the word 'written' be inserted before 'authorisation' in article 24. This would cover cases where a written power of attorney was used.

The Chairman stated that Mr van Boeschoten's proposal would go to the Drafting Committee. He asked also that it consider the use of the word 'institution'. On this basis, he referred article 24 to the Drafting Committee.

Mr van Boeschoten, on a point of order, pointed out that the proposal in Working Document No 47 related to *article 14*, not article 15.

The meeting was closed at 12.30 p.m.

Documents de travail Nos 49 à 58
Working Documents Nos 49 to 58

Distribués le 20 octobre 1980 (matin)
Distributed on 20 October 1980 (morning)

No 49 – Proposal of the United States delegation

This proposal replaces the proposal contained in Working Document No 48.

Amendment of article 22:

Add the following new sub-paragraph to paragraph 2:

c require payment for locating the child.

Add the following paragraph after paragraph 2:

Upon ordering the return of a child or issuing an order concerning rights of access under this Convention, the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child, or who prevented the exercise of rights of access, to pay necessary travel and other expenses of the applicant, including the costs of legal representation, return of the child, and any payments made for locating the child.

Amendment to article 26:

1 *Remove brackets.*

2 *Insert in line 2 after* 'Convention' *the following:* 'or directly to the judicial or administrative authorities of a Contracting State'.

3 Insert in line 4 after 'courts' *the words:* 'or administrative authorities'.

No 50 – Proposal of the Australian and Finnish delegations

Article 14 bis

The judicial or administrative authority to which an application has been made for return of a child under article 11 may request the production to it of a document referred to in sub-paragraph *e* or *f* of article 8 and may make production of such document a condition of making an order for return of the child.

No 51 – Proposition de la délégation belge

Articles 21 et 22

1 Remplacer ces articles par la disposition suivante:

A l'exception des frais de rapatriement, chaque Etat contractant s'engage à n'exiger du demandeur aucun paiement pour toute mesure prise pour le compte de celui-ci par son Autorité centrale, y compris les frais et dépens du procès et, lorsque c'est le cas, les frais entraînés par la participation d'un avocat.

2 Amendement subsidiaire

Si cette proposition était rejetée, il faudrait compléter l'article 21 par une disposition prévoyant que:

Si le demandeur a, pour l'affaire en cause, bénéficié en tout ou en partie de l'assistance judiciaire dans l'Etat requérant, il en bénéficiera de plein droit, et dans la mesure la plus large, dans l'Etat requis.

No 52 – Proposal of the United Kingdom delegation

Article 25 (Drafting amendment)

This Convention shall not prevent any person *who claims that rights of custody and access* have been breached applying directly to the judicial or administrative authorities of a Contracting State.

No 53 – Proposal of the United Kingdom delegation

Article V (Relations with other Conventions)

It is proposed to include in the Convention an article to the following effect.

Parties to the present Convention who are also parties to other conventions [or have regionally uniform laws] relating to or implying the return of abducted children or relating to access rights may agree as between themselves which convention [or rule of law applicable under such convention or uniform law] shall take priority in matters to which the present Convention applies. In the absence of such agreement priority shall be given to the present Convention.

The United Kingdom delegation propose the inclusion within the Convention of an article in these terms:

The fact that a decision relating to custody or access has been given by or falls to be recognized by a judicial or administrative authority of the requested State shall not be a ground for refusing to return a child under article 11 of this Convention.

Note: Article W of the draft Convention refers to the question of the temporal application of the Convention. Without taking any fixed position on the matter it is proposed for purposes of discussion that the following text might be adopted:

This Convention shall apply regardless of the date of the alleged breach of custody or access rights.

Reference is made to article 24 of the Divorce Convention which is similar in terms but contains a right to make a reservation on this matter.

No 54 – Proposal of the United Kingdom delegation

Article 14

Add to the text proposed by the Netherlands delegation in Working Document No 47 the following:

The Central Authorities of Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.

No 55 – Proposal of the Australian and United Kingdom delegations

Article 22

The delegations suggest that the present text be changed by substitution of the words in italics.

Each Central Authority shall bear its own costs in applying the Convention.

Central Authorities and other *governmental agencies* of Contracting States shall not impose any charges in relation to applications submitted under this Convention but may –

a require the payment of any charges which are not met through the legal aid system and which arise from the employment of legal *advisers*;

b require the payment of the expenses incurred or to be incurred in *returning* the child

No 56 – Proposition de la délégation espagnole

Article 14 (ter)

Lorsque l'autorité judiciaire ou administrative d'un Etat est saisie aux fins de statuer sur les mérites d'un droit de garde, et que le défendeur résidant à l'étranger ne comparaît pas, elle doit au préalable s'informer, auprès de l'Autorité centrale de son Etat, s'il existe une demande de retour de l'enfant aux termes de la présente Convention.

No 57 – Proposal of the United States, Canadian and Netherlands delegations
– Proposition des délégations des Etats-Unis, du Canada et des Pays-Bas

Additional Final Clause

A Contracting State may, at the time of signature, ratification, acceptance, approval or accession, or at the time of a declaration made under article Y, declare that it shall not be bound to assume any costs referred to in article 22*a* resulting from the services of legal counsel or advisers or from court proceedings except insofar as those costs may be covered by its system of legal aid and advice.

Clause finale additionnelle

Un Etat contractant pourra, au moment de la signature, de la ratification, de l'acceptation, de l'approbation ou de l'adhésion, ou au moment d'une déclaration faite en vertu de l'article Y, déclarer qu'il ne sera tenu au paiement des coûts visés à l'article 22*a* reliés aux services d'un avocat ou d'un conseiller juridique ou aux frais de justice que dans la mesure où ces coûts peuvent être couverts par son système d'assistance judiciaire et juridique.

No 58 – Document de clarification présenté par la délégation italienne

La délégation italienne voudrait exprimer par écrit, encore une fois, ses doutes, à propos de la formulation de la dernière phrase de l'article 3, telle qu'elle a été confirmée par le Comité de rédaction.

A notre avis, on pourrait envisager une lacune dans cette disposition. En effet, les décisions judiciaires ou administratives énoncées de ladite disposition pourraient être: 1) des actes émanant directement de l'Etat de la résidence de l'enfant; 2) des actes étrangers que ledit Etat a reconnus formellement par la voie judiciaire ou par la voie administrative; 3) des actes étrangers qui, sans avoir été reconnus par une décision administrative ou judiciaire de l'Etat de la résidence, reçoivent ex jure «force de loi» *dans cet Etat, au moins pour les effets qui nous intéressent.*

Or, ces trois possibilités diverses ne sont pas bien envisagées dans le projet de l'article 3.

Nous avions proposé d'enlever la virgule entre le mot «administrative» *et l'expression* «ou d'un accord»; *ce qui aurait montré clairement que les décisions judiciaires ou administratives étrangères pourraient être considérées* «en vigueur» *de plein droit dans l'Etat de la résidence. Mais le Comité de rédaction n'a pas considéré opportune cette petite modification.*

Et nous pensons que l'équivoque a augmenté, si nous prenons en considération l'article 13, tel qu'il a été modifié – très justement d'ailleurs – par la proposition australienne, canadienne et du Royaume-Uni (Doc. trav. No 15).

Dans cette proposition on parle d'éviter un processus de reconnaissance pour les décisions étrangères, mais seulement – nous voudrions le souligner – *pour les décisions étrangères émanant de l'Etat de la résidence de l'enfant.*

Que doit-on penser alors des décisions rendues dans un Etat tiers et non reconnues dans l'Etat de la résidence de l'enfant par un acte particulier (c'est-à-dire une décision administrative ou judiciaire interne), mais qui sont, pour autant, en vigueur ex jure *dans ce dernier Etat?*

Ces cas ne sont pas envisagés expressément ni par l'article 3, ni par l'article 13 modifié.

Nous comprenons qu'il serait absurde que ces hypothèses ne soient pas comprises dans l'article 3 et dans l'article 13; cependant, peut-être, cette lacune formelle de la Convention pourrait bien être évitée par le Comité de rédaction.

Procès-verbal No 11

Séance du lundi 20 octobre 1980 (matin)
Meeting of Monday 20 October 1980 (morning)

The meeting was opened at 9.45 a.m. Mr Anton (United Kingdom) was in the Chair. Miss Pérez-Vera (Spain) was Rapporteur.

The Chairman began the proceedings by stressing to the delegates that very little time remained for discussion, since it was necessary to complete the meeting's first reading of the Convention by Tuesday evening, so that the proposals of the Drafting Committee could then be considered. He then turned to article 25 of the draft Convention, and to the proposals concerning it, *i.e.* Working Documents Nos 14 (now superseded by the work of the Drafting Committee) and 52.

Mr Jones (United Kingdom) described Working Document No 52 as proposing a drafting amendment designed to cover the possibility that the applicant was not the person whose rights of custody had been breached.

Miss Selby (United States) recalled that Working Document No 14 had made it clear that an applicant could apply directly to judicial or administrative authorities of Contracting States. Article 25 of the Convention should make this right explicit.

The Chairman noted the meetings's agreement with Miss Selby's remark. He referred article 25, together with Miss Selby's comments, to the Drafting Committee and turned the attention of delegates to article 26 and Working Document No 49.

Miss Selby (United States) sought to make two points in particular with regard to the proposal in Working Document No 49:

1 The square brackets presently around article 26 should be removed. Since article 26 was extremely important from a procedural point of view, their removal was essential for the speedy consideration of applications, which required the admissibility of information referred to therein. She emphasised that the article did not concern the weight or importance to be placed on such evidence, but was directed towards the removal of certain requirements and formalities which could result in delays and expended arguments.

2 The proposed insertion of the words 'or directly to the judicial or administrative authorities of a Contracting State' were intended to cover a case where an applicant made a direct application to the judicial or administrative authorities concerned, by-passing the Central Authority. Miss Selby emphasised that the article dispensed only with formalities, and that its presence in the Convention was necessary if the latter was not to be burdened with evidential complications.

Mr Walsh (Ireland) felt that the words 'shall be admissible' raised grave problems, since much of the evidence concerned would be based on hearsay. He suggested that the word 'shall' be replaced by 'may'.

Mr Müller-Freienfels (Federal Republic of Germany) agreed with Mr Walsh. German courts would have similar difficulties with the existing formulation. However, it should be made clear that courts were not precluded, in terms of article 26, from using the documents referred to therein.

The Chairman suggested that the word 'admissible' implied what Mr Müller-Freienfels had made explicit.

Mr Jones (United Kingdom) expressed some disquiet concerning two parts of the United States proposal in Working Document No 49. Firstly, the extension of article 26 to direct applications could lead to an applicant circumventing local rules of evidence by the mere claim that his application was brought under the Convention. Secondly, he doubted whether the reference to 'administrative authorities' should be added, since in his opinion such authorities did not have rules of admissibility and had to accept all evidence presented to them.

Le Rapporteur propose de changer la place de la phrase que veut introduire la délégation américaine. Il s'agit de faire comprendre que cette requête tombe sous l'application de la Convention. La phrase proposée par la délégation américaine devrait être introduite après les termes «Autorité centrale».

The Chairman felt that the issues were relatively simple and had been debated at sufficient length. Since the Rapporteur had effectively replied to the points raised by Miss Selby, he asked that the meeting proceed to vote.

Votes

Working Document No 49, in so far as it proposed the removal of the square brackets from around article 26, was approved unanimously; Italy and Norway abstaining.

The oral proposal of Ireland that 'may' *be substituted for* 'shall' *in article 26 was approved by a vote of 14 in favour (Austria, Egypt, Finland, France, Federal Republic of Germany, Greece, Ireland, Luxemburg, Norway, Portugal, Sweden, Switzerland, Venezuela, Yugoslavia), 7 against (Australia, Belgium, Canada, Denmark, Netherlands, Spain, United States), with 3 abstentions (Italy, Japan, United Kingdom).*

The Chairman sent the text of article 26, subject to the accepted amendment proposed by Ireland, to the Drafting Committee. With regard to article 27, he noted that no written proposals had been received.

Miss Selby (United States) pointed out that article 27 had been referred to the Committee on Application Clauses.

Mr Dyer (First Secretary at the Permanent Bureau) informed the meeting that he had consulted Mr Matić, the Chairman of the Application Clauses Committee, and it was felt that there should be no meeting of this Committee until the full commission had clarified the nature of the provisions of the Convention (especially those of article 17) during its first reading. The Committee would take into account any oral suggestions made now by delegates. However, the final form of the provision adopted would depend on the final form of the Convention.

The Chairman requested that the Application Clauses Committee consider the relevant issues and report to the full Commission no later than Tuesday morning. He noted that Mr Matić, due to personal difficulties, had intimated his wish to resign the chairmanship of the Committee, and that the appointment of a new Chairman would be discussed during the coffee break. Since the meeting was awaiting the presentation of certain written proposals on other matters, he asked that delegates turn to article 22, discussion of which had been deferred at the previous meeting. The relevant Working Documents were Nos 49 and 51, but he pointed out that Working Document No 51 should be read as relating only to article 22, since article 21 had already been approved by the Commission.

M. Jenard (Belgique) explique sa proposition visant à la gratuité des frais de justice et des frais d'avocat. Après avoir lu sa proposition, il l'explique: le premier aspect est d'ordre social; cette Convention vise des personnes de condition généralement modeste; les cas sont fréquents où le requérant est trop riche pour obtenir l'assistance judiciaire mais trop indigent pour subvenir aux frais de la procédure.
Le second aspect est d'ordre pratique; pour obtenir l'assistance judiciaire la procédure est souvent compliquée, notamment lorsque l'on a affaire à des pays éloignés où des problèmes de langue interviennent.
En troisième lieu, M. Jenard indique les problèmes soulevés par l'absence de l'institution d'assistance judiciaire dans certains pays.
Enfin, M. Jenard souligne la très grande disparité dans les mesures de rétribution des avocats selon le pays auquel ils appartiennent; il lit un article illustrant son point de vue.
L'harmonisation des dispositions de la Convention de Strasbourg avec celles de la présente Convention est un argument supplémentaire en faveur de la gratuité des avocats.

The Chairman stated that the debate on Working Document No 51 would be facilitated if it was understood as proposing the deletion of sub-paragraph *a* of article 22(2).

M. Jenard (Belgique) répète que le but de la proposition de sa délégation vise à la gratuité des frais d'avocat; pour le reste il s'en remet au Comité de rédaction.

The Chairman felt that the results desired by Mr Jenard would necessarily come about from the deletion of sub-paragraph *a* of article 22(2). On this basis, he opened the discussion on Working Document No 51. He stressed that it should be understood as proposing amendments simply to article 22.

M. Chatin (France) envisage ce problème, avant tout, dans l'optique du droit anglo-saxon.
Il relève d'autre part que les frais d'avocat sont inexistants lorsque l'Autorité centrale saisit directement les autorités judiciaires, comme c'est le cas aux Etats-Unis pour le recouvrement des frais alimentaires.

Miss Selby (United States) admitted that the sometimes high cost of private legal fees in the United States underlay the proposal in Working Document No 49. However, she cautioned delegates not to expect the whole pattern and structure of legal aid provision in the United States to be altered solely for this Convention. She added that the problem concerned those cases in which *private* attorneys acted for the parties; the United States would also explore the possibilities for reducing these costs by use of legal aid provided by the private bar and government attorneys.
With regard to the solution adopted by the Strasbourg Convention, Miss Selby suggested that it was based upon a greater similarity of legal aid systems in the Contracting States, and that the wider membership of The Hague Conference effectively precluded such a solution in the present context.

The Chairman reiterated the question posed by Mr Chatin as to whether the Central Authorities of common law

countries could themselves apply directly to judicial or administrative authorities for the return of a child.

Mr Walsh (Ireland) answered that, so far as Ireland was concerned, this would not be possible, due to the Central Authorities possessing insufficient interest.

Mr Jones (United Kingdom) considered that in England and Wales, it would be possible to arrange for the cost of legal assistance for an applicant under the Convention to be met by the State – as is provided in the Strasbourg Convention. This might be done either by the Central Authority briefing counsel for the applicant or by making use of, for example, the Official Solicitor. However, he recalled that this point had been extensively discussed in the Special Commission of November 1979, and that it had then become apparent that a number of jurisdictions would not be able to adopt such a system. Approval of Working Document No 51 would thereby involve a reservation being made by those States.

The Chairman observed that, so far as Scotland was concerned, a serious problem would arise if Central Authorities were given the power to apply directly, and not merely as the mandate of applicants. He also asked delegates to consider the effect of these proposals on the possible ratification of the Convention by other States, and not merely to consider their own national positions.

Mr Leal (Canada) admitted to holding serious reservations concerning the proposal in Working Document No 51. He noted that, in the province of Ontario, the sytem of legal aid was based on the provision of funds to a litigant who chose his *own* lawyer. There was no 'public defender' system. As a result, the adoption of the Belgian proposal could lead to the impossible situation whereby Ontario was obliged to pay the total costs incurred by an applicant who might hire the highest-paid lawyer in the Province.

Mr van Boeschoten (Netherlands) agreed that the meeting must be very careful to avoid provisions which could cause problems with regard to ratification. On the question of legal aid, the Netherlands operated a system similar to that described by Mr Leal, which allowed a litigant a free choice with regard to counsel. However, he doubted whether the Netherlands Government would be prepared to pay the costs of legal assistance incurred by a millionaire, and some prudence was therefore required on this point. He added that the Netherlands might find even the Strasbourg Convention's provisions on legal aid difficult to accept.

M. Chatin (France) constate que les Etats-Unis, le Canada et le Royaume-Uni n'ont pas rejeté l'institution de l'avocat du Gouvernement; il prend pour exemple la Convention de La Haye sur l'obtention des preuves qui connaît cette institution. La France a signé un accord avec le Québec où l'Autorité centrale, elle-même, remplit les fonctions d'avocat.
La proposition de la délégation britannique, prévue au Document de travail No 54, présente une solution médiane. M. Chatin aimerait que l'on remplace le mot «*practicable*» par le terme «*possible*».

M. Barile (Italie) appuie la proposition de M. Jenard et relève qu'en Italie le juge certaines fois a compétence pour nommer un avocat.

Mr Aina (Commonwealth Secretariat) observed that most developing Commonwealth countries had no systems for the provision of legal aid in civil matters. It would therefore be very difficult for them to accept the Convention's provisions on legal aid as they stood.

M. Jenard (Belgique) répond à M. Chatin. Il souligne que le problème de la gratuité concerne aussi les pays européens; il reprend l'argument de l'harmonie des Conventions de Strasbourg et de La Haye. Il s'oppose à l'idée, qu'en l'absence de jugement, la procédure ne soit pas gratuite.
Répondant ensuite à Mlle Selby M. Jenard fait allusion à la Convention de New York sur le recouvrement des aliments à l'étranger et fait mention de la disposition qui permet d'avoir recours aux avocats d'office.
Dans sa réponse à la délégation néerlandaise, il reprend l'argument des «millionnaires» avancé par le Délégué des Pays-Bas, et affirme que ces derniers ne feront pas, en général, recours aux moyens de la Convention mais chercheront les meilleurs avocats sur place.
Pour la ratification par la Belgique, la disposition prévoyant la gratuité des avocats est primordiale.

The Chairman repeated that the Belgian proposal in Working Document No 51 must be understood as relating to article 22. In this context, it implicitly required the deletion of the existing article 22(2)*a*.

M. Jenard (Belgique) propose que l'on remplace «leur» par le mot «à».

M. Chatin (France) estime que l'on devrait prévoir expressément qu'un avocat du Gouvernement soit nommé en priorité si cette possibilité existe.

The Chairman stressed that the proposal under consideration was for the amendment of article 22(2)*a* and he asked that the meeting proceed to a vote.

Vote

Working Document No 51, in so far as it implicitly proposed the deletion of sub-paragraph a *of article 22(2) and its replacement by paragraph 1 of Working Document No 51, was accepted by a vote of 10 in favour (Belgium, Czechoslovakia, Denmark, France, Greece, Italy, Luxemburg, Portugal, Spain, Switzerland), 8 against (Australia, Canada, Federal Republic of Germany, Japan, Netherlands, Norway, United Kingdom, United States), with 6 abstentions (Egypt, Finland, Ireland, Sweden, Venezuela, Yugoslavia).*

The Chairman noted that this affirmative vote meant that Mr Chatin's subsidiary proposal fell. He then turned to the proposal in Working Document No 55.

Mr Creswell (Australia) described the proposal in Working Document No 55 as a drafting amendment, and referred in particular to the proposed substitution of 'advisers' for 'counsel', and of 'returning' for 'repatriating'.

The Chairman sent the proposal in Working Document No 55 to the Drafting Committee. He emphasised that Mr Chatin's oral proposal to add to sub-paragraph *a* of article 22(2) the words 'other than a lawyer appointed by the Government' had fallen owing to the meeting's acceptance of the Belgian proposal in Working Document No 51.

Mr Dyer (First Secretary at the Permanent Bureau) announced that Mr van Boeschoten (Netherlands) had agreed to replace Mr Matić (Yugoslavia) as Chairman of the Committee on Application Clauses. He added that this Committee would meet at 2 p.m. today and that the Forms Committee would meet at the same time.

The Chairman asked if any further points still had to be made with regard to article 22.

Mr Holub (Czechoslovakia) asked whether it was intended that the Central Authority of a requested State be bound to

pay the expenses incurred in repatriating the child. He noted that the new article 7(1)*h*, proposed by the Drafting Committee in Working Document No 45, made no mention of this obligation on the part of Central Authorities, while the Report described as normal the existence of such a duty. Due to this apparent contradiction, it might be necessary to add a new sub-paragraph *j* to article 7(2). In addition, as noted in the Report, the word 'repayment' had been replaced by 'payment' in article 22(2)*b* of the draft Convention, and it was important to know whether Central Authorities were also bound to *advance* the money for such expenses in all cases.

Le Rapporteur rappelle que dans son Rapport «paiement» est utilisé à la place de «remboursement». L'Autorité centrale pourrait demander aux ravisseurs le paiement des frais de rapatriement de l'enfant. Toutefois ces derniers ne faisaient pas l'objet de la disposition de l'article 7*h* qui ne concerne pas le paiement du billet de retour mais bien plutôt les facilités administratives, du genre de l'octroi d'un visa, par exemple.

Mr Holub (Czechoslovakia) intervened to say that he was not sure what had been decided concerning the United States proposal in Working Document No 49. Did it constitute an exception?

The Chairman took the sense of the meeting to be that no State was *obliged* to pay the expenses of repatriation. Article 22(2)*b* was a subsidiary provision concerning the recovery of expenses originally paid in advance by a Central Authority. He asked that the delegates direct their attention now to Working Document No 49.

Miss Selby (United States), on a point of order, proposed that the debate on legal assistance, which had culminated in the vote referred to in paragraph 34, be reopened.

The Chairman replied that Miss Selby's proposal could be linked to the possible reservation proposed by Mr Jenard which would be placed before the meeting on Tuesday morning. He suggested that delegates await the text of Mr Jenard's proposal on this matter before turning to Miss Selby's point again.

Miss Selby (United States) insisted that the decision referred to in paragraph 34 required further consideration. It was a very serious and indeed critical matter for the United States delegation. She noted that the vote had contained a large number of abstentions. However, since it was important to see the terms of the final Draft which would incorporate the Belgian proposal, she suggested that further discussion be deferred until such final text was available.

The Chairman observed that, in so far as Miss Selby had raised a point of order concerning possible confusion in the vote, an absolute majority of delegates was required under Rule 16 of the Rules of Procedure before the matter could be reopened.

M. Batiffol (France) pense que la confusion et le désaccord des délégués nécessitent un temps de réflexion avant de rouvrir la discussion sur ce point.

The Chairman acknowledged Mr Batiffol's point but suggested that, since the first reading of the text of the Convention had to be completed by the close of debate on Tuesday, the question should be left open for the moment, until the possible reservation proposed by Mr Jenard had been dealt with. He noted that the latter would be available for debate on Tuesday morning.

M. Jenard (Belgique) propose que l'on poursuive la discussion lorsque le Comité de rédaction aura présenté son texte.

The Chairman asked Mr Jenard whether he would demand a unanimous vote by delegates for the re-discussion of the issue of principle decided by the vote referred to in paragraph 34.

M. Jenard (Belgique) n'entend pas renoncer à la procédure de la majorité absolue prévue par le règlement.

Mr van Boeschoten (Netherlands) supported the view that consideration of the question raised by Miss Selby be postponed. In the first place, it would be more fruitful to discuss it in the light of any reservations which were proposed. In the second place, the matter had been debated quite recently, and some time for reflection on a rather unexpected decision was needed.

The Chairman took the sense of the meeting to be that the reopening of the question of legal aid be deferred, pending receipt of the relevant proposals from the Drafting Committee.

Miss Selby (United States) asked whether it might be possible to take a decision *now* to reopen the matter once the relevant text was available.

The Chairman referred to Rule 16 of the Rules of Procedure of the Hague Conference, which required an absolute majority for reopening the debate on matters which had already been decided. This rule was binding on the Commission. He noted, however, that in view of the difficulties which had been encountered and the high number of abstentions during the vote, delegates might well vote in favour of re-discussion.

Miss Selby (United States) felt that the meeting should decide (1) whether the question be re-discussed at some point, and (2) whether further discussion should take place now or on Tuesday. She reiterated her plea that the meeting decide at this point whether discussion be reopened tomorrow, by which time the text would be available.

Mr Leal (Canada) observed that a very serious situation had arisen as a result of the vote on Working Document No 51, and that the Canadian delegation would require instructions from its Government on this point.
He found himself in agreement with Mr van Boeschoten that it would be helpful to give delegates the chance to draft reservations before any re-discussion was undertaken, since it was possible that acceptable reservations could be devised. He added that the Drafting Committee was unlikely to alter the text of the Belgian proposal in any significant way, in the absence of any mandate to do so.

Miss Selby (United States) wondered whether consideration of the text from the Drafting Committee concerning Mr Jenard's proposal and any possible reservation would be undertaken without any prior majority vote to that effect.

Mr van Boeschoten (Netherlands) felt that Miss Selby's motion to reopen the discussion could more appropriately be made once the Drafting Committee's text was before the meeting, since only then could the matter be re-debated.

The Chairman stressed that very little time remained for the drafting of the Convention, and he asked for the assistance of delegates in expediting the discussions. He made the two following points:

(*i*) the matter of reservations concerning the issue of legal aid could be discussed without a prior vote by absolute majority;
(*ii*) the issue of principle contained in Working Document No 51 had been decided and could not be reopened without such absolute majority in terms of Rule 16 of the Rules of Procedure.
Miss Selby should have the opportunity to discuss the matter with other delegates, but in the meantime he requested the meeting to turn to the proposals in Working Document No 49.

Miss Selby (United States) drew the attention of the delegates to two separate elements in Working Document No 49.
Firstly, it was designed to cover those costs concerning the return of a child which would not be paid by the Central Authorities. Such costs should be made chargeable to the abductor, since otherwise he would be in a better position than the deprived party who, whatever the outcome of the case, would already have discharged a heavy legal burden. The proposed provision would therefore act as a deterrent vis-à-vis abductors, whilst assuring applicants that they would incur no financial burden in the event of a successful application. She stressed that the provision was permissive only, since there could be situations in which the payment of such costs was not appropriate.
Secondly, a reference to rights of access was necessary, since the Convention would be used by parties seeking to enforce such rights. In these cases, it was equally appropriate to deter the *custodian* from preventing the effective enjoyment of access rights. Although she did not wish in any way to pre-empt the discussion of article 17, it should be recognised in this context that the safeguarding of rights of access could also serve to deter abductions.
Miss Selby emphasised her concern that the costs involved in legal representation and the return of the child should not be borne by a wholly innocent party who sought to secure his legal rights.

The Chairman asked Miss Selby whether the payment envisaged in the proposed additional sub-paragraph *c* referred to in Working Document No 49 would be by the applicant, the abductor, or both.

Miss Selby (United States) replied that the expenses of the *applicant* should be charged against the person responsible for the wrongful removal/retention of the child or for the non-exercise of access rights.

The Chairman asked whether the sense of the proposal was that payment should be required from the *abductor*.

Miss Selby (United States) explained that the expenses envisaged were those which would not be paid by the Central Authorities but which would result from, for example, the hiring of a private detective. She added that the United States delegation had considered requiring the payment of a modest application fee to the Central Authority when a request to locate the child was submitted.

The Chairman asked whether even the applicant might be required to pay such a fee to the Central Authority.

Miss Selby (United States) replied that this was a separate proposal.

The Chairman opened the discussion on Working Document No 49, in so far as it proposed the addition of a new sub-paragraph *c* to article 22(2).

Mr Holub (Czechoslovakia) felt that the person from whom payment would be required remained an open question, and that the meeting should look also to sub-paragraph *b* in this text.

Mr Walsh (Ireland) observed that it was necessary to consider the entire proposal as a whole. He pointed out that, if the Central Authority could require payment from the applicant for locating the child in the first instance, the applicant could thereafter recover this expense from the abductor by way of a court order. As a result, he felt that the word 'reasonable' should be added before the word 'payment' in Working Document No 49.

Mr Creswell (Australia) believed that the proposed additional sub-paragraph *c* was at present expressed too widely in terms of the person from whom payment could be obtained. There could be difficulties in obtaining a court order for costs against a non-party to the proceedings, and it was quite possible that the abductor might not in fact be a party. He suggested that the notion of 'respondent' be built into the proposal in Working Document No 49.

M. Chatin (France) entrevoit un danger dans la proposition faite par les Etats-Unis d'introduire une lettre *c*; cette disposition est, selon lui, beaucoup trop imprécise. Les frais de recherche sont souvent très élevés notamment lorsque l'on fait appel à Interpol, comme c'est le cas en France. Il semble qu'il conviendrait de prévoir que les Etats supportent ces frais. Par contre, la deuxième partie de la proposition semble très opportune.

M. Jenard (Belgique) appuie la proposition des Etats-Unis.

Mr van Boeschoten (Netherlands) stated that heretofore he had construed article 22 as concerning only the relationship between a Central Authority and the person seeking assistance from it; he had not interpreted it as applying to payments by the abductor or 'guilty party' of expenses incurred by the Central Authority. If the scope of article 22 were to be extended in the way proposed, a further provision was required to the effect that the abductor could be obliged to pay such expenses in certain circumstances. However, he felt that this was really a separate issue.

M. Voulgaris (Grèce) explique pourquoi il s'oppose à l'introduction d'une lettre *c*, cette adjonction serait dissuasive pour le demandeur qui n'oserait plus poser une requête, craignant des frais énormes; il propose de laisser tomber cette adjonction et se déclare favorable au maintien du second paragraphe de la proposition qui a un effet dissuasif, cette fois-ci, pour le kidnappeur.

Miss Selby (United States) emphasised that Working Document No 49 raised two separate issues, *viz.* the expenses which the applicant might have to pay, on the one hand, and those payments which might be charged by a court against the abductor, on the other. With regard to the former, she stated that the United States delegation had envisaged the levying of a modest application fee on the applicant. This could help ensure that an application would not be frivolous. However, she would be willing to amend the proposal for a new sub-paragraph *c*, to the effect that a Central Authority might require the payment of a 'modest application fee' for locating the child. The latter issue concerned the further or actual expenses which could be recovered from the abductor. These would include expenses incurred by the Central Authority.
Miss Selby asked that these two issues be voted upon separately.

Mr Walsh (Ireland) noted that the United States delegation was prepared to accept the insertion of 'reasonable' in the

proposed sub-paragraph *c* of article 22(2). He suggested that it should also be placed in the text of the new paragraph proposed in Working Document No 49.

The Chairman announced that two votes would be taken, the first for the inclusion of a new sub-paragraph *c* to article 22(2), in terms of Working Document No 49, the second concerning the addition of a new paragraph after article 22(2), both as proposed in Working Document No 49.

Mr Walsh (Ireland) intimated that he withdrew his oral proposal for the addition of the word 'reasonable' in the proposed new paragraph to article 22.

M. Jenard (Belgique) exprime ses doutes quant à l'interprétation de la lettre *c* de la proposition des Etats-Unis; si les frais étaient mis à la charge du ravisseur il serait prêt à soutenir la proposition; dans le cas contraire il s'y opposerait.

The Chairman commented that it was Miss Selby's wish that the words 'of a reasonable application fee' be added to the proposed sub-paragraph *c*. This fee would be payable by the applicant. The proposed new paragraph was intended to ensure that the costs referred to therein could be charged against the abductor by the court.

M. Vischer (Suisse) intervient pour que l'on définisse la nature de «*application fee*»; il se demande si cet émolument a valeur de condition au fond.

The Chairman asked that the proposal, as amended, be put to the vote.

Le Rapporteur soulève la contradiction introduite par l'alinéa *c* du Document de travail No 22. Il rappelle que l'Autorité centrale a l'obligation de tout mettre en oeuvre pour localiser l'enfant; de plus, selon l'article 22 paragraphe 1, il appartient à l'Autorité centrale de supporter ses propres frais qui devraient, au moins, comprendre ceux occasionnés par la recherche de l'enfant. L'emploi du terme «raisonnable» est mal venu et pourrait provoquer des interprétations allant à l'encontre de l'intérêt du demandeur; le Rapporteur est favorable au principe énoncé dans le deuxième paragraphe de la proposition américaine mais émet des doutes quant à la situation de cet article dans la Convention; il conviendrait de placer cette disposition ailleurs.

The Chairman put Working Document No 49 to the vote.

Votes

Working Document No 49, in so far as it proposed the addition of a new sub-paragraph c *to article 22(2), subject to the insertion of the words* 'of a reasonable application fee' *after* 'payment', *was rejected by a vote of 17 against (Belgium, Canada, Czechoslovakia, Denmark, Finland, France, Federal Republic of Germany, Greece, Luxemburg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, United Kingdom, Venezuela), 4 in favour (Australia, Egypt, Ireland, United States), with 1 abstention (Japan).*

Working Document No 49, in so far as it proposed a new paragraph after paragraph 2 of article 22, subject to the addition of the words 'locating the child' *after* 'the costs of', *was approved by a vote of 11 in favour (Australia, Belgium, Canada, Czechoslovakia, Egypt, France, Greece, Ireland, Sweden, United Kingdom, United States), 5 against (Japan, Luxemburg, Netherlands, Portugal, Spain), with 6 abstentions (Denmark, Finland, Federal Republic of Germany, Norway, Switzerland, Venezuela).*

The Chairman then opened discussion on article 14.

Mr Holub (Czechoslovakia), on a point of clarification, asked whether the applicant, abductor or both were to be subject to demands for payment from the Central Authority in terms of article 22(1)*b*.

Le Rapporteur demande au Délégué tchécoslovaque de préciser s'il fait allusion à l'article 22 du projet ou à la proposition américaine telle qu'elle vient d'être adoptée. S'il s'agit de cette dernière proposition, il est clair que le ravisseur doit payer.

The Chairman, in answer to Mr Holub, observed that article 22(2)*b* was in its terms perfectly neutral as regards the party who would pay the expenses concerned. Moreover, it was not a mandatory provision but purely optional. He asked the meeting to turn its attention to article 14 and the relevant Working Documents thereon, *i.e.* Nos 4, 44, 47, 54, 50 and 56. Although Working Document No 56 was stated as applying to article 14(3), the Chairman felt that it should be discussed later with regard to the problem of incompatible decrees.

Mr Espinar (Spain) agreed that this be done.

M. Jenard (Belgique) se rallie à la proposition hollandaise prévue au Document de travail No 47.

Mr Minami (Japan) endorsed the Netherlands proposal in Working Document No 47, and withdrew Working Document No 44.

Mr van Boeschoten (Netherlands) announced his willingness to supplement Working Document No 47 with the United Kingdom proposal in Working Document No 54. He described the effect of Working Document No 47 as twofold. Firstly, it would amend the existing text by providing that the judicial or administrative authorities address their request for a decision or other determination to the *applicant*. Secondly, it made it clear that the production of such decision or other determination was not a precondition for the return of a child, since an applicant would merely be *requested* to obtain the relevant information.
Mr van Boeschoten added that Working Document No 47 also embraced the situation envisaged in Working Document No 44 whereby the law of a particular State made it impossible for such a decision or determination to be rendered.

M. Espinar (Espagne) ne s'oppose pas en principe à la proposition néerlandaise mais fait quelques remarques. Il précise que cette proposition risque d'entraîner deux différents types de discrimination: d'un côté celle qui se produit entre les ressortissants des Etats où telle attestion peut être obtenue et les ressortissants des pays où l'obtention n'est pas possible. Les demandeurs de ces derniers Etats ont la tâche plus facile. D'autre part il y a aussi discrimination entre les pays en fonction du temps nécessaire pour l'obtenir. D'ailleurs, s'il est possible d'ordonner le retour de l'enfant sans l'attestation il ne voit pas de raisons pour la demander.

The Chairman stated that it was difficult to act without written proposals, but suggested that the Drafting Committee note Mr Espinar's comments within the context of Working Document No 47 which he sent thereto. With regard to Working Document No 54, he noted that Mr Chatin had suggested the substitution of 'possible' for 'practicable'.

Mr Jones (United Kingdom) stated that Working Document No 54 was intended to meet the points raised in Working Document No 4, which had been withdrawn. It

merely required Central Authorities to do what they could to assist applicants. He felt that the Drafting Committee should consider Mr Chatin's proposal which was really a drafting point and should not be dealt with by the full Commission.

Miss Selby (United States) referred to the cases where a Central Authority might discover that the applicant had no clearly established right to custody. She was concerned that article 14 should not be interpreted in such a way that a Central Authority in a particular State could decide that an applicant from that State should have the right to custody. Such a Central Authority should not become the agent of the applicant.

M. Espinar (Espagne) désirerait ajouter un deuxième paragraphe à la proposition allant dans le sens du Document de travail No 37.

The Chairman commented that Mr Espinar's points were covered by Working Document No 50. He asked that the meeting proceed to a vote on Working Document No 54.

Vote

Working Document No 54 was approved unanimously, with one abstention (Norway).

The Chairman then opened discussion on Working Document No 50.

Mr Creswell (Australia) explained that the proposal in Working Document No 50 arose out of what had been suggested in Working Document No 37. It had been felt that Working Document No 37, as it stood, would have imposed a comprehensive requirement that a certificate be provided in every case. This would be excessive, given the cases in which the basis of a party's right to custody was not in dispute (but only the exercise thereof). Such a provision should therefore be directory only, not mandatory. In this connection, Mr Creswell referred back to article 8(2)*e* and *f* of the draft Convention, which made the production of such documents optional.

Mr van Boeschoten (Netherlands) referred to the words 'may make production of such document a condition' in Working Document No 50. He felt that they should not be included in article 14, and that it should be for the authority concerned to decide if a legal basis for the rights claimed had been established or not. A court could always rule against an applicant who failed to submit a certificate.

Mr Savolainen (Finland) observed that it was difficult to find an appropriate place within the text of the Convention for the proposal in Working Documents Nos 50 and 37. He suggested that it be placed close to article 13 of the draft Convention, since it related to the proof of foreign law. In his view, the wording of the proposal should be revised so as to express clearly the idea that, in the absence of documentary evidence, proceedings *might* be suspended. He felt that such an alteration would clarify the Convention and improve its operation.

M. Espinar (Espagne) fait valoir les nombreuses facilités que la Convention tend à accorder en faveur du retour de l'enfant; dans cet objectif, il serait préférable qu'on requière une attestation à titre purement formel et non comme condition d'entrée en matière.

Miss Selby (United States) agreed with Mr van Boeschoten. However, the judicial or administrative authority concerned would have to find at some stage that the applicant possessed custody rights. Therefore, it was appropriate to require the applicant to present such proof as was available. Nevertheless, to require such proof in all cases would unnecessarily complicate proceedings in which there was no controversy on this point. On balance, she felt it better to omit from the Convention the proposal contained in Working Document No 50.

Mr Minami (Japan) found it difficult to support Working Document No 50 which appeared to extend help to the abductor by complicating the proceedings for the return of a child.

Mr Creswell (Australia), in reply to Mr van Boeschoten, agreed that where no determination of wrongful removal/retention could be made, no absolute obligation to produce evidence could be imposed. However, where formal evidence of custody rights was being sought, the requirement was perfectly appropriate, since a judicial authority should be able to insist upon the production of relevant evidence. He stressed the optional nature of the provision in Working Document No 50, which did not seek to impose the obligation to produce documents in every case. With regard to Mr Minami's point, he felt that the facultative nature of the provision would prevent it being used as a delaying tactic by the respondent. If a court regarded a request for the production of certain documents as unreasonable, it could simply refuse to entertain the application.

The Chairman asked whether the proposal in Working Document No 50 was really necessary, and he cautioned delegates against inserting unnecessary provisions into the Convention. There was no doubt that a court would not have to return a child if there was insufficient evidence that the applicant had rights of custody. In this regard, he suggested that delegates subscribe to the maxim 'when in doubt, leave it out'.

Mr Savolainen (Finland) conceded that he had no strong feelings about the proposal in Working Document No 50. If the Chairman's interpretation was clearly correct, he would be willing to withdraw the proposal.

Mr Creswell (Australia) felt that this was really a matter of judgment and requested that the sense of the meeting be taken with regard to Working Document No 50.

Le Rapporteur souligne que la proposition de l'Australie et de la Finlande s'éloigne tout à fait de la proposition du Document de travail No 37; cette proposition est acceptable mais superflue; le Rapporteur retire d'ailleurs sa propre proposition.

The Chairman asked that the meeting proceed to a vote on Working Document No 50.

Vote

Working Document No 50 was rejected by a vote of 12 against (Belgium, Egypt, France, Federal Republic of Germany, Greece, Ireland, Japan, Luxemburg, Netherlands, Portugal, Switzerland, United States), 6 in favour (Australia, Canada, Denmark, Finland, Norway, Venezuela), with 4 abstentions (Czechoslovakia, Spain, Sweden, United Kingdom).

The Chairman stated that insufficient progress was being made in the consideration of the draft Convention and that it might be necessary to hold additional meetings.

The meeting was closed at 12.55 p.m.

Distribué le 20 octobre 1980 (après-midi)

Proposition du Sous-Comité Formule modèle

1 A l'article 8, alinéa 2, il convient d'ajouter un astérisque après le mot «demande» *renvoyant à une note disant:*

«Toute demande faite en vertu de la présente Convention pourra être déposée au moyen de la formule modèle y annexée».

2 Formule modèle:

Requête en vue du retour

Convention de La Haye du ..... sur les aspects civils de l'enlèvement international d'enfants

AUTORITÉ CENTRALE REQUÉRANTE OU REQUÉRANT	AUTORITÉ REQUISE

Concerne l'enfant ..... qui aura 16 ans le ..... 19.....

NOTE: Les rubriques suivantes doivent être remplies de la façon la plus complète possible.

I — IDENTITÉ DE L'ENFANT ET DES PARENTS

1 *Enfant*

nom et prénoms .....
date et lieu de naissance .....
résidence habituelle avant l'enlèvement .....
passeport ou carte d'identité No (s'il y a lieu) .....
signalement et éventuellement photo (voir annexes) .....

2 *Parents*

2.1 Mère: nom et prénoms .....
date et lieu de naissance .....
nationalité .....
profession .....
résidence habituelle .....
passeport ou carte d'identité No (s'il y a lieu) .....

2.2 Père: nom et prénoms .....
date et lieu de naissance .....
nationalité .....
profession .....
résidence habituelle .....
passeport ou carte d'identité No (s'il y a lieu) .....

2.3 Date et lieu du mariage .....

II — PARTIE REQUÉRANTE: PERSONNE OU INSTITUTION (qui exerçait la garde effectivement avant l'enlèvement)

3 nom et prénoms .....
nationalité (si personne physique) .....
profession (si personne physique) .....
adresse .....
passeport ou carte d'identité No (s'il y a lieu) .....
relation avec l'enfant .....
nom et adresse du conseiller juridique (s'il y a lieu) .....

Distributed on 20 October 1980 (afternoon)

Proposal of the Subcommittee on Model Forms

1 In article 8, second paragraph, after 'application', *add asterisk as follows:*

'Any application submitted under this Convention may be in the form of the model annexed'.

2 Model Form:

Request for return

Hague Convention of ..... on the Civil Aspects of International Child Abduction

REQUESTING CENTRAL AUTHORITY OR APPLICANT	REQUESTED AUTHORITY

Concerns the following child: ..... who will attain the age of 16 on ..... 19.....

NOTE: The following particulars should be completed insofar as possible.

I — IDENTITY OF THE CHILD AND ITS PARENTS

1 *Child*

name and first names .....
date and place of birth .....
habitual residence before removal or retention .....
passport or identity card No, if any .....
description and photo, if possible (see annexes) .....

2 *Parents*

2.1 Mother: name and first names .....
date and place of birth .....
nationality .....
occupation .....
habitual residence .....
passport or identity card No, if any .....

2.2 Father: name and first names .....
date and place of birth .....
nationality .....
occupation .....
habitual residence .....
passport or identity card No, if any .....

2.3 Date and place of marriage .....

II — REQUESTING INDIVIDUAL OR INSTITUTION (who actually exercised custody before the removal or retention)

3 name and first names .....
nationality of individual applicant .....
occupation of individual applicant .....
address .....
passport or identity card No, if any .....
relation to the child .....
name and address of legal adviser, if any .....

III — ENDROIT OÙ DEVRAIT SE TROUVER L'ENFANT

4.1 Renseignements concernant la personne supposée avoir enlevé ou retenu l'enfant

nom et prénoms .....
profession .....
dernière résidence connue .....
passeport ou carte d'identité No .....
(s'il y a lieu)
signalement et éventuellement photo (voir annexes) .....

4.2 Adresse de l'enfant .....

4.3 Autres personnes susceptibles de donner d'autres informations permettant de localiser l'enfant .....

IV — MOMENT, LIEU, DATE ET CIRCONSTANCES DU DÉPLACEMENT OU DU NON-RETOUR ILLICITE

.....

V — MOTIFS JUSTIFIANT LA REQUÊTE (DE FAIT OU LÉGAUX)

.....

VI — PROCÉDURES CIVILES EN COURS

.....

VII — L'ENFANT DOIT ÊTRE REMIS A:

a nom et prénoms .....
date et lieu de naissance .....
adresse .....

b arrangements proposés pour le retour .....

VIII — AUTRES OBSERVATIONS

.....

IX — ENUMÉRATION DES PIÈCES PRODUITES*

.....

Fait à .....

le .....

Signature et/ou cachet de l'Autorité centrale requérante ou du requérant

.....

* p. ex. copie certifiée conforme d'une décision ou d'un accord relatif à la garde ou au droit de visite; certificat de coutume ou déclaration sous serment relatif à la loi applicable; information sur la situation sociale de l'enfant; procuration conférée à l'Autorité centrale.

III — PLACE WHERE THE CHILD IS THOUGHT TO BE

4.1 Information concerning the person alleged to have removed or retained the child

name and first names .....
date and place of birth, if known .....
nationality, if known .....
occupation .....
last known address .....
passport or identity card No, if any .....
description and photo, if possible (see annexes) .....

4.2 Address of the child .....

4.3 Other persons who might be able to supply additional information relating to the whereabouts of the child .....

IV — TIME, PLACE, DATE AND CIRCUMSTANCES OF THE WRONGFUL REMOVAL OR RETENTION

.....

V — FACTUAL AND LEGAL GROUNDS JUSTIFYING THE REQUEST

.....

VI — CIVIL PROCEEDINGS IN PROGRESS

.....

VII — CHILD IS TO BE RETURNED TO:

a name and first names .....
date and place of birth .....
address .....
telephone number .....

b proposed arrangements for return of the child .....

VIII — OTHER REMARKS

.....

IX — LIST OF DOCUMENTS ATTACHED*

.....

Date .....

Place .....

Signature and/or stamp of the requesting Central Authority or applicant

.....

* *e.g.* Certified copy of relevant decision or agreement concerning custody or access; certificate or sworn declaration as to the applicable law; information relating to the social background of the child; authorization empowering the Central Authority to act on behalf of applicant.

Procès-verbal No 12

Séance du lundi 20 octobre 1980 (après-midi)
Meeting of Monday 20 October 1980 (afternoon)

The meeting was opened at 4.00 p.m. Mr. Anton (United Kingdom) was in the Chair. Miss Pérez-Vera (Spain) was Rapporteur.

The Chairman asked Mr van Boeschoten, acting as Chairman of the Committee on Reservation Clauses, to present the results of discussions on articles 27, 28 and 29.

Mr van Boeschoten (Netherlands) said that the outcome of discussions was that articles 27, 28 and 29 should be left unamended.

The Chairman, observing that there were no written proposals to alter articles 27, 28 and 29, referred them to the Drafting Committee. He now turned to a more difficult topic: the relationship of proceedings under the Convention with other proceedings. In connection with this question, proposals had been submitted in Working Documents Nos 19, 32, 53(2), and 56. (The latter was a Spanish proposal, in fact a supplement to a point made in relation to Document No 53 containing a proposal by the United Kingdom.) However, Working Document No 43 should also be considered in this context. Taking the questions in a logical order, he would start with Working Document No 43. Hopefully, this proposal raised no great problems of substance. Document No 43 dealt with the relationship between proceedings under the Convention and other proceedings within the requested States under this Convention. He asked a representative of the authors of Working Document No 43 to explain the proposal.

Mr Jones (United Kingdom) said that this was really a fairly simple point. It meant that once a judicial or eventually an administrative authority had received notice that there was to be an application under the Convention, proceedings must stop. He illustrated this point with a concrete case. If a father abducted a child from France to England, and started custody proceedings in England, then, if the competent authority were to receive notice that proceedings had been commenced in France under the Convention, proceedings in Britain should stop until the issue had been determined in France.
The proposal also contained a provision in square brackets. If proceedings were started in Britain by the father of the child, and a letter or other informal communication was received from France, this would mean that proceedings should be stopped in Britain. But if, after a long time, nothing more happened, and it became obvious at some point that no application would ever be received, then it would be necessary to decide what would follow in this case. This point, dealt with by the provision contained within the square brackets, resulted from a suggestion made by the Australian delegation. The inclusion of this provision was definitely to the advantage of the applicant.

M. Espinar (Espagne) fait quelques remarques sur la phrase placée entre crochets: la délégation espagnole s'oppose au maintien de cette phrase. Il est d'accord en substance, mais s'oppose à la formulation. La Convention prévoit un délai d'un an pour déposer une requête (ou plus selon le Document de travail No 25 qui a été admis); il ne convient pas d'étendre ce délai à une période indéterminée ou «raisonnable». L'expression «raisonnable» peut être dangereuse pour la Convention. Pour M. Espinar, la question soulevée par la phrase mise entre crochets devrait être résolue dans le sens de la proposition allemande contenue au Document de travail No 25.

M. D'Almeida Ribeiro (Portugal) indique que la loi du lieu où se trouve l'enfant semble dominer; toutefois, cette solution n'est pas très opportune, notamment lorsqu'on introduit la notion de «période raisonnable» contraire au caractère d'urgence des affaires concernant les mineurs.

Mr Savolainen (Finland) said that he would first like to emphasise that the Finnish delegation considered this proposal very important, if not essential, in view of the existence of two Nordic Treaties: a Treaty of 1931 concerning Marriage, and a Treaty of 1977 relating to the Enforcement of Judgements. If the proposed provision were not included within the Convention, then, in the light of these inter-Nordic Conventions, it would be easy for abductors to take advantage of treaty provisions relating to the automatic recognition of judgments. Secondly, the proposal had been drawn before the German proposal contained in Working Document No 25 had been decided upon. Originally his idea had been to limit the operation of this clause under article 12*a*. The text should indicate that it referred to a situation where the child would not be returned under article 12*a*. He considered that the case where time had elapsed should be left outside this provision.

M. Batiffol (France) accepte l'observation espagnole concernant l'applicabilité du délai; il fait remarquer encore qu'il s'agit d'«autorité administrative» et non pas de «tribunal administratif».

Miss Selby (United States) wanted to draw certain points to the attention of the Drafting Committee. First, the French text, '*statuer sur les mérites*' could include enforcement procedure. The English version did not express this and a precision should be added to the effect that enforcement was covered. Secondly, the terms '*sur les mérites du droit de garde*' did not clearly cover all issues concerning rights. It should be made clear in the text that support and other connected questions were not included.

Mr van Boeschoten (Netherlands) asked whether the Drafting Committee could not extend the terms of the provision, since there appeared to be certain cases which were still not covered. In this connection he referred to the *Böll* case, and pointed out that administrative or protective measures employed in the State of refuge might not be covered by the term *custody*.

M. Jenard (Belgique) fait remarquer qu'il suffirait de dire «statuer sur le droit de garde» au lieu de parler des «mérites» du droit de garde.

M. Batiffol (France) précise qu'il s'agit de «statuer sur le droit de garde au fond».

The Chairman said that it was only possible to operate here on written proposals. So he asked the delegates not to make oral suggestions for modification.

M. Barile (Italie) appuie le point de vue soulevé par l'intervention du Représentant de la délégation hollandaise.

The Chairman said that a number of interesting drafting points had been made and could now be referred to the Drafting Committee. But some points involved questions of substance. Firstly Miss Selby had referred to the question of enforcement, and asked that the text might read 'shall neither make nor enforce . . .'. However, this might cause considerable difficulty, Mr Barile had pointed out. Indeed, once a judgment had been given, it would be very difficult to prevent its enforcement, except by recalling the judgment. So here, a matter of substance was involved. Next, Mr van Boeschoten had suggested extending the proposal to cases where administrative authorities took measures inconsistent with the operation of the Convention. The delegates were certainly favourable to this point on principle, but the Chairman called to Mr van Boeschoten's notice that his proposal would imply considerable modification of the language of the Convention, which referred to judicial and administrative authorities.

Mr van Boeschoten (Netherlands) withdrew his proposal.

The Chairman then raised the next point, which was the proposal of Mr Espinar (Working Document No 43). The Chairman proposed a vote in two steps. First, whether the Commission wished to adopt article 14*bis in principle*; then, whether the text contained within square brackets should or should not be maintained.

Vote

*The inclusion in principle of article 14*bis *(Working Document No 43) was approved by a vote of 21 in favour (Australia, Austria, Belgium, Canada, Czechoslovakia, Denmark, Finland, France, Federal Republic of Germany, Greece, Ireland, Israel, Italy, Luxemburg, Netherlands, Norway, Spain, Sweden, Switzerland, United Kingdom, United States), 2 against (Japan, Portugal), with 1 abstention (Venezuela).*

Vote

The maintaining of the text within square brackets was approved by a vote of 11 in favour (Australia, Canada, Denmark, Ireland, Israel, Netherlands, Norway, Sweden, United Kingdom, United States, Venezuela), 5 against (Belgium, Finland, France, Luxemburg, Spain), with 8 abstentions (Austria, Czechoslovakia, Federal Republic of Germany, Greece, Italy, Japan, Portugal, Sweden).

The Chairman then indicated that he would proceed with Working Document No 53. He felt it would be best to deal with this proposition in connection with the Japanese proposal contained in Working Document No 19, and the Netherlands proposal contained in Working Document No 32. He first asked the United Kingdom delegate to speak to Working Document No 53, paragraph 2.

Mr Jones (United Kingdom) said that this proposal probably met the point made by Miss Selby made on an earlier provision, in other words, it aimed at dealing with a decision given or recognised in the State requested. A decision given or recognised within this State was not to be an obstacle to the operation of the Convention. That is, the Convention took priority.

The Chairman took note that Mr Yadin seconded the proposal, and asked whether there was any opposition.

M. Espinar (Espagne) relève le danger de prévoir une disposition où le juge après avoir rendu une décision devrait refuser de l'exécuter. Il n'est donc pas possible d'imposer à l'Etat requis de ne pas exécuter ses propres décisions.

Mr Minami (Japan) said that he opposed the United Kingdom proposal for the reasons stated by the Spanish delegate. The Japanese delegation's point of view was expressed in Working Document No 19. This proposal was aimed at dealing with the same problem as the Netherlands proposal contained in Working Document No 32. The proposal aimed at avoiding the conflict of decisions within the same State. Courts should not be obliged to return the child, if they have already decided the contrary.

M. Schockweiler (Luxembourg) se rallie à la proposition de la délégation espagnole; il n'est pas possible de méconnaître une décision qui a acquis force exécutoire dans l'Etat où elle était rendue.

The Chairman pointed out that time was short. He asked delegates to limit their interventions to making new points.

Mr Müller-Freienfels (Federal Republic of Germany) opposed this proposal. According to German law, a decision having '*autorité de la chose jugée*' could not be overruled in this way. The solution should be possible by vesting *exclusive* jurisdiction during the time-limit in the competent authorities of the child's residence before the removal.

M. Jenard (Belgique) s'oppose à la proposition du Royaume-Uni et invoque l'autorité de chose jugée tout en admettant qu'elle est discutable en matière de droit de garde.
Il voit encore d'autres obstacles à cette proposition, notamment lorsqu'une décision est ancienne ou que l'autorité qui l'a rendue n'a pas la compétence internationale requise.
Pour ces mêmes raisons d'ailleurs il s'oppose à la proposition japonaise.

Mr Creswell (Australia) said that he was particularly interested in Mr Jenard's intervention since it seemed to crystallise his own thought. He said that, originally, he had supported the proposal, but this support was now weakening. He would admit that even in Australia it was possible for the abductor to take proceedings rapidly: which meant that the applicant would be confronted with a definitive decision. He added that perhaps the Drafting Committee could direct his attention to the classes of cases referred to in Working Document No 53. He made this point because he felt that if courts allowed time to elapse, then a decision was taken, and then an application made, he did not think that this application should be acceded to.

Mr Walsh (Ireland) said that there was a difficulty here since the proposal covered not only decisions and recognition of decisions, but also covered decisions of judicial *and* administrative authorities. An objection to the recognition of a judicial decision might not be founded against an administrative decision. There were a great many elements rolled up here.

M. Chatin (France) montre les mérites de la proposition britannique; cette dernière appartient au cadre général de la Convention qui tend à protéger l'enfant. Le Document de travail No 43 prévoit que les autorités de l'Etat requis doivent suspendre la procédure dès qu'elles sont informées de la requête à l'Autorité centrale. Lorsqu'une décision judiciaire a été rendue dans l'Etat où le kidnappeur a amené l'enfant, cette décision prend «vie» puisqu'elle est encore appuyée par un état de fait. Par contre, la décision rendue antérieurement dans l'Etat de la résidence habituelle de l'enfant devient une décision «morte»; il s'agit de protéger avant tout l'enfant contre la fraude et la violence; la proposition britannique tend bien à réaliser cet objectif.

Mr van Boeschoten (Netherlands) pointed out that ex-

cepting the case where article 12 contained grounds for refusal covering custody, it would be possible to find some cases in favour of giving priority to the Convention and others leading to the opposite conclusion. It would be too complicated to distinguish these cases. He was inclined to support Mr Chatin. He felt that there should be a provision to the effect that the Convention had priority.

The Chairman asked Mr van Boeschoten if this meant that he withdrew his reservation.

Mr van Boeschoten (Netherlands) indicated that he had simply wished to make the proposal as acceptable as possible.

Mr Jones (United Kingdom) said that although he appreciated the weight of the arguments against the proposal, he wondered what would happen if the proposal were to be withdrawn. It would seem *a contrario* that it followed that if there was a decision, then this decision would be good grounds for refusal. If this point were to be left uncertain, then the effects of the Convention would be uncertain. He had no particularly strong feelings either way, but he felt it would be desirable to clarify this point.

The Chairman indicated that the vote would be taken on the following points. First, was the principle contained in Working Document No 53, paragraph 3, acceptable? Second, if the principle were adopted, then some States might wish for the possibility of making a reservation.

Vote

The principle contained in Working Document No 53, paragraph 3, was approved by a vote of 13 in favour (Australia, Canada, Czechoslovakia, Finland, France, Greece, Ireland, Israel, Netherlands, Spain, Sweden, United Kingdom, United States), 10 against (Austria, Belgium, Denmark, Federal Republic of Germany, Japan, Luxemburg, Norway, Sweden, Switzerland, Venezuela), with 1 abstention (Italy).

The Chairman then turned to the issue concerning the reservation. To facilitate proceedings, he proposed that a vote should be taken as to the adoption of the model proposed by Japan in Working Document No 19, article X.

Mr van Boeschoten (Netherlands) said that a distinction should be made between the Netherlands proposal and the Japanese proposal. The Netherlands proposal did not cover *subsequent* decisions, that is, decisions taken after the removal of the child. These were covered by the Japanese proposal.

The Chairman agreed that it would have to be decided which of the two proposals should be admitted. He proposed that the vote should first be taken on the principle, and then on the form to be adopted.

Mr van Boeschoten (Netherlands) said that he was in a difficult position, since if the proposal covered subsequent decisions, he would have to vote against it.

The Chairman asked Mr van Boeschoten to formulate a proposal that could be put to the vote.

Mr van Boeschoten (Netherlands) replied that his proposal was contained in Working Document No 32, article X*b*.

The Chairman suggested putting the narrower proposal (that is, the proposal of Mr van Boeschoten) to the vote first of all. If this proposal was adopted, then he would ask the Commission whether it was in favour of extending its coverage (in conformity with the Japanese proposal).

Votes

*Working Document No 32, article X*b *was approved by a vote of 15 in favour (Australia, Austria, Canada, Denmark, Finland, Federal Republic of Germany, Ireland, Japan, Luxemburg, Netherlands, Norway, Sweden, Switzerland, United Kingdom, Venezuela), 4 against (Belgium, Czechoslovakia, Israel, Spain), with 5 abstentions (France, Greece, Italy, Portugal, United States). As a result of this vote, article X*b *was considered as adopted.*

The question of whether a wider coverage of the reservation, i.e. *that it should be extended to decisions given* after *the removal of the child* (cf. *Working Document No 19), was rejected by a vote of 19 against (Australia, Belgium, Canada, Czechoslovakia, Denmark, Finland, France, Greece, Ireland, Israel, Italy, Luxemburg, Netherlands, Norway, Portugal, Spain, Sweden, United Kingdom, United States), 1 in favour (Japan), with 4 abstentions (Austria, Federal Republic of Germany, Switzerland, Venezuela).*

The Chairman observed that Mr Espinar had drawn his attention to the Spanish proposal in Working Document No 56.

M. Espinar (Espagne) explique les intentions de sa proposition contenue au Document de travail No 56. Elle tend tout d'abord à favoriser la recherche non policière de l'enfant. La non-comparution d'un parent résidant à l'étranger peut être raisonnablement considérée comme un indice de l'existence d'un «*legal kidnapping*».
Ensuite cette proposition veut éviter par la voie préventive les problèmes de décisions obtenues dans le pays de refuge.

The Chairman noted that Mr Chatin supported this proposal. He asked whether there was any opposition.

Miss Selby (United States) said that the United States delegation opposed the proposal in so far that it imposed a mandatory duty on the judge. It was impossible to ensure that judges would comply with the Convention. If they did not, the mandatory terms of this article could be grounds for reopening proceedings. It would be better to find some terms which expressed something less than a legal obligation, in view of the real possibility of the failure of judges to comply with this obligation. (She was however sympathetic to the idea in substance.)

Mr Leal (Canada) asked for the French text to be read out in order to hear the translation.

*The text of Working Document No 56 (article 14*ter*) was read.*

Mr Jones (United Kingdom) said that he too was sympathetic to the objectives of this proposal but, like Miss Selby, he felt it would not work. He had been thinking of it the other way round. How would the Central Authority *know* if such a request had been made? (Since there was no obligation to communicate the request through the Central Authorities.) Also, it might well be that the State concerned (*'l'Autorité centrale de* son *Etat'*) was unidentified. He would oppose the proposal on these grounds, although respecting its objectives.

M. Espinar (Espagne) explique qu'une collaboration entre le juge du fond et l'Autorité centrale telle que la proposition espagnole la prévoit facilite la recherche de l'enfant par rapport à une intervention de la police.
Il signale le risque de vouloir faire une convention sur un problème comme celui-ci sans vouloir enlever aucun des obstacles posés par les caractéristiques de chaque droit interne.

The Chairman said that the Commission was certainly wholeheartedly in agreement with the objectives of the proposal. But there appeared here a division between the inquisitorial systems of continental Europe and the accusatorial system of the common law. It was difficult for a common law judge to intervene in the manner suggested. His role was limited to adjudicating on the basis of documents presented to him by the advocates of the parties. He asked Mr Espinar whether the issue was so important for him that it should be put to a vote. However, he pointed out that the result of a favourable vote would render the Convention very much more difficult for common law countries and Commonwealth countries eventually acceding, to apply.

Mr Espinar (Spain) withdrew his proposal.

The Chairman thanked Mr Espinar for his comprehension.

The meeting was closed at 6 p.m.

Documents de travail Nos 60 à 65
Working Documents Nos 60 to 65

Distribués le 21 octobre 1980 (matin)
Distributed on 21 October 1980 (morning)

No 60 – Proposition de la délégation belge

Article X (ordre public)

Toutefois la réserve de l'alinéa précédent ne s'applique pas lorsque, après l'enlèvement, les autorités judiciaires de l'Etat de la résidence habituelle de l'enfant ont décidé que le non-retour serait manifestement contraire à son intérêt.

No 61 – Proposition de la délégation belge

Clause finale additionnelle visée au Doc. trav. No 57

Si cette clause était adoptée, il faudrait la compléter par un alinéa qui disposerait que:

Aucun Etat qui aura fait usage de cette réserve ne pourra prétendre à l'application de la Convention dans la mesure où il l'a exclue.

No 62 – Proposition commune des délégations suivantes: République fédérale d'Allemagne, Belgique, Espagne, France, Grèce, Irlande, Italie, Luxembourg, Portugal, Suisse

– Joint proposal of the following delegations: Belgium, France, Federal Republic of Germany, Greece, Ireland, Italy, Luxemburg, Portugal, Spain, Switzerland

*Article 16*bis

Le retour de l'enfant, conformément aux dispositions de l'article 11 (12 nouveau), peut être refusé quand il ne serait pas permis par les principes fondamentaux de l'Etat requis sur la sauvegarde des droits de l'homme et des libertés fondamentales.

*Note: Cet article 16*bis *vise à remplacer la réserve concernant l'article 12 (13 nouveau) (P.-v. No 9,* supra, *p. 307).*

*Article 16*bis

The return of the child under the provisions of article 11 (new 12) may be refused if it would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

*Note: This article 16*bis *is intended to replace the reservation concerning article 12 (new 13) (P.-v. No 9,* supra, *p. 307).*

No 63 – Proposal of the French and United Kingdom delegations
– Proposition des délégations de la France et du Royaume-Uni

Article 17

In the first line, substitute: 'An application to *organise* or secure the *effective* exercise of rights of access . . .'.

In the final paragraph, third line, substitute: 'with a view to organising or protecting these rights and . . .'.

Article 17

Remplacer la première ligne par: «Une demande visant à *organiser* ou à protéger l'exercice *effectif* d'un droit de visite . . .».

Remplacer la troisième ligne du troisième alinéa par: «une procédure légale en vue d'organiser ou de protéger le droit de visite et les conditions . . .».

No 64 – Proposal of the Australian delegation

Article [16] bis

Exceptionally, and for reasons to be stated explicitly in the judgment, the return of the child under the provisions of article 11 may be refused if the return would be manifestly contrary to the child's welfare.

Note: This proposal is submitted as an alternative for consideration if the proposal in Working Document No 62 is not accepted. The intention is that if this text is accepted, it would be unnecessary to retain the reservation approved in P.-v. No 9, supra, *p. 307.*

No 65 – Proposal of the United States delegation

*Article (16*bis*)*

The return of the child under the provisions of article 11 (new 12) may be refused if it would not be permitted by the fundamental principles of the requested State relating to the protection of civil rights.

Documents de travail Nos 60 à 65

Procès-verbal No 13

Séance du mardi 21 octobre 1980 (matin)
Meeting of Tuesday 21 October 1980 (morning)

The meeting was opened at 9.30 a.m. Mr Anton (United Kingdom) was in the Chair. Miss Pérez-Vera (Spain) was Rapporteur.

The Chairman said that it was vital to finish the first reading of the text of the Convention. If it were not finished by the end of the afternoon Session, it would be necessary to hold an extra meeting in the evening.

Le Secrétaire général indique que le Secrétariat mettra tout en oeuvre pour cette éventuelle réunion supplémentaire, mais qu'il sera inévitable en ce cas que les procès-verbaux soient simplifiés, et qu'il faudra excuser certains retards dans leur distribution.

Mr Leal (Canada) said that he would speak in his capacity as Vice-Chairman, but also from the heart. The Draft had the real support of many who felt that it could indeed constitute a blow for social justice. But the debates of the past few days showed that too much legal 'polishing' was in danger of leading the Commission astray. The perfect could be the enemy of the good. The Commission was in danger of throwing away something eminently workable, in favour of a document acceptable only to lawyers. He asked the delegates to keep amendments to a minimum, and to keep in mind that the objective was to finish a workable text.

The Chairman indicated the order of debates. It was necessary to finish the discussion of the articles not yet covered. Firstly, article 17. Then, article 5 (the relations with other conventions) and Working Document No 53 (United Kingdom proposal on the temporal application of the Convention). Then there was the issue of the opening of the Convention to other States, the question raised by Mr Jenard. Finally, there was the question of the reopening of certain other issues.
Debate would start with article 17. Here were concerned the Belgian Working Document No 4, the Danish Working Document No 31, and Working Document No 63 containing drafting changes. The Chairman asked Mr Jenard whether he maintained his proposal contained in Working Document No 4.

M. Jenard (Belgique) retire sa proposition (Doc. trav. No 4).

The Chairman said that next under consideration was Working Document No 63 proposed by the French and United Kingdom delegations. It applied minor changes to the text.

Mr Jones (United Kingdom) said that the word 'fix' had given rise to difficulty, and that it had been agreed that the word 'organise' was more appropriate. The same change was inserted in the third line of the final paragraph. The word 'effective' had been added as it was the effective exercise of the rights of access with which this text was concerned. These were purely drafting points, but they answered some of the misgivings which had been expressed concerning the previous text.

The Chairman, observing that there were no objections on this point, considered the text as adopted, apart from the issue concerned in the Danish proposal in Working Document No 31. He gave the floor to Mr Hjorth to explain the Danish proposal.

Mr Hjorth (Denmark) said that the Danish proposal was intended as a clarification of article 17. As it stood, it would be inconceivable to present to the Danish Parliament an article which the Commission itself had not clarified. The matter of returning the (*abducted*) child was quite a different matter from the right of access, which was a decision to take the child away from the custodian. The proposal thus dealt with a matter not covered by the rest of the Convention. The two situations should be treated differently. The right of access should be founded on certain principles. Firstly, the decision taken on this right should always be taken within the State of the child's habitual residence. This was not a Convention on enforcement. It would be desirable to make it clear that only the authorities of the habitual residence of the child were in a position to take a decision concerning the child on this point. Secondly, when fixing this right of access, the authority in question should keep to the practice followed in domestic cases. This meant that the right of access should not be greater for foreigners than it was for citizens of the forum State. For example, if a national citizen could not remove the child from the jurisdiction, then, foreigners should not be allowed to do so either. And where a national has to pay all expenses for the transport of the child, this should be the same for foreigners. As it stood, article 17 was not clear on this point. It had been said that the right of access included the right to take the child across State boundaries. This was not the idea of the Danish proposal. The Danish proposal made for a total assimilation of national and foreign cases. The foreigner would have the same rights as the national but these rights would extend no further. The proposal also contained a special reference to the execution of decisions on right of access. This was because different countries had different methods of execution. In some countries, execution was effectuated by the police force, and a crying child would be taken from its screaming mother. In Denmark, this situation was impossible. The mother would surrender the child as a result of persuasion only. Any other methods of execution could not be applied to foreigners any more than they could be applied to Danish citizens. In the final paragraph of the proposal, a subsidiary possibility was proposed concerning the possibility of making a reservation.

The Chairman thanked Mr Hjorth for his clear explanation. He observed that the proposal was supported and asked for observation against the proposal.

M. Chatin (France) attire l'attention sur ce que la proposition danoise porte atteinte à l'un des deux articles essentiels de la Convention. Alors que l'article 12 lutte contre les voies de fait, le but recherché à l'article 17 est complémentairement d'éviter l'apparition d'«orphelins juridiques» sur le plan international: il convient d'empêcher que le droit de visite puisse être supprimé à l'occasion du retour de l'enfant, car il est en quelque sorte sa contrepartie et son absence serait une incitation au déplacement de l'enfant. Le Délégué français précise que le mot «organiser», proposé par sa délégation conjointement à celle du Royaume-Uni, vise deux hypothèses: d'une part celle dans laquelle aucune décision judiciaire n'a été prise dans le pays au départ de l'enfant, d'autre part celle où une décision

judiciaire a déjà été prise dans ce pays; et il s'agit alors de fixer les modalités pratiques d'exercice de ce droit de visite.
Le Délégué français expose sa certitude que le principe, défendu par la délégation danoise, de la fixation du droit de visite selon la loi de l'Etat de la résidence habituelle doit être récusé. Il insiste sur ce que certains Etats organisent le droit de garde de façon internationale. Ainsi, en France, il apparaît que, dans 77% des cas, la garde est confiée indistinctement à la mère étrangère comme à la mère française. Mais il est évident que le juge français, internationaliste dans l'attribution du droit de garde, entend assurer par la même décision un droit de visite au conjoint qui n'a pas la garde. La manière danoise apparaît au Délégué français comme une sorte de nationalisme en matière de garde. Les Etats ayant une conception plus internationaliste demandent à trouver dans le droit de visite la contrepartie du droit de garde qu'ils acceptent de confier à l'étranger.
Il rappelle le principe sur lequel la Commission s'est décidée: les autorités de l'Etat d'où vient l'enfant doivent pouvoir demander l'organisation du droit de visite dans l'Etat où l'enfant se trouve. Cette préoccupation permet de sauvegarder l'autorité et l'indépendance du juge dans la fixation du droit de garde.
Aussi le Délégué français réitère-t-il son opposition formelle à la réserve proposée: celle-ci aboutirait à la création d'orphelins juridiques, et la Convention aurait ainsi manqué son objet.

The Chairman asked whether any other delegates wished to speak against the Danish proposal. But he asked that interventions should be limited to three minutes at most.

Mr Jones (United Kingdom) said that he agreed with Mr Chatin. But the main reason he opposed the Danish suggestion was that it appeared to him unnecessary in connection with article 17. Mr Hjorth would know that his problem had been discussed at length in the past, in different contexts. Certainly, in the context of the Strasbourg Convention, which contained enforcement provisions, this point gave rise to considerable difficulties. However, article 17 of this Convention did not deal with recognition of decisions on access rights, but with the relations between Central Authorities. These Central Authorities were to co-operate as far as possible and to promote the peaceful enjoyment of access rights. Article 17 had a permissive form. He considered that it was in no way incompatible with Denmark's view.
Mr Jones felt that the proposal contained in Working Document No 31 would not be a useful addition, and would even be dangerous in that it might imply that article 17 dealt with a subject which in fact it did not cover. In conclusion, he emphasised that he felt the addition was unnecessary and that article 17 did not in fact interfere with the Danish objectives.

Mr Hjorth (Denmark) said that he was familiar with these arguments. He said that it was not true to say that Denmark denied the right of access to foreigners. The right of access was indeed often provided for foreigners. The proposal simply meant that this right of access should be given to foreigners in exactly the same conditions as to national citizens. He said that listening to Mr Chatin's remarks he realised more and more that the precision contained in Working Document No 31 was necessary. Indeed, this necessity was the very reason for the French opposition. The British delegation had now given a contrary interpretation to article 17. This incertitude was highly unsatisfactory.
He would prefer a clear-cut article against his own wishes, rather than an article which remained ambiguous.

The Chairman put Working Document No 31 to the vote.

Vote

The insertion of a fourth paragraph in article 17 of the Convention, as suggested in Working Document No 31, was rejected by a vote of 18 against (Austria, Belgium, Canada, Finland, France, Federal Republic of Germany, Greece, Ireland, Israel, Italy, Japan, Luxemburg, Netherlands, Portugal, Spain, Switzerland, United Kingdom, United States), 2 in favour (Denmark, Norway), with 4 abstentions (Australia, Czechoslovakia, Sweden, Venezuela).

The Chairman then asked whether there was any support for the subsidiary proposal contained in Working Document No 31.

M. Barile (Italie) dit qu'il conviendrait de décider d'abord sur le plan des principes si la Convention doit prévoir des facultés de réserve. Et ce ne serait qu'après que ce principe aurait été accepté qu'il serait utile de discuter la proposition danoise.

The Chairman said that he had already ruled that reservations would be considered individually in the context of each article. He felt that he had made himself sufficiently clear on this point. He proceeded to put to the vote the subsidiary proposal contained in Danish Working Document No 31.

Vote

The possibility of a reservation to the effect indicated in Danish Proposal No 31 was rejected by a vote of 17 against (Austria, Belgium, Canada, Finland, France, Federal Republic of Germany, Greece, Ireland, Italy, Japan, Luxemburg, Netherlands, Portugal, Spain, Sweden, Switzerland, United States), 3 in favour (Denmark, Norway, United Kingdom), with 4 abstentions (Australia, Czechoslovakia, Israel, Venezuela).

The Chairman now turned to article V of the draft Convention. He observed that the only document presented in relation to this question was Working Document No 53, the United Kingdom proposal (article V, relations with other Conventions).

Mr Jones (United Kingdom) said that this proposal had been put forward simply as a basis for discussion. The United Kingdom had signed only the European Convention, and there was no uniform law in force in the United Kingdom. So technically, this provision was not needed from the United Kingdom's point of view. But this proposal was an attempt to put into the Convention a provision meeting the needs of certain other States. He believed that the reference to conventions would meet the case of certain Nordic treaties, as well as of certain bilateral treaties such as that in vigour between France and Belgium. The reference to regionally uniform law was rather speculative on his part. But he believed that it could be useful for the United States and Scandinavian countries. The provision read that parties to another convention could agree which convention would take priority. Otherwise, the present Convention would take priority. He added that there was no particular part of the provision on which the United Kingdom Government wished to take a rigid line.

The Chairman observed that there was support for this proposal. He therefore opened the debate on the issue of principle (the text being subject to drafting). He asked if there was any opposition to the text.

M. Jenard (Belgique) dit que la proposition de la délégation du Royaume-Uni lui paraît être impraticable sur le plan international. Les Etats sont déjà liés par de nombreuses conventions qui peuvent les obliger au retour de l'enfant

(notamment la Convention de La Haye sur l'exécution des jugements). Il est irréaliste d'envisager que ces Etats doivent renégocier toutes ces conventions à cause de la ratification de la présente Convention. De plus, souligne le Délégué belge, d'autres conventions peuvent être plus favorables au retour de l'enfant. Quelle raison trouver dans ces cas à la priorité donnée à la présente Convention?
Le Délégué belge propose que l'on applique la convention la plus favorable au retour de l'enfant.

Mr Dyer (First Secretary at the Permanent Bureau) said that he wished to identify more clearly the issue of principle involved. The United Kingdom proposal provided a mechanism for the application either of the present Convention or of another treaty between two or more States parties. He felt that Mr Jenard went too far in saying that the alternative would be to say that the present Convention would apply where it was more favourable. Mr Dyer said that he saw an alternative in the form of article 23 of the Hague Convention on Maintenance Obligations (pages 210 and 211 of the *Recueil*): *This Convention shall not restrict the application of an international instrument in force between the State of origin and the State addressed or other law of the State adressed for the purposes of obtaining recognition or enforcement of a decision or settlement.* This was preferable to Mr Jenard's suggestion.

Mr Yadin (Israel) said that he was not sure as to whether he would accept the content of the United Kingdom proposal or alternative solution. But the question he was raising was why such a provision was necessary at all in this Convention. It concerned the standard question relating to the law of treaties. The conflict of conventions was not a specific problem in the context of this Convention and he did not see why courts should be bound by an approach dictated in a specific provision. The approach should be found in a more general context on the basis of principles of the law of treaties.

M. Jenard (Belgique) dit son appui à la suggestion du Premier secrétaire.

Le Secrétaire général appuie la suggestion du Premier secrétaire en soulignant que la clause qu'il recommande a toujours donné des résultats satisfaisants.

Mr Jones (United Kingdom) confessed himself troubled by the arguments advanced by Mr Jenard, as in fact they arrived at the opposite result from that which he himself had wanted. There might be many bilateral conventions more favourable than the present Convention. For example, nothing could be more favourable than a convention ordering the automatic recognition of decisions. Far from excluding the application of such conventions, this proposal would permit that application where States parties were in agreement to that effect. Comparing the proposal to article 23 of the Maintenance Convention, it seemed to him that the only difference of substance was contained in the last line of the proposal which led to the application of the Convention in the absence of agreement. Indeed, where there was a conflict, it was necessary to find a solution. He did not feel that the Maintenance Convention really did this. Of course, it would be possible to say that the more favourable convention should take priority. But this was rather a subjective criterion as a convention might well be more favourable in some circumstances and less in others. For example, an enforcement convention might well be more favourable in the presence of a judgment, and less favourable in the absence of a judgment. Perhaps Mr Jenard could reconsider his approach. Mr Jones wondered whether it would be possible for the United Kingdom delegation to withdraw the proposal and put it back to the Drafting Committee. He did not oppose the principles outlined by Mr Jenard in substance.

The Chairman said that the Commission was faced with the choice between the formulation contained in Working Document No 53 or the formulation adopted by article 23 of the Maintenance Convention. He felt that the essential difference between them was that the United Kingdom proposal referred to regionally uniform laws. He proposed that the United Kingdom proposal should be put to the vote as a whole. If this proposal were to be rejected, then the principle of article 23 of the Maintenance Convention could be considered as accepted. In this case, a vote should be taken upon the formula proposed by Mr Dyer, adding after the word *obtaining*: 'the return of a child wrongfully removed or retained', and, in square brackets, 'in the absence of such an instrument, this Convention would take priority'.

Miss Selby (United States) said, regarding the uniform law provision, that from the point of view of the United States it was unnecessary, and the United States delegation would prefer to see it deleted.

Mr Savolainen (Finland) said that he was not sure that he understood the proposal of Mr Dyer. Regarding the Scandinavian Treaties, it might well lead to results contrary to this Convention.

The Chairman said that it would perhaps be better in this case to vote on the principle of adopting article V as proposed in Working Document No 53, suppressing the square brackets.

Vote

Working Document No 53, article V, as an issue of principle, with square brackets deleted, was approved by a vote of 10 in favour (Australia, Czechoslovakia, Denmark, Finland, Ireland, Italy, Netherlands, Norway, Sweden, United Kingdom), 9 against (Belgium, Canada, Greece, Israel, Japan, Luxemburg, Portugal, Spain, United States), with 4 abstentions (France, Federal Republic of Germany, Switzerland, Venezuela). As a result of this vote Working Document No 53, article V, was considered as adopted in principle and was referred to the Drafting Committee.

The Chairman now turned his attention to Working Document No 53, article W.

Mr Jones (United Kingdom) said that as stated in the paper, the United Kingdom delegation took no rigid position on this point. The only important point was that the Convention must be *clear*. It would be necessary to say either that the Convention *shall* apply to unlawful removals which occurred before the Convention came into operation, or that the Convention would apply only to cases occurring after its coming into operation. The question of the course to take must be decided on a delicate balance of arguments. The proposal here was the most favourable to the applicant. Its inclusion would lead to the return of a greater (albeit small) number of children. In any legislation, the transitional provisions were always difficult. On balance, the United Kingdom delegation had felt that the proposal contained the best solution. But it was not a question of major importance, and the United Kingdom did not feel strongly either way.

The Chairman observed that the proposal was supported, and asked whether any delegates opposed it.

M. Barile (Italie) dit n'être pas opposé à la proposition du Royaume-Uni. Mais il se demande comment la règle fonctionnera à la lumière de la faculté d'un Etat fédéral de dénoncer la Convention pour l'un de ses Etats fédérés.

The Chairman said that the answer was that from the moment that the denunciation of the Convention took effect in relation to a State or territory, then the Convention would cease to operate, as from that moment.

M. Barile (Italie) dit que ce point paraît devoir faire l'objet d'une décision en particulier à propos du cas de dénonciation d'un Etat fédéral dont il avait parlé.

Le Secrétaire général dit que la pratique de la Conférence n'a pas été jusqu'à ce jour aussi pessimiste. Il n'est pas d'usage à la Conférence de prévoir une clause comme celle proposée par le Délégué italien. La Conférence s'en est tenue jusqu'a ce jour aux conditions classiques de dénonciation, notamment de cinq en cinq ans, qui permettent de déterminer aisément à quel moment la Convention cessera de s'appliquer. Et, en ce qui concerne l'article Y adopté par la Commission des affaires générales, auquel le Délégué italien fait allusion, il précise que la déclaration modificative ne peut avoir qu'un effet intensif, et qu'elle n'autorise pas le retrait d'un Etat fédéré. Aussi lui semble-t-il n'y avoir pas lieu de craindre qu'un Etat puisse se libérer autrement que par la dénonciation de la Convention.

The Chairman said that it was impossible to work here without written proposals. Unless Mr Barile objected, he proposed to maintain the United Kingdom proposal as accepted.

M. Barile (Italie) dit son accord sur la proposition du Royaume-Uni. Mais, en ce qui concerne les Etats fédéraux, il pense que l'article Y adopté par la Commission des affaires générales permet toutes déclarations modificatives, tant dans le sens d'un retrait que dans celui d'une extension.

Mr Yadin (Israel) said that he was not opposed to the United Kingdom proposal, but he felt that Mr Jones had expressed the issue more clearly in his oral intervention than in the written proposal. The wording in Working Document No 53, 'regardless of the date of the alleged breach of custody' was too wide. So it would be necessary to add to the end of this sentence, 'which took place before the Convention came into operation'.

The Chairman observed that there was no opposition to the proposal and so referred it to the Drafting Committee. He said that the next question on which he wished to open the discussion was that of the opening of the Convention to other States. He said there were two alternatives. One was the classic solution as adopted in article 31 of the Maintenance Convention (*Such accession shall have effect only as regards the relations between the acceding State and those Contracting States which have not raised an objection to its accession in the twelve months after the receipt of the notification referred to in sub-paragraph 3 of article 37* . . .). But another form was equally possible. This would be along the lines of article 39 of the Hague Convention on Evidence (*The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession.*). The Chairman said that these were the only two possibilities relevant in this context.

Le Secrétaire général rappelle l'évolution de la pratique de la Conférence en ce domaine. Les conventions les plus anciennes appliquaient le système du veto (l'opposition d'un seul Etat membre suffisait à éliminer l'adhésion). Telle était le cas de la Convention relative à la procédure civile du premier mars 1954, article 31. Ce système a été abandonné. Deux autres systèmes ont alors été utilisés par la Conférence: soit l'acceptation explicite de l'adhésion par chaque Etat membre, pour que celle-ci devint effective à leur égard, soit l'opposition individuelle d'un Etat membre privant l'adhésion d'effet à son égard.
Le Secrétaire général indique que le système de l'opposition individuelle est d'un fonctionnement simple, alors que le système de l'acceptation individuelle rend malaisé aux Etats de déterminer où en sont les «bilatéralisations successives».
Le Secrétaire général rappelle que la Quatrième commission de la Treizième session a choisi de recommander l'utilisation en principe du système de l'opposition individuelle dans un délai de douze mois. Mais, souligne-t-il, ce conseil formulé par la Quatrième commission de la Treizième session, qui avait spécialement étudié cette question sur le rapport préparé par le Bureau Permanent, n'y oblige pas la Quatorzième session.

The Chairman said that for the purposes of focussing the discussion, he would ask from the Chair if there were any objections to the classic formula of article 31 of the Maintenance Convention.

Miss Pripp (Sweden) asked whether it was possible to recall an objection made by virtue of such an article.

Le Secrétaire général précise que l'opposition notifiée au Ministère des Affaires étrangères des Pays-Bas peut toujours être retirée. Il ne s'agit là que de l'application d'un principe de droit international public, la faveur à la Convention.

The Chairman asked if there was any opposition.

Mr Jones (United Kingdom) said that he preferred article 39 of the Evidence Convention. Certainly, it would be more difficult to apply in practice. But withholding acceptance of an accession was quite a different matter from entering an objection to an accession. He shuddered to think of the diplomatic consequences the latter might involve. Despite the difficulties of application it might entail, he preferred the Evidence formula.

Mr Savolainen (Finland) shared Mr Jones's views.

Mr Schneider (Holy See) asked whether the note that the Secretary General had referred to had taken into account the Vienna Treaty. This Convention covered these points, and many of the States present were already Parties to this Convention.

Le Rapporteur dit sa préférence pour le système de l'opposition individuelle.
Il demande à la Commission de bien réaliser que le système de l'acceptation individuelle est en fait beaucoup plus restrictif. En effet, un Etat hésitera souvent pour des raisons diplomatiques à s'opposer à une adhésion. Au contraire, s'il doit manifester son acceptation, il s'en abstiendra souvent par négligence ou inertie, alors qu'il n'y aurait pourtant pas cause d'opposition.

The Chairman said that if he were in the United Kingdom, he would take it that the debate was in favour of article 39 of the Evidence Convention! Unfortunately, the rules of the Conference obliged him to ask for a vote on this point!

Vote

The adoption of a formulation similar to that retained by article 39 of the Hague Convention on Evidence was adopted by a vote of 16 in favour (Australia, Austria, Canada, Denmark, Finland, France, Federal Republic of Germany, Greece, Ireland, Italy, Luxemburg, Norway, Portugal, Sweden, Switzerland, United Kingdom), 5 against (Belgium, Israel, Japan, Spain, United States), with 2 abstentions (Netherlands, Venezuela).

The next point was Working Document No 59. The Chairman asked Mr Müller-Freienfels as President of the Subcommittee on Model Forms to present this document.

Mr Müller-Freienfels (Federal Republic of Germany) said that this proposal was the result of a considerable number of meetings and discussions. It was a formula open to those States who wished to use it. He said that by way of presentation, it would be better to answer specific questions. He pointed out a small translation problem under point V.

Mr Dyer (First Secretary at the Permanent Bureau) said that he simply wished to note that regarding point 1, relating to an asterisk to be added to article 8, the Secretariat would prefer to reserve the decision as to the exact way of dealing with this point.

Le Secrétaire général adjoint rappelle qu'il a été provisoirement admis que ce formulaire figurerait dans l'Acte final de la Conférence, mais qu'il resterait extérieur à l'instrument soumis à la ratification.

M. Chatin (France) se demande pourquoi le Document porte deux types de numérotation, l'une en chiffres latins et l'autre en chiffres arabes. Il y dénonce une source de complications inutiles.

The Chairman asked Mr Müller-Freienfels to take account of this observation. However, he emphasised that it was necessary to leave a marge of appreciation to the Committee on Model Forms. He now turned to Working Documents Nos 62 and 64. As he understood the matter, discussion of both these documents required the absolute majority for reopening the discussion on reservations upon which a decision had been recorded in *Procès-verbal* No 9. He himself hoped that delegates would be sympathetic to the proposal contained in Working Document No 64. He felt it was a pity to have a reservation on such an important issue. He made a plea for modesty, pointing out that in view of the considerable differences between the legal cultures represented, it was difficult to accommodate all views without a certain flexibility. He asked Mr Chatin to speak to the reopening of the discussion, under the heading of Working Document No 62.

M. Chatin (France) expose qu'il s'agit d'une proposition présentée conjointement par un grand nombre de délégations (Allemagne, Belgique, Espagne, France, Grèce, Irlande, Italie, Luxembourg, Portugal et Suisse) qui sollicitent la réouverture du débat sur l'ordre public, afin d'offrir à la Commission le choix entre le maintien de la faculté de réserve précédemment votée à une seule voix de majorité et le nouvel article 16*bis* proposé.
Ce nouvel article 16*bis* a un triple but: mieux adapter le refus de retour de l'enfant aux préoccupations de la Commission, toutes les délégations paraissant être d'accord sur ce que ce refus ne doit pouvoir intervenir qu'exceptionnellement et dans des circonstances rares; rapprocher autant que possible les points de vue divergents des délégations sur la formulation de cette faculté de refus; supprimer enfin le mécanisme de la réserve et assurer par là une réciprocité plus effective.

The Chairman proposed a vote on the reopening of the discussion of the decision on reservations decided upon in *Procès-verbal* No 9. An absolute majority would be needed. Two speakers could speak for the proposal and two speakers could speak against it.

Mr Walsh (Ireland) said that he felt that this joint proposal was a happy compromise. In some States, a constitutional provision which a judge could not go against might constitute an absolute obstacle to the return of the child. Even without a constitutional provision, there might be deep rooted laws binding the judge. So in view of what Mr Leal had said earlier, he thought the proposal laudable in that it reflected an attempt to make the Convention as accessible as possible for all States concerned.

The Chairman observed that there was no opposition to the reopening of the discussion. Working Documents Nos 62, 68 and apparently Working Document No 65 (United States proposal) were relevant in this context.

Mr Hjorth (Denmark) said that he understood this attempt to find a provision upon which there was general agreement. But he was worried by the precision of the compromise solution. What was meant by human rights and fundamental freedoms? The proposal made last Wednesday had the advantage of referring precisely to considerations of the law relating to family and children in the State addressed. Were such considerations covered by the present proposal? He would prefer a clear provision, whatever its content may be.

M. Espinar (Espagne) soutient la proposition du Document de travail No 62. Il souligne qu'il est très difficile de rédiger une clause d'ordre public appropriée à la matière de la Convention. Les motifs justifiant le refus de retour doivent être rédigés en des termes généraux, mais aussi de façon à ne pouvoir être invoqués que dans des cas très rares. Le Document de travail No 62 lui semble répondre à ces exigences.

Mr van Boeschoten (Netherlands) said that he would be brief. The overriding consideration for his delegation was the satisfaction of the maximum number of States. But, while he agreed with the Danish Delegate and feared that the meaning of the provision would not be clear, he would nevertheless support the proposal in order to put an end to differences of opinion.

The Chairman said that although he had indicated that only two speakers would be able to speak for and against the proposal, he would take it that the issue concerned Working Documents No 64 (Australian proposal) and No 65 (United States proposal), in order that more speakers might be able to intervene.

Mr Creswell (Australia) said that the proposal had been put forward in the same spirit of co-operation. In the Australian delegation's point of view, the actual content of the proposal was not the best. However, it was an attempt to reflect what they perceived that the Commission was trying to strive for. He had some difficulty in understanding why Working Document No 62 was framed so broadly, since he had understood the purpose of the authors was to indicate the issue more precisely. There should be a reference to the protection of children rather than a broad reference to fundamental freedoms and human rights. He believed that the Australian proposal had the virtue of a reference to the welfare of the child rather than to a broader issue of human rights. He added that the adverb 'manifestly' had the desirable restrictive effect. A strong case would have to be made out to induce the courts to invoke the clause.

The Chairman asked Miss Selby whether the United States proposal contained in Working Document No 65 implied the deletion of the reservation.

Miss Selby (United States) apologised for causing confusion here. She said that the purpose of Working Document No 65 was to *clarify* Working Document No 62. It could be considered as an amendment of Working Document No 62, and did imply the deletion of the reservation. She said that

human rights and fundamental freedoms included social, economic, and cultural freedoms. What the Convention was concerned about here was *civil rights*. The proposal submitted was as precise as possible. Miss Selby indicated however that she would be happy to withdraw this proposal if it met with no support. She saw considerable merit in Working Document No 65. It was simply a more precise suggestion.

Mr Savolainen (Finland) shared the doubts expressed by the Danish and Netherlands Delegates concerning Working Document No 62. He agreed that these concepts were very imprecise, and might be subject to many different interpretations. From Finland's point of view, it was clear that the United Nations Declaration of the Rights of the Child was included in the term 'human rights'. His fear was that Working Document No 62 would open the door to the systematic refusal to return the child. He felt that 'fundamental freedoms' was not a suitable concept in the context of this Convention, particularly in the context of summary proceedings. It was difficult to conceive that judges in summary proceedings would devote themselves to the question of determining whether a fundamental freedom or human right was involved. To facilitate proceedings, Mr Savolainen favoured the Australian proposal. But he wondered whether an amendment might not be possible to narrow it down somewhat. It was perhaps a question of drafting, but it seemed to him to touch on substance. He suggested that the text could read: 'Exceptionally, and for reasons *of equity and justice*, to be stated explicitly in the judgment, the return of the child under the provisions of article 11 may be refused if the return would be manifestly contrary to the child's welfare'.

The Chairman suggested putting these words in square brackets. They did not prejudice the choice between Working Document No 62 and Working Document No 64. Since Miss Selby had proposed Working Document No 65 as an amendment to Working Document No 62, he asked authors of Working Document No 62 for their view on substituting the language proposed in Working Document No 65.

Mr Walsh (Ireland) said that the United States suggestion used the words 'fundamental principles'. However, he pointed out that while some civil rights were fundamental principles, others were not, and might simply result from statute. This could be illustrated by looking at the American civil rights legislation. The Finnish delegate had referred to the United Nations Declaration of the Rights of the Child, which referred to the 'paramount interest of the child'.
This indicated there were other possible considerations. The Australian suggestion might lead to the reopening of the trial on the merits of the case. This was just what should be avoided. If objections were made regarding the imprecision of the content of human rights and fundamental freedoms, Mr Walsh pointed out that of the 29 States represented in the Conference, 16 were subscribers to the Declaration of Human Rights. As Judge Tanaka had pointed out in the South-West African case before the Permanent Court, these rights were deeper rights, not dependent upon positive law. In some countries this term might not have a precise meaning, but the reference to 'fundamental' and 'human' showed that they were rights which concerned the foundation of human existence. But the criterion of civil rights was surely much wider. Civil rights could be created every day by statute. But they could also be removed every day. Civil rights were dependent on current translation. So in spite of the apparent imprecision of Working Document No 62, the proposal was in fact narrower than the alternative suggestions.

The Chairman said that he wished to put to the vote the choice between the formulations in Working Document No 65 and in Working Document No 62.

Mr van Boeschoten (Netherlands) said that he would be brief. He did not favour Working Document No 65. The concept seemed to be wider than that in Working Document No 62. He also was worried about the translation of the concept of civil rights. He feared that it would lead to the adoption of an expression with a different content from that conveyed by the American expression.

The Chairman said that he would ask one more speaker to take the floor before putting the question to an indicative vote.

Mr Yadin (Israel) said that he preferred the Australian proposal to the suggestions contained in Working Documents Nos 62 and 65. First, it highlighted child welfare, which was after all the first consideration of the Convention. Secondly, it gave a definite yardstick instead of a nebulous reference to human rights and fundamental principles.

The Chairman asked the United States Delegate whether she wished an indicative vote to be taken on the formulation in Document No 65.

Miss Selby (United States) replied that a show of hands would be in order. However, she emphasised that *any* concept concerning rights would lead to difficulties.

The Chairman put the United States formulation contained in Document No 65 to an indicative vote. As a result of this show of hands, 16 delegates voted against the proposal and 2 were in favour of it. In view of this indicative vote, the Chairman asked Miss Selby whether she would withdraw the proposal contained in Document No 65.

Miss Selby (United States) said that she would withdraw the proposal.

The Chairman said that the debate was now narrowed down to the choice between Working Documents Nos 62 and 64. Both proposals had the merit of avoiding the reservation.

Mr van Boeschoten (Netherlands) said that the two proposals were quite different. He said that Document No 64 reintroduced the test of the child's welfare. The Dutch Civil Code contained similar terms. He felt that such terms would make it too easy for the courts to refuse to return the child. The Convention would be forestalling what it sought to achieve.

M. Jenard (Belgique) déclare que l'adoption de cette proposition rendrait la Convention inacceptable pour la Belgique. Son résultat serait en effet de faire glisser dans le pays de refuge le débat de fond sur le bien-être de l'enfant. Et le Délégué belge exprime sa crainte très vive que la signature par la Belgique de la Convention ne rende encore plus difficiles les négociations de son Gouvernement avec certains Etats, non-Membres de la Conférence.

The Chairman pointed out that the proposal of the Australian delegation had been submitted on condition that Document No 62 was not accepted.

M. Batiffol (France) dit partager les craintes du Délégué belge. Il ajoute que la notion d'intérêt de l'enfant lui paraît offrir au juge trop de raisons faciles de refuser le retour. Et il redoute que la Convention ne perde de ce fait toute portée utile.

Miss Pripp (Sweden) said that she agreed with the Finnish

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Delegate. It was necessary to find a workable solution. A problem arose in relation to Working Document No 62 in this connection. The formulation was that the return of the child would be refused if it would *not* be permitted, etc. In the conventions and other international instruments concerning human rights, the construction did not permit refusals or not. The formulation made interpretation very difficult. Miss Pripp suggested that a possible compromise could be made between the suggestions contained in Working Documents Nos 64 and 62. Thus, the text would read, 'The return of the child may be refused if it would appear manifestly contrary to fundamental principles, etc.'.

M. Barile (Italie) juge que le compromis réalisé dans la proposition commune du Document de travail No 62 lui paraît être le meilleur. En la matière l'ordre public de son pays est respecté par les principes énoncés dans ledit Document.

M. Jenard (Belgique) dit catégoriquement que la proposition suédoise est inacceptable pour la Belgique.

The Chairman put Document No 62 to the vote. He emphasised that it implied the suppression of the reservation in article 12, referred in *Procès-verbal* No 9.

Vote

Working Document No 62 was approved by a vote of 14 in favour (Belgium, Canada, Czechoslovakia, France, Federal Republic of Germany, Greece, Ireland, Italy, Luxemburg, Netherlands, Portugal, Spain, Switzerland, United Kingdom), 6 against (Australia, Denmark, Finland, Israel, Norway, Sweden), with 4 abstentions (Austria, Japan, United States, Venezuela). As a result of the vote Working Document No 62 was adopted by an absolute majority.

The Chairman asked Mr Creswell whether he withdrew the proposal contained in Working Document No 64.

Mr Creswell (Australia) indicated that he withdrew proposal No 64.

The Chairman now turned to Working Document No 57. He said that Working Document No 61 containing a Belgian proposal made an addition to Document No 57. He once again called the attention of delegates to the second sentence of article 16 of the Rules of the Conference.

Miss Selby (United States) said that it would be advisable to refresh the memories of the delegates as to what exactly had been decided yesterday.

The Chairman asked the Drafting Committee whether they could have ready by 3 o'clock their version of the Belgian proposal in Working Document No 51.

Mr Leal (Canada) said that when the Drafting Committee had adjourned the previous day, they had finished a re-draft of article 22. But the Belgian proposal involved the suppression of paragraph 8. So the next task of the Drafting Committee was to draw up a new paragraph in article 22, or indeed a new article, as it was impossible to incorporate the Belgian suggestion as it now stood. The answer to the Chairman's question was affirmative. On the reopening of the meeting, delegates would be able to examine the redrafting of article 22.

The Chairman said that discussion would thus be referred to the afternoon session. He asked whether there were any other proposals which had not yet been discussed. He indicated that there was a possible question arising in relation to article 20, paragraph 2, of the present text, and deriving from a Japanese proposal. He asked the Japanese Delegate, in conjunction with the Secretariat, to draft a possible reservation on this point.

Miss Selby (United States) raised the issue covered by Document No 12, which was not a major point, but could be important. This was the situation where a court did not wish to return a child to either of the parents. If both parents were incapable of receiving the child, the court could then be authorised to refer the problem back to a more proper forum, that is, the courts of the State of the habitual residence of the child. This would avoid obliging the courts of the State of refuge to refer the child automatically to an institution in this State. It was not a mandatory provision, just a possibility, to be used wherever the judge thought appropriate.

The Chairman observing that there was support for the proposal, opened the discussion on Working Document No 12. It was proposed to add a new second paragraph to article 12.
The Chairman asked if there was any opposition to this proposal.

Mr Leal (Canada) said that he questioned this proposal. He said that exactly the same problem arose even where substantial risk was not involved. This was the case where the court did not wish to return the child to the custodial parents in the requesting State, simply because it felt that this would be pre-judging the issue. This had happened in the Australian case previously discussed. He proposed to modify the United States text so as to avoid obliging a State to send a child back to its custodial parents.

Mr van Boeschoten (Netherlands) said that he did not see how this proposal would work in practice. It was proposed to allow the courts to send the child back to a person other than the custodial parents. But such a decision would not be entitled to recognition under the Convention. Thus, when the child arrived in the requesting State, the parents with full custody rights could and would act to exercise their custodial rights.

Mr Walsh (Ireland) said that the formulation of the second paragraph of the proposal was too wide. He did not like the term 'substantial risk'. From experience, he knew that only too often 'substantial' meant 'not imaginary'. He proposed substituting 'if a court is satisfied that the return of the child *would* subject him to severe conditions of neglect, etc. . .'.

Le Rapporteur dit que la proposition américaine lui semble être dans le droit fil de l'esprit de la Convention, pourvu qu'elle soit rédigée en des termes plus restrictifs, de façon que l'hypothèse couverte recoupe les cas de refus possibles. La proposition aurait alors le mérite de rappeler au juge qu'il a le choix entre le refus du retour de l'enfant et sa remise à une institution de l'Etat requérant. Puis, le Rapporteur répond aux objections du Délégué des Pays-Bas que, l'esprit de la Convention étant d'établir une coopération entre Autorités centrales, il n'est pas irréaliste d'espérer que cette coopération soit effective. Par contre, précise le Rapporteur, la proposition américaine deviendrait dangereuse si la remise à une institution pouvait intervenir dans d'autres cas que ceux justifiant le refus de retour. Car on risquerait alors de voir le juge de l'Etat requis entrer dans l'examen du fond.
Le Rapporteur dit en conclusion son soutien à la proposition américaine, mais à la condition que cette proposition soit maintenue dans les limites indiquées.

The Chairman said that before putting the proposal to the

vote, he wished to emphasise that it was of primordial importance to secure a *simple* Convention. Indeed, simplicity was the attraction of the Convention for the United Kingdom and for the Commonwealth. He said that for these reasons it would be advisable not to include in the Convention a faculty which a prudent judge would consider as existing anyway. So he asked Miss Selby if the United States insisted on the inclusion of this provision. He himself was thinking of the saleability of the Convention.

Miss Selby (United States) said that her very idea was to facilitate the application of the Convention. Her proposal clarified the Convention for the judges. She suggested that the proposal should be voted upon.

The Chairman put Working Document No 12 to the vote.

Vote

Working Document No 12 was rejected by a vote of 15 against (Australia, Austria, Canada, Czechoslovakia, Denmark, Finland, Ireland, Japan, Luxemburg, Netherlands, Norway, Portugal, Sweden, Switzerland, United Kingdom), 5 in favour (Belgium, France, Israel, Spain, United States), with 3 abstentions (Federal Republic of Germany, Greece, Venezuela).

The Chairman proposed that the Report should indicate that this faculty existed implicitly.

M. Jenard (Belgique) rappelle la proposition japonaise d'amendement de l'article 20 tendant à charger l'Autorité centrale requise de transmettre les documents à l'Autorité centrale de l'Etat où elle a toutes raisons de penser que l'enfant se trouve. Il imagine l'hypothèse où la Belgique ayant adressé une requête à l'Autorité centrale des Pays-Bas, celle-ci jugerait devoir la faire suivre à l'Autorité centrale japonaise. En ce cas l'Autorité centrale néerlandaise devrait-elle traduire la requête rédigée en néerlandais qui lui a été adressée? Il y a là une difficulté pratique. Aussi le Délégué belge suggère-t-il qu'il vaudrait mieux prévoir seulement une faculté de transmettre, plutôt qu'une obligation.

The Chairman said that Mr Jenard had made an interesting proposal, but that it was impossible to discuss proposals which were not in writing. However, if Mr Jenard were to submit a proposal in writing, he would accept that it be put to discussion in the context of the discussion on the Japanese reservation.

Miss Pripp (Sweden) asked in connection with article 20, whether it was possible *not* to use a translation if the Central Authorities had made an agreement to this effect. Nordic countries had such an agreement.

The Chairman said that this would certainly be possible, and suggested that a reference be made on this point in the Report. He would now proceed with the second reading of the text. He referred to Working Document No 45.

The title of the Convention was read.

Mr Leal (Canada) said that the presence of square brackets was explained by the fact that sometimes matters arose which appeared as touching upon matters of substance. As far as the title was concerned, there was a suggestion to delete 'the civil aspects of' for the sake of simplicity. He himself preferred to keep this in, as it might be an advantage to indicate clearly from the beginning that the Convention did not deal with criminal proceedings.

The Chairman asked whether there was a proposal to delete the phrase within square brackets.

M. Menéres Barbosa (Portugal) dit que le souci d'abréviation du titre ne lui paraît pas suffisant pour justifier la suppression des «aspects civils». Le maintien de ces termes lui paraît être commandé par l'exacte définition de l'objet de la Convention.

The Chairman, noting that there was support for the Portugese intervention, asked whether there should be further debate. He then put the question to the vote.

Vote

The proposal to delete 'the civil aspects of' *was rejected by a vote of 19 against (Australia, Austria, Belgium, Canada, Czechoslovakia, Denmark, France, Federal Republic of Germany, Greece, Ireland, Japan, Luxemburg, Norway, Portugal, Sweden, Switzerland, United Kingdom, United States, Venezuela), 2 in favour (Finland, Spain), with 2 abstentions (Israel, Netherlands). As a result of the vote, the square brackets were deleted and* 'the civil aspects of' *maintained.*

The title of Chapter I and article 1 were read.

Mr Leal (Canada) said by way of presentation that the *chapeau* of the article and paragraph *a* had remained unchanged. Paragraph *b* had been modified to emphasise the purposes of the Convention. The words 'the exercise of' contained within square brackets could be deleted without harm to the substance of the text. The words 'under the law of' were inserted for purposes of clarification.

The Chairman put to the vote the question of whether 'the exercise of' should be maintained or deleted.

Vote

The deletion of 'the exercise of' *in paragraph* b *of article 1 was approved by a vote of 12 in favour (Canada, Czechoslovakia, Finland, France, Israel, Luxemburg, Netherlands, Norway, Portugal, Switzerland, United Kingdom, Venezuela), 9 against (Australia, Austria, Denmark, Federal Republic of Germany, Greece, Ireland, Spain, Sweden, United States), with 2 abstentions (Belgium, Japan). As a result of this vote the words* 'the exercise of' *were deleted. This meant that the verb became* 'are'.

Le Secrétaire général adjoint, propose d'intervertir la rédaction de l'alinéa *b* de la version française pour obtenir: «de faire respecter effectivement dans les autres Etats contractants les droits de garde et de visite existant dans un Etat contractant».

The Chairman said that, as a matter of style, there was no objection to having two different expressions in French and in English.

Article 2 was read.

Mr Leal (Canada) said that the words 'for this purpose' had been added in the third line for purposes of clarification. There was no change of substance.

The Chairman pointed out that the English text contained the word 'all', where the French did not. Could the text be harmonised?

Le Secrétaire général indique que le texte français sera rectifié: «les Etats contractants prennent *toutes* mesures . . .».

The Chairman said that since there was no opposition, this point was adopted.

Article 3 was read.

Mr Leal (Canada) said that the format of article 3 had been re-cast to facilitate comprehension of the text. In paragraph *a*, the text had been reorganised, for the sake of clarification, and paragraph *b* had been modified to cover the case where the abduction itself prevented the exercise of rights. In the final paragraph, the words 'having legal effect' had been substituted in response to certain objections, and a similar modification had taken place in the French text.

Mr Müller-Freienfels (Federal Republic of Germany) objected to the plural form of 'administrative decisions' in the English text. The French text employed the singular, and this was preferable.

The Chairman observed that there was no opposition to substituting in the English text 'a judicial or administrative decision'.

M. Chatin (France) propose la suppression de la dernière phrase de l'alinéa *b*: «ou l'eût été si de tels événements n'étaient survenus». Il lui semble en effet que l'hypothèse qu'elle veut couvrir est déjà protégée en son absence.

The Chairman asked Mr Jones whether he felt that this was a question of substance or drafting.

Mr Jones (United Kingdom) replied that it was certainly a question of substance. Mr Chatin's example was not what he had had in mind. If the term meant something, it surely was that the child must actually have been in custody. As this interpretation was too narrow, the words 'or would have been so exercised but for the removal or retention' had been added.

The Chairman said that to implement the proposal of Mr Chatin an absolute majority vote would be necessary. Did he insist on his suggestion?

M. Chatin (France) déclare ne pas vouloir entraver l'avancement des travaux, et suggère que la question soit revue lors de la deuxième lecture.

Le Secrétaire général rappelle que la Commission est déjà en train de procéder à cette deuxième lecture, et que le texte qu'elle arrêtera au terme de cette lecture sera directement soumis à la séance plénière.

M. Batiffol (France) propose que le Rapport mentionne que l'hypothèse préoccupant le Délégué du Royaume-Uni est bien couverte par la Convention. Cela permettrait de supprimer ce membre de phrase dont il craint qu'il puisse présenter quelque obscurité pour les juristes n'ayant pas suivi les débats de la Commission.

M. Jenard (Belgique) imagine l'hypothèse d'une mère investie du droit de garde, qui, en ayant délégué l'exercice au père, n'aurait pu obtenir de celui-ci la restitution de l'enfant. Il semble au Délégué belge que le maintien du membre de phrase peut être utile en pareil cas.

M. Chatin (France) s'étonne de cette hypothèse où la garde paraît être exercée par kidnappeur interposé.

The Chairman said that he wished to allow the debate to be more calm on these relatively minor matters. Their discussion was adjourned until the afternoon session.

Mr Walsh (Ireland) proposed resuming the meeting at 2.30 p.m.

The Chairman felt that this would create practical difficulties with the Secretariat.

The meeting was adjourned until 3 o'clock.

Documents de travail Nos 66 à 68
Working Documents Nos 66 to 68

Distribués le 21 octobre 1980 (après-midi)
Distributed on 21 October 1980 (afternoon)

No 66 – Proposition préliminaire du Comité de rédaction – Preliminary proposal of the Drafting Committee

Article 23

Chaque Autorité centrale supportera les propres frais en appliquant la Convention.
L'Autorité centrale et tous services publics des Etats contractants ne réclameront aucun remboursement de leurs frais en rapport avec les dispositions de cette Convention, mais ils peuvent demander le paiement des dépenses occasionnées ou qui seront occasionnées par le retour de l'enfant. Notamment, ils ne peuvent réclamer du demandeur de paiements des frais et dépens du procès ou, lorsque c'est le cas, pour les frais entraînés par la participation d'un avocat.
En ordonnant le retour de l'enfant ou en statuant sur le droit de visite dans le cadre de la Convention, l'autorité judiciaire ou administrative peut ordonner, le cas échéant, à la personne qui a déplacé ou qui a retenu l'enfant, ou qui a empêché l'exercice du droit de visite, de payer les frais de voyage et tous autres frais nécessaires engagés par le demandeur, notamment les frais de représentation judiciaire et de retour de l'enfant, ainsi que toutes dépenses faites pour localiser l'enfant.

Article 23

Each Central Authority shall bear its own costs in applying this Convention.

Central Authorities and other public services of Contracting States shall not impose any charges in relation to applications submitted under this Convention but may require the payment of the expenses incurred or to be incurred in returning the child. In particular, they may not require any payment from the applicant towards the costs and expenses of the proceedings or, where applicable, those arising from the participation of legal counsel or advisers.

Upon ordering the return of a child or issuing an order concerning rights of access under this Convention, the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child, or who prevented the exercise of rights of access, to pay necessary travel or other expenses of the applicant, including the costs of locating the child, of legal representation, of return of the child, and of any payments made for locating the child.

No 67 – Proposal of the Canadian, Netherlands and United States delegations

Article 23

It is proposed to restore the original text of article 22 regarding legal costs:

Central Authorities . . . may –

a require the payment of any charges which are not met through the legal aid system and which arise from the employment of legal counsel;

The text would be in other respects unchanged.

It is intended that the proposal in Working Document No 57 would be considered only if this proposal is not accepted.

No 68 – Proposition de la délégation du Canada
– Proposal of the Canadian delegation

Clause finale additionnelle

Un Etat contractant pourra, au moment de la signature, de la ratification, de l'acceptation, de l'approbation ou de l'adhésion, ou au moment d'une déclaration faite en vertu de l'article Y, déclarer que la présente Convention ne s'applique qu'aux déplacements ou non-retours illicites effectués après l'entrée en vigueur de la présente Convention entre l'Etat requérant et l'Etat requis.

Additional Final Clause

A Contracting State may, at the time of signature, ratification, acceptance, approval or accession, or at the time of a declaration made under article Y, declare that this Convention applies only to wrongful removals or retentions made after the coming into force of this Convention between the requesting and the requested States.

Procès-verbal No 14

Séance du mardi 21 octobre 1980 (après-midi)
Meeting of Tuesday 21 October 1980 (afternoon)

The meeting was opened at 3 p.m. Mr Anton (United Kingdom) was in the Chair. Miss Pérez-Vera (Spain) was Rapporteur.

The Chairman noted that Mr Chatin did not wish to pursue his point concerning the proposed deletion of the last sentence of article 3(1)*b* in Working Document No 45.

Mr Yadin (Israel) suggested that the word 'may' occurring in article 3(2) should be replaced by 'shall', and that 'through' be replaced by 'by' before the words 'operation of law'.

Mr Savolainen (Finland) proposed that the words 'may include those arising through operation of law' in article 3(2) be replaced by 'may arise by operation of law'.

The Chairman observed that both Mr Yadin and Mr Savolainen had proposed helpful amendments to the text of article 3(2).

Le Secrétaire général adjoint s'oppose à l'utilisation du terme «entité». Le terme «institution» semble suffisant.

M. Jenard (Belgique) se rallie au point de vue du Secrétaire général adjoint.

Mr Jones (United Kingdom) recalled that there had been extensive discussion on this point in the Drafting Committee. The problem was that, although 'body' would adequately convey the sense required in English, no single word in French corresponded to it. It was therefore necessary to retain 'entity' so as to avoid considerable disparity between the English and French texts.

Le Secrétaire général adjoint propose que l'on parle d'«entité légale».

M. Chatin (France) précise que cette question a été longuement discutée.

Mr Jones (United Kingdom) commented that some 'entities', which could well be involved in child abduction cases, were not legal persons.

The Chairman observed that the Deputy Secretary General's intervention touched upon a question of substance. In terms of article 16 of the Rules of Procedure, an absolute majority of the delegates would have to vote in favour of the matter being re-opened for debate.

M. Jenard (Belgique) pense que la notion d'«entité» n'a aucune signification.

The Chairman requested an amendment to the French text of article 3(1)*a* which would conform to the English words 'a person, an institution or any other body'.

Le Secrétaire général adjoint propose de laisser tomber «toute autre entité».

The Chairman asked whether the sense of the meeting was that the words in the French text '*toute autre entité*' be deleted.

Le Rapporteur explique l'utilisation du terme «entité»; l'idée était d'englober d'autres possibilités que les «institutions», notamment les communes.

The Chairman suggested that both the English and French texts of article 3(1)*a* contain instead the words 'to a person or any organisation, either jointly or alone'. He asked whether the United Kingdom and United States delegations would accept this.

Mr Jones (United Kingdom) and **Miss Selby** (United States) assented to the Chairman's proposal.

Le Secrétaire général adjoint propose de remplacer le terme «toute autre entité» par «tout autre organisme».

Mr Dyer (First Secretary at the Permanent Bureau) expressed reservations concerning delegates' attempts to redraft articles from the floor. He pointed out that the proposals of the Drafting Committee contained many delicate drafting points, which had been considered by that Committee at great length. In his view, the English text of article 3(1) should be left in the form proposed by the Drafting Committee.

Mr Savolainen (Finland) agreed with Mr Dyer that article 3(1) be accepted in the form proposed by the Drafting Committee.

The Chairman observed the sense of the meeting to be that Mr Dyer's proposal should be accepted.

Mr Dyer (First Secretary at the Permanent Bureau), in response to a request from Mr Leal, read out the terms of article 3(2), as now amended by the full Commission. They were as follows:
'the rights of custody mentioned in sub-paragraph *a* above may arise by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.'

M. Barile (Italie) s'exprime au sujet de son Document de travail No 58 et propose de biffer la virgule, placée entre «décision administrative» et «d'un accord en vigueur»; il explique avec soin son point de vue dans le Document de travail No 58.

The Chairman replied that Mr Barile had raised an issue of principle which could not be discussed again unless an absolute majority of delegates so wished.

Le Rapporteur estime que ce problème touche à la rédaction.

M. Espinar (Espagne) envisage le problème du fond; avec la virgule, la phrase signifie que la décision est en vigueur dans le pays de la résidence habituelle du mineur; si l'on supprime la virgule, d'autres Etats que celui de la résidence habituelle du mineur sont englobés.

Le Rapporteur explique le souci de M. Barile; ce dernier entend parler de «décision en vigueur» et non pas de décision qui a été rendue ou qui a été reconnue dans l'Etat de résidence habituelle de l'enfant.

M. Barile (Italie) envisage le cas d'une décision judiciaire ou administrative d'un Etat tiers qui ne serait pas «reconnue» dans l'Etat de résidence habituelle de l'enfant; mais qui, néanmoins, recevrait *ex jure* «force de loi» dans cet Etat; cette situation n'est pas comprise dans le texte du projet si l'on maintient la virgule.

The Chairman emphasised the point that delegates should not attempt to re-draft articles from the floor. He noted that all the delegates were agreed upon the principle concerned in article 3, but that the text of the final paragraph of that article should be sent to the Drafting Committee.

M. Barile (Italie) fait référence à l'article 13 et le Document de travail No 15 s'y rapportant, pour montrer que la confusion s'y trouve aussi.

The Chairman declared that article 3 would go to the Drafting Committee along with the modifications and clarifications suggested by the meeting. He then turned to article 4, as proposed in Working Document No 45.

Article 4 was read.

Mr Yadin (Israel) opined that at the end of article 4, the reference should be to one certain breach of custody or access rights, and not to any breach. Moreover, the opening words of the article should read 'The Convention shall apply to any child who, immediately before the breach of custody or access rights, was under the age of 16 years.' He recalled that he had made these suggestions during the first reading of the draft Convention.

Mr Leal (Canada) observed that the Drafting Committee might not in fact have considered Mr Yadin's proposals when re-drafting article 4.

The Chairman referred Mr Yadin's proposals to the Drafting Committee.

Mr Müller-Freienfels (Federal Republic of Germany) was concerned to ensure that the Convention would apply to any child who happened to attain his 16th birthday only after the breach of custody or access rights occurred. He felt that German courts might well encounter problems with the present formulation of article 4.

The Chairman sent article 4 to the Drafting Committee, along with the point raised by Mr. Müller-Freienfels. He then turned the attention of the delegates to article 5, as proposed by the Drafting Committee.

Article 5 was read.

Mr Leal (Canada) stated that article 5 had not been altered at all by the Drafting Committee. The Committee had considered the replacement of 'are' in article 5*a* by 'shall include' or 'include'. However, since this raised a substantive point it was felt that the full Commission should first decide whether or not to accept such an amendment.

Mr Creswell (Australia) supported the suggestion advanced by Mr Leal, and observed that he had wished to make the same point.

The Chairman noted that a point of substance had been raised. He cautioned delegates about attempting to amend the text submitted by the Drafting Committee, and reminded the meeting that an exhaustive definition of rights of custody was not required, but merely a stipulative definition of what was meant by such rights.

Le Rapporteur rappelle la remarque du représentant du Commonwealth qui mettait en évidence que le droit de garde peut être envisagé sous deux aspects: 1) le droit de fixer le lieu de résidence et 2) de prendre les soins à l'égard de l'enfant. Le Rapporteur demande si, au fond, la question ne se résume pas à savoir duquel de ces deux aspects le droit de garde est avant tout constitué.

Mr Dyer (First Secretary at the Permanent Bureau) felt that the existing language of article 5 adequately covered the point raised and would also meet the needs expressed by the observer from the Commonwealth Secretariat. For example, the existing definition of custody rights embraced the situation where rights of custody and the right to determine a child's place of residence were vested in different persons. He endorsed the plea of the Chair that delegates not devote themselves to questions of phrasing and drafting.

The Chairman asked that the meeting proceed to a vote concerning the alteration of the text proposed by the Drafting Committee.

Vote

The oral proposal of Mr Leal, in his capacity as Chairman of the Drafting Committee, to substitute 'shall include' *for* 'are' *in article 5a was accepted by a vote of 13 in favour (Australia, Austria, Belgium, Canada, France, Federal Republic of Germany, Greece, Ireland, Israel, Luxemburg, Portugal, Sweden, Switzerland), 6 against (Finland, Japan, Netherlands, Spain, United Kingdom, United States), with 4 abstentions (Denmark, Italy, Norway, Venezuela).*

Le Secrétaire général adjoint propose d'introduire le verbe «comprend» à la place d'«inclut».

Mr Savolainen (Finland) referred to Working Document No 13, which had proposed the addition of the words 'and protection' after 'care' in article 5*a*. In this connection, he noted that the proposal in Working Document No 53 had been sent to the Drafting Committee. In his view, therefore, it was appropriate and might clarify the position if the words 'and protection' were added to article 5, so that the decisions referred to in Working Document No 53 would also extend to decisions concerning child protection.

Mr Leal (Canada) recalled that the Drafting Committee had considered the Finnish proposal in Working Document No 13, and had decided that the words 'and protection' should not be included in article 5*a*.

Mr Savolainen (Finland) requested that the meeting vote on the proposal in Working Document No 13. He felt it advisable that terminology adopted by this Convention should conform to that used in the 1961 Convention on the Protection of Minors.

M. Chatin (France) s'oppose à la notion de «protection» et explique que la Convention a pour but, avant tout, de supprimer les voies de fait; le terme «protection» introduit une équivoque.

Mr van Boeschoten (Netherlands) opposed any reference to 'protection' in article 5, since in his view it would unnecesarily confuse and complicate matters. He feared that the inclusion of these words might result in a person vested with the right of protection of a child attempting to use the provisions of this Convention on the same basis as a custodian. This was not the intention of the Commission.

M. Espinar (Espagne) appuie la proposition de la Finlande et l'admet pour les mêmes raisons que M. Chatin la rejette; M. Espinar explique que cette adjonction précise les types de rapports que la Convention protégera.

Mr Yadin (Israel) disagreed with Mr Chatin that the Convention was not concerned with the protection of children. As regards the proposed insertion of the words 'and protection', he felt that it was unnecessary since 'care' necessarily included protection. Any highlighting of 'protection' could lead only to confusion.

Mr Savolainen (Finland) commented that the insertion of the proposed words had been intended to remove any possibility for different interpretations concerning article 5*a*.

The Chairman asked that the meeting proceed to a vote on Working Document No 13.

Vote

Working Document No 13, in so far as it proposed the addition of the words 'and protection' *after* 'care' *in article* 5a, *was rejected by a vote of 16 against (Austria, Belgium, Canada, France, Federal Republic of Germany, Greece, Ireland, Israel, Italy, Japan, Luxemburg, Netherlands, Portugal, Switzerland, United Kingdom, United States), 3 in favour (Finland, Spain, Venezuela), with 4 abstentions (Australia, Denmark, Norway, Sweden).*

Le Secrétaire général adjoint propose que l'on supprime le mot «notamment» à l'article 5*b*.

The Chairman agreed that the word '*notamment*' be deleted.

Miss Selby (United States) wondered what had become of the United States proposal that a clear distinction be made between Central Authorities, on the one hand, and judicial or administrative authorities, on the other.

Mr Leal (Canada) replied that the Drafting Committee had incorporated the suggestion intersticially; where it was important to differentiate Central Authorities from judicial/administrative authorities, the distinction had been drawn. However, the Committee felt that such a distinction would have been otiose in the context of article 5.

Miss Selby (United States) asked that it be put on record that the judicial/administrative authorities were those which had the power to make decisions on custody.

The Chairman stated that the Report would note Miss Selby's point. He agreed that the notion of an 'administrative authority' was highly obscure in both the United Kingdom and the United States.

Mr Dyer (First Secretary at the Permanent Bureau) was concerned to avoid any explicit definition of judicial and administrative authorities. He noted that in some countries such authorities could act on a petition for the return of a child, while having no power to make decisions on the merits of a case.

Article 6 was read.

Mr Leal (Canada) observed that the only change made by the Drafting Committee had been to expand article 6(2) so as to take account of the unanimous decision of the Commission that more than one Central Authority could be appointed by certain States. In addition, the word 'relevant', originally in the second sentence of article 6(2) had been replaced by 'appropriate'. The balance of the article therefore remained the same.

M. Jenard (Belgique) expose son malaise devant la formule «d'organisations territoriales autonomes»; cette expression a une signification particulière dans son pays.

The Chairman observed that Mr Jenard's point would apply also to States with more than one system of law.

M. Batiffol (France) propose de maintenir des formules simples.

M. Jenard (Belgique) reprend l'explication de son problème; dans son pays certains estiment que la «communautarisation» s'applique à la Convention et d'autres que les aspects civils ne seraient «pas communautarisés».

Mr Creswell (Australia) wondered why the second paragraph of article 6 had been made elaborate. He recalled that the change proposed had been prompted by an oral suggestion of Mr Espinar that a reference to the type of State concerned should be deleted.

Mr Yadin (Israel) asked whether any significance was to be implied from the spelling of the word 'State' with a capital 'S' in article 6(2).

The Chairman explained that the use of the capital 'S' was to distinguish the federal State or similar political unit from its constituent parts or states, for which a small 's' was more appropriate. With regard to Mr Jenard's point, he felt that the Drafting Committee's text of article 6 embraced autonomous territorial organisations, while other articles in the Convention were also addressed to the concerns expressed by Mr Jenard.
He then sent article 6 and the observations made by delegates to the Drafting Committee, and turned to article 7(1).

Article 7(1) was read.

Mr Leal (Canada) confirmed that no change had been made by the Drafing Committee to the corresponding article in the draft Convention.

Article 7(2) and the following sub-paragraph a *were read.*

Mr Leal (Canada) observed that the *chapeau* of the second paragraph of article 7 had been amended. Central Authorities were now obliged to take 'all appropriate measures' and the subsequent sub-paragraphs of article 7 had been amended to reflect this change. As a result, the wording of paragraph *a* had been changed, but only in the above sense.

Mr Yadin (Israel) noted that the French text of the *chapeau* of article 7(2) had managed to avoid the difficulty concerning 'entity', encountered in article 3. He therefore suggested that the English text should delete the word 'bodies', and thought that this might also be a possible solution within the context of article 3.

The Chairman demurred, since he considered that the context of article 7 was different from that of article 3.

Mr Leal (Canada) expressed the sense of the *chapeau* to be that either Central Authorities or other bodies, be they controlled by the Central Authorities or requested by them to act, could take the appropriate measures concerned.

M. Voulgaris (Grèce) fait la proposition de modifier le texte français par «ou tout autre organe» au lieu d'«intermédiaire»; ce dernier terme laisse penser que l'on peut recourir à des personnes privées.

Mr Walsh (Ireland) agreed with Mr Voulgaris. He also observed that the word 'organ' embraced both a single individual and a number of persons, while 'body' always implied more than one individual.

The Chairman suggested that the Drafting Committee should take note of the proposal which had emerged, *viz.* that the French text in the *chapeau* of article 7 be amended to '*soit avec le concours de tout autre organisme*', while the corresponding English text would read 'either directly or through any appropriate organs'.

Le Secrétaire général adjoint demande si l'article 3 devrait être modifié en anglais et se lire «*organ*» à la place de «*body*».

The Chairman emphasised that the present discussion concerned the *chapeau* of article 7(2). He asked the Drafting Committee to take note of the suggestions which had been made.

Mr Creswell (Australia) suggested that 'they shall' would be a more appropriate formulation than 'they will' in the *chapeau* to article 7(2).

The Chairman agreed that the alteration proposed by Mr Creswell would make the English text conform more closely to the French. He took the sense of the meeting to be that the English text of the *chapeau* to article 7(2) should follow the French text and read 'directly or through any intermediary'.

Miss Selby (United States) referred to the earlier proposal of the United States that Central Authorities should use their 'best efforts', and to the United Kingdom proposal that they should do everything 'practicable'. She had understood these proposals to reflect the sense of the meeting at the time, and that they had been referred to the Drafting Committee. The idea behind the United States proposal was that Central Authorities should be able to determine the most appropriate means by which their obligations could be discharged. Although the word 'appropriate' was acceptable to her, Miss Selby felt that the French text should conform to the English (and not vice-versa), and suggested that '*prendront*' be substituted for '*doivent prendre*'.

The Chairman observed that the sense of '*prendront*' was still mandatory, and correspondended to the English 'shall take', so that the change proposed might not achieve the result intended. In his view, such a change was not really necessary, since the only obligation which ought to be imposed upon a Central Authority was to take *appropriate* measures. In this regard, the existing language in the French text appeared to be perfectly adequate. The Chairman added that, while there was really no substantive difference between 'will' and 'shall', the latter was conventionally used in United Kingdom Statutes.

Miss Selby (United States) accepted the Chairman's observations but asked that the record should reflect the sense of the verbs used.

The Chairman assured Miss Selby that the Report would reflect the full sense of the phrase '*toutes mesures appropriées*', and he referred the *chapeau* of article 7(2) to the Drafting Committee.

Le Secrétaire général adjoint demande si l'article 7, premier paragraphe, et son chapeau seront renvoyés au Comité de rédaction.

The Chairman stressed that article 7(1) and the *chapeau* of article 7(2) were referred to the Drafting Committee, which should note the point that the word '*doivent*' in the French text would be more appropriately translated by 'shall' in the English text.
The Chairman then referred to Working Document No 67, and observed that article 16 of the Rules of Procedure now

came into play concerning the re-discussion of the proposals of article 23.

Miss Selby (United States) stated that the ratification of the Convention by the United States was at stake. If the existing text of article 23 was retained, or retained without the reservation proposed in Working Document No 57, ratification would be impossible.
In her view, the Convention sought to achieve two things in particular, *viz.* (*i*) to establish an administrative relationship between States which would assist people in cases of child abduction and, (*ii*) to provide certain legal machinery which, it was hoped, would act primarily as a deterrent and be used sparingly. The proposal in Working Document No 67 did not affect either of these major purposes, but retention of the present text would in no way help a party to recover a child who had been abducted to the United States. Miss Selby asked delegates to consider the great number of inter-state child abductions which occurred within the United States, in which the parties concerned had to avail themselves of the existing legal aid systems. It would be next to impossible to adopt a wholly different system of legal aid purely for this Convention. United States nationals, in the event of ratification, would use this Convention in applications to United States Courts, and it would be clearly unacceptable to allow them to use the more generous provisions of The Hague Convention, while necessarily denying the use of these provisions to parties involved in internal abductions.

The Chairman observed that no delegate opposed re-debate on the issue of legal aid, so that in terms of Rule 16 of the Rules of Procedure, the question was reopened for discussion. He asked delegates to consider simultaneously the proposals in Working Documents Nos 57, 61 and 67.

Mr Walsh (Ireland), on a point of clarification, wondered whether the word 'and' in Working Document No 67 was intended to limit the charges which a Central Authority could require to be paid or whether an additional charge was envisaged.

The Chairman thought that this was a drafting point and that, for the purposes of debate, the word should be read as 'and/or'.

M. Jenard (Belgique) s'oppose vivement au rétablissement de l'ancien texte de l'article 22; il fait référence au Document de travail No 53; il expose notamment l'incompatibilité entre la disposition prévoyant la «gratuité» de la Convention de Strasbourg avec le texte de l'article 22 de la présente Convention. Une Convention ne serait pas efficacement applicable si elle n'offre pas à ceux qu'elle veut protéger les moyens matériels de la mettre en application. Il relève aussi que personne n'a répondu aux 4 arguments qu'il avait avancés le matin; la seule raison que font valoir les Etats opposés à la «gratuité» est la rigidité d'un système qui ne pourrait être changé.
Une justice ouverte aux seuls riches n'est pas une justice et cette Convention veut avant tout protéger des gens de condition modeste.

Working Document No 61 was read.

The Chairman noted that certain drafting questions arose out of Working Document No 61, which he understood should be read as a counter-reservation.

Mr Leal (Canada) addressed himself first to Working Document No 57. In his view, the last two lines of the proposal therein effectively answered the questions raised by Mr Walsh in the context of Working Document No 67. In reply to Mr Jenard, Mr Leal made the following points:
(1) under the legal aid systems in force in Canada, no charge would be imposed on a party for the payment of counsel's fees, provided he had accepted the counsel provided under that system;
(2) the Canadian system of legal aid indeed existed for the benefit of poor people. The province of Ontario expended 45 million Canadian dollars per year in providing legal aid and assistance to such persons. Nevertheless, no government could view with equanimity the open-ended financial commitment entailed in the acceptance of Working Document No 51. Canada could not ratify a Convention which committed her to paying *whatever* costs were incurred by an applicant who had not used legal aid provisions which were available to anyone, regardless of nationality.
Mr Leal added that the Canadian delegation was not asking European States who had signed the Strasbourg Convention to change their systems of legal aid. He proposed merely that parties who required legal aid in a case brought under this Convention should be obliged to accept the legal aid system of the country concerned. He begged delegates to reach a decision which was acceptable to all Contracting States and which would make it possible for Canada to help foreign nationals in cases of child abduction.

Mr van Boeschoten (Netherlands) observed that delegates were now faced with a stark choice: to kill or to save the Convention. If the Commission incorporated within the Convention the provision in Working Document No 51 without allowing for a reservation on the part of the States which could not accept it, the Convention would be rendered useless. The wider ambit of The Hague Conference made it essential that these countries accede to the Convention, so that it could be truly world-wide in scope. Thus, the only real question should be whether the proposal in Working Document No 67 be contained in the body of the Convention, or be expressed as a reservation. In reply to Mr Jenard, Mr van Boeschoten observed that the provisions of the Strasbourg Convention, if ratified, would still be available to European States. Furthermore, Working Document No 53 proposed the inclusion of an article which could allow the Strasbourg Convention to have precedence with regard to questions involving only States which were parties to that Convention.

M. Chatin (France) explique les raisons pour lesquelles la France veut trouver une solution médiane qui permette au Canada, aux Etats-Unis et à l'Australie de résoudre leurs problèmes sur ce point; cette Convention offre l'occasion de régler ces situations avec des pays qui ne sont pas Parties à la Convention de l'Europe.
Il propose de reprendre l'ancien article 22 tel qu'il est retranscrit dans le Document de travail No 67 et de le modifier dans le sens suivant: «et qui pourrait découler de l'intervention d'un avocat ou d'un avoué dans les cas où ces derniers ne pourraient être désignés par le gouvernement»; M. Chatin propose d'indiquer que les Etats devraient faire de leur mieux pour favoriser le recouvrement des frais d'avocat.
Cette solution de compromis satisfait la délégation française.

The Chairman noted that the proposal in Working Document No 53, in so far as it related to article 5, had been approved. Working Document No 53, in other respects, was designed to enable Parties to the Strasbourg Convention to agree amongst themselves as to which Convention should have priority. He urged delegates to avoid questions concerning 'competing' Conventions, since the Drafting Committee was at present dealing with this matter. The Chairman then referred to Mr Chatin's suggestion that the text of article 23 be amended to read 'require the payment of

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any charges which are not met through the legal aid system and which arise from the employment of legal counsel, except where such counsel are appointed by the Government'. In the view of the Chairman, this was a helpful compromise.

Mr Leal (Canada) was most favourably disposed towards Mr Chatin's suggestion. There was no question of payment being required from a party when the counsel appointed by the Government came from outside the legal aid system. However, a problem remained, since in Canada the Government would appoint Government counsel for one spouse, but not for both. The proposal therefore did not take account of the situation where one spouse, as a party to the proceedings, engaged outside counsel who refused to abide by the legal aid tariff.

Miss Selby (United States) agreed completely with Mr Leal's point that no charge would be made for the services of counsel appointed by the Government. However, she felt unable to give what amounted to a 'political commitment' that Government counsel would always be appointed. Although Mr Chatin's proposal was attractive, it failed to take account of the situation in which the counsel concerned had not been appointed by the Government.

Mr van Boeschoten (Netherlands) had serious reservations concerning Mr Chatin's proposal. In the Netherlands, any lawyer appointed by the Government would be a private lawyer who received no fixed salary and who would submit his own note of charges. Thus, any suggested exemption as regards attorneys appointed by the Government might not have the effect intended by Mr Chatin.

M. Espinar (Espagne) appuie la proposition de M. Chatin; le paiement ne devrait intervenir que chaque fois que l'Etat ne peut couvrir les frais de représentation par un avocat.
Il relève notamment que le problème économique de l'assistance judiciaire ne se pose généralement pas aux deux parties en même temps.
M. Espinar se déclare favorable avant tout à une solution de conciliation.

Miss Pripp (Sweden) sought to make two points. Firstly, in Sweden, the Government could not appoint lawyers. Secondly, article 5(3) of the Strasbourg Convention did not make it clear that States had decided to bear *all* the costs incurred; on the contrary, the article covered only those costs which the Central Authority had agreed to bear.

Le Secrétaire général prend la parole pour lever le désaccord entre les Etats avant tout animés de sentiments de générosité et ceux qui considèrent les réalités pratiques. Pour assurer la réussite de la Convention, une solution de compromis s'impose. Deux solutions s'offrent aux Etats: soit on pose le principe de la «générosité» et on le restreint par des réserves, soit on prévoit le paiement avec une disposition laissant les Etats libres d'être généreux.
Avant de vouloir régler tous les aspects du fonctionnement, il faut donner à la Convention la possibilité de débuter; le Secrétaire général se réfère à l'expérience qu'il a tirée de l'étude des conventions d'entraide pour montrer l'importance des réunions subséquentes des Autorités centrales; la Convention sera précisée et améliorée, par la suite, par des recommandations et des protocoles.

Mr Holub (Czechoslovakia) felt that delegates should consider in this context Working Document No 49 (which had proposed that the court could direct the payment of costs to the applicant), and the fact that a Central Authority, in terms of article 23, could request payment from either the abductor or the applicant.

M. Jenard (Belgique) exprime à son tour son voeu de réussite pour la Convention; il trouve que la proposition de M. Chatin est bonne.
Pour la délégation belge, l'assistance judiciaire n'est pas une bonne solution. Il reconnaît que chaque Etat est confronté à des problèmes de budget; toutefois, il n'y a pas lieu de fermer la porte à des gens de condition modeste qui représentent certainement la majorité des cas auxquels la Convention s'appliquera. M. Jenard fait appel aux Etats pour ouvrir leurs tribunaux de façon généreuse et équitable.

Mr Leal (Canada) thought that the United States and Canadian delegations would be able to accept the first paragraph of article 23, proposed by the Drafting Committee in Working Document No 66. However, he noted that the Netherlands delegation might be unable to accept it.

Mr van Boeschoten (Netherlands) observed that it was not really a problem for the Netherlands, which was a Party to the Strasbourg Convention.
A bridge had to be built between two opposing positions, and this could be done if delegates accepted that the picture which had been presented was too 'black and white'. Legal aid systems existed in the United States and Canada, as in European countries, and there was no point in debating the relative merits or superiorities of different sytems. Mr van Boeschoten observed that legal aid systems were constantly developing, and that the trend in all countries appeared to be towards widening their scope. Delegates should therefore not attempt to impose their own systems on others, and should accept either a new provision on this point or a reservation for those States which were unable to accept the existing text.
So far as Mr Chatin's proposal was concerned, he felt that its meaning was rather unclear and that the Netherlands might find difficulty in accepting it. However, the most important task before the meeting was to achieve a Convention, and delegates should do their best to accommodate the serious concerns of certain States.

The Chairman noted that Mr Chatin's proposal was not in writing, and that considerable drafting difficulties were involved. For example, the legal adviser concerned might not be nominated by the Government, but by semi-autonomous or non-governmental agencies. However, the meeting should address itself to the issue of principle involved, and he proposed to put Working Document No 67 to the vote.

M. Chatin (France) demande qu'on lui explique l'ordre des votes.

The Chairman announced that the proceedings would be suspended for 10 minutes, to enable Mr Chatin's proposal to be presented in written form.

Mr Leal (Canada) proposed to the meeting the following resolution of the problem. The Canadian, Netherlands and United States delegations were prepared to withdraw Working Document No 67, on the basis that Working Document No 61 was also withdrawn and that a reservation to the Convention be permitted in terms of Working Document No 57. Thus, no change to the text of article 23 would result, while the Convention would contain no counter-reservation as originally proposed in Working Document No 61.

M. Jenard (Belgique) déclare que la proposition telle qu'elle est actuellement reçue permet une solution d'entente.

The Chairman asked that the Canadian proposal be put to the vote.

Vote

The proposal of Canada, that Working Documents Nos 61 and 67 be withdrawn, and that the Commission accept the reservation proposed in Working Document No 57, was approved unanimously.

The Chairman thanked all the delegates, and in particular those who had been most involved in the controversy concerning article 23, for the patience, goodwill and spirit of compromise which they had shown in resolving the problem.

Mr Leal (Canada) expressed his thanks to the Commission and in particular to Mr Jenard, for the understanding and patience which they had exercised, and which had enabled a satisfactory solution to be achieved.

The meeting was closed at 6.05 p.m.

Documents de travail Nos 69 à 74
Working Documents Nos 69 to 74

Distribués le 22 octobre 1980 (matin)
Distributed on 22 October 1980 (morning)

No 69 – Proposal of the United States delegation

Proposed preamble:

The States signatory to the present Convention,
Desiring to protect children from the harmful effects of their wrongful removal or retention across international borders and in the interest of deterring such disruptive conduct by the establishment of agreed procedures for the prompt return of children to the State of their habitual residence and for the protection of rights of access,
Having resolved to conclude a Convention to this effect,
Have agreed upon the following provisions –

No 70 – Proposition des délégations belge, française et luxembourgeoise

Clauses finales

La présente Convention ne s'oppose pas à ce que deux Etats contractants s'entendent pour déroger aux dispositions de la présente Convention, et notamment à celles de l'article 12*b*, afin de réduire les conditions auxquelles elle subordonne le retour de l'enfant.

No 71 – Proposition du Secrétariat
-- Proposal of the Secretariat

F La Recommandation suivante relative au projet de *Convention sur les aspects civils de l'enlèvement international d'enfants*:

La Quatorzième session

Recommande aux Etats parties à la *Convention sur les aspects civils de l'enlèvement international d'enfants* d'utiliser pour les demandes de retour des enfants déplacés ou retenus illicitement la formule modèle suivante:

[formule figurant au Doc. trav. No 59]

F The following Recommendation concerning the draft *Convention on the civil aspects of international child abduction*:

The Fourteenth Session recommends to the States Parties to the *Convention on the Civil Aspects of International Child Abduction* that the following model form be used in making application for the return of wrongfully removed or retained children:

[form of Working Document No 59]

No 72 – Proposition de la délégation belge
– Proposal of the Belgian delegation

Le texte suivant est destiné à remplacer celui du Document de travail No 53:

La Convention n'empêche pas qu'un autre instrument international liant l'Etat d'origine et l'Etat requis ou que le droit non conventionnel de l'Etat requis soient invoqués pour obtenir le retour de l'enfant.

The following text is intended to replace that contained in Working Document No 53:

This Convention shall not restrict the application of an international instrument in force between the State of origin and the State addressed or other law of the State addressed for the purposes of obtaining the return of the child.

No 73 – Proposal of the Canadian delegation
– Proposition de la délégation canadienne

Article 12 (new paragraph)

For the purpose of this article, where the applicant did not take any steps to seek the return of the child within [6 or 12] months after the removal or retention, it shall be presumed to have consented or acquiesced to the removal or retention.

Article 12 (nouveau paragraphe)

Aux fins du présent article, le demandeur est présumé avoir consenti ou acquiescé au déplacement ou au non-retour lorsqu'il n'a rien fait pour obtenir le retour de l'enfant dans les [6 ou 12] mois à compter du déplacement ou de la rétention.

No 74 – Proposition de la délégation finlandaise
– Proposal of the Finnish delegation

Le texte suivant est destiné à être ajouté à la suite du texte du Document de travail No 53

Toutefois, cette Convention n'empêche pas qu'un autre instrument international liant l'Etat d'origine et l'Etat requis ou que le droit non conventionnel de l'Etat requis soient invoqués pour obtenir le retour d'un enfant illicitement déplacé ou retenu.

Documents de travail Nos 69 à 74

The following text is intended to be added after the text contained in Working Document No 53:

This Convention shall not, however, restrict the application of an international instrument in force between the State of origin and the State addressed or other law of the State addressed for the purposes of obtaining the return of a wrongfully removed or retained child.

Document de travail No 75

Distribué le 22 octobre 1980 (matin)

Proposition du Comité de rédaction (suite)

Article 12

a Lorsqu'un enfant a été déplacé ou retenu illicitement au sens de l'article 3 et, qu'au moment de l'introduction de la demande devant l'autorité judiciaire ou administrative de l'Etat contractant où se trouve l'enfant, une période de moins d'un an s'est écoulée à partir du déplacement ou du non-retour, l'autorité saisie ordonne son retour immédiat.

b Après l'expiration du délai fixé au paragraphe *a*, l'autorité judiciaire ou administrative doit aussi ordonner le retour de l'enfant à moins qu'il ne soit établi que l'enfant se soit habitué à son nouveau milieu.

c Lorsque l'autorité judiciaire ou administrative de l'Etat requis a des raisons de croire que l'enfant a été emmené dans un autre Etat, elle peut suspendre la procédure ou rejeter la demande en remise de l'enfant.

Article 13

Nonobstant les dispositions de l'article précédent, l'autorité judiciaire ou administrative de l'Etat requis n'est pas obligée d'ordonner le retour de l'enfant, lorsque la personne, l'institution ou l'entité, qui s'oppose à son retour, établit:

a qu'à l'époque du déplacement ou du non-retour, le demandeur, l'institution ou l'entité qui avait le soin de la personne de l'enfant, n'exerçait pas effectivement le droit de garde ou avait consenti ou acquiescé postérieurement à ce déplacement ou à ce non-retour; ou

Working Document No 75

Distributed on 22 October 1980 (morning)

Proposal of the Drafting Committee (continuation)

Article 12

a Where a child has been wrongfully removed or retained in terms of article 3 and, at the date of the application to the judicial or administrative authority of the Contracting State where the child is located a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority shall order the return of the child forthwith.

b The judicial or administrative authority shall also order the return of the child after expiration of the time period set forth in paragraph *a* unless it is demonstrated that the child is now settled in its new environment.

c Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

Article 13

Notwithstanding the provisions of the preceding article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that:

a at the time of the removal or retention, the applicant, institution or other body which had the care of the person of the child was not actually exercising the custody rights, or had consented to or subsequently acquiesced in the removal or retention;

b qu'il existe un risque grave que le retour de l'enfant ne l'expose à un danger physique ou psychique, ou de toute autre manière ne le place dans une situation intolérable.

L'autorité judiciaire ou administrative peut aussi refuser d'ordonner le retour de l'enfant si elle constate que celui-ci s'oppose à son retour et qu'il a atteint un âge et une maturité où il se révèle approprié de tenir compte de cette opinion.

Dans l'appréciation des circonstances visées dans cet article, les autorités judiciaires ou administratives doivent tenir compte des informations fournies par l'Autorité centrale ou toute autre autorité compétente de l'Etat de la résidence habituelle de l'enfant sur sa situation sociale.

Article 14

Pour déterminer l'existence d'un déplacement ou d'un non-retour illicite au sens de l'article 3, l'autorité judiciaire ou administrative de l'Etat requis peut tenir compte directement du droit et des décisions judiciaires ou administratives, [rendues] [en vigueur] dans l'Etat de la résidence habituelle de l'enfant sans avoir recours aux procédures spécifiques sur la preuve de ce droit ou pour la reconnaissance des décisions étrangères qui seraient autrement applicables.

Article 15

Les autorités judiciaires ou administratives d'un Etat contractant peuvent, avant d'ordonner le retour de l'enfant, demander la production par le demandeur d'une décision ou d'une attestation émanant des autorités de l'Etat de la résidence habituelle de l'enfant constatant que l'enfant a été déplacé ou retenu illicitement au sens de l'article 3 de la Convention, dans la mesure où cette décision ou cette attestation peut être obtenue dans cet Etat. Les Autorités centrales des Etats contractants assistent dans toute la mesure du possible le demandeur pour obtenir une telle décision ou attestation.

Article 16

Après avoir été informées du déplacement illicite d'un enfant ou de son non-retour dans le cadre de l'article 3, les autorités judiciaires ou administratives de l'Etat contractant où l'enfant aurait été déplacé ou retenu, ne pourront statuer sur le fond du droit de garde jusqu'à ce qu'il soit, établi que les conditions de la présente Convention pour une remise de l'enfant ne sont pas réunies ou jusqu'à ce qu'une période raisonnable soit écoulée sans qu'une demande sous cette Convention ait été faite.

Article 17

Aucune décision sur le droit de garde reconnue ou rendue [dans une procédure non contradictoire] dans l'Etat requis ne pourra être invoquée pour refuser le retour de l'enfant dans le cadre de la Convention. [Réserve à être ajoutée.]

Article 18

Les dispositions de ce chapitre ne limitent pas le pouvoir de l'autorité judiciaire ou administrative d'ordonner le retour de l'enfant à tout moment.

Article 19

Une décision sur le retour de l'enfant rendue dans le cadre de cette Convention ne préjuge pas le fond du droit de garde.

Article 20

Le retour de l'enfant conformément aux dispositions de l'article 12 peut être refusé quand il ne serait pas permis par les principes fondamentaux de l'Etat requis sur la sauvegarde des droits de l'homme et des libertés fondamentales.

b there is a substantial risk that the return would expose the child to physical and psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In evaluating the circumstances referred to in this article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

Article 14

In ascertaining whether there has been a wrongful removal or retention within the meaning of article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions [rendered in] [in force in], the State of the habitual residence of the child without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.

Article 15

The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the habitual residence of the child a decision or other determination that the child's removal or retention was wrongful within the meaning of article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.

Article 16

After receiving notice of a wrongful removal or retention in the sense of article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child should not be returned under this Convention or unless an application under this Convention fails to be lodged within a reasonable time following receipt of the notice.

Article 17

The fact that a decision relating to custody or access has been given by or falls to be recognized by a judicial or administrative authority of the requested State shall not be a ground for refusing to return a child under this Convention. [Reservation to be added.]

Article 18

The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time.

Article 19

A decision under the Convention concerning the return of the child shall not be taken as prejudging the merits of custody rights.

Article 20

The return of the child under the provisions of article 12 may be refused if it would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

CHAPITRE IV — DROIT DE VISITE

Article 21

Une demande visant à organiser ou à protéger l'exercice effectif d'un droit de visite peut être adressée à l'Autorité centrale d'un Etat contractant selon les mêmes modalités qu'une demande visant au retour de l'enfant.
Les Autorités centrales sont liées par les obligations de coopération visées à l'article 7, pour assurer l'exercice paisible du droit de visite et l'accomplissement de toute condition à laquelle l'exercice de ce droit serait soumis, et pour que soient levés, dans toute la mesure du possible, les obstacles de nature à s'y opposer.
Les Autorités centrales, soit directement, soit par l'intermédiaire d'autorités compétentes dans leur Etat, peuvent entamer ou favoriser une procédure légale en vue d'organiser le droit de visite et les conditions auxquelles l'exercice de ce droit pourrait être soumis.

CHAPTER IV — RIGHTS OF ACCESS

Article 21

An application to organize or secure the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child.
The Central Authorities are bound by the obligations of co-operation which are set forth in article 7 to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject. The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights.
The Central Authorities, either directly or through their competent authorities, may initiate or assist in the institution of proceedings with a view to organizing or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject.

CHAPITRE V — DISPOSITIONS GÉNÉRALES

Article 22

Aucune caution ni aucun dépôt, sous quelque dénomination que ce soit, ne peut être imposé pour garantir le paiement des frais et dépens dans les procédures visées par la Convention.

Article 23

Aucune légalisation ni aucune formalité similaire ne sera requise dans le contexte de la Convention.

Article 24

Toute demande, communication ou autre document sont envoyés dans leur langue originale à l'Autorité centrale de l'Etat requis et accompagnés d'une traduction dans la langue officielle ou l'une des langues officielles de cet Etat, ou, lorsque cette traduction est difficilement réalisable, d'une traduction en français ou en anglais.
Toutefois, un Etat contractant pourra s'opposer à l'utilisation soit du français, soit de l'anglais, en faisant la réserve prévue à l'article X.

Article 25

Les ressortissants d'un Etat contractant et les personnes qui résident habituellement dans cet Etat auront droit, pour tout ce qui concerne l'application de la Convention, à l'assistance judiciaire et juridique dans tout autre Etat contractant, comme s'ils étaient eux-mêmes ressortissants de cet autre Etat et y résidaient habituellement.

Article 26

Chaque Autorité centrale supportera ses propres frais en appliquant la Convention.
L'Autorité centrale et les services publics des Etats contractants ne réclameront aucun remboursement de leurs frais occasionnés par l'application de la Convention. Notamment, ils ne peuvent réclamer du demandeur le paiement des frais et dépens du procès ou, éventuellement, des frais entraînés par la participation d'un avocat. Toutefois, ils peuvent demander le paiement des dépenses causées ou qui seront causées par le retour de l'enfant.
En ordonnant le retour de l'enfant ou en statuant sur le droit de visite dans le cadre de la Convention, l'autorité judiciaire ou administrative peut mettre à la charge, le cas échéant, de la personne qui a déplacé ou qui a retenu l'enfant, ou qui a empêché l'exercice du droit de visite, le paiement des frais de voyage et de tous autres frais nécessaires engagés par le demandeur, notamment des frais de représentation

CHAPTER V — GENERAL PROVISIONS

Article 22

No security, bond or deposit, however described, shall be required to guarantee the payment of costs and expenses in the proceedings to which the Convention refers.

Article 23

No legalization or similar formality may be required in the context of the Convention.

Article 24

Any application, communication or other document sent to the Central Authority of the requested State shall be in the original language, and shall be accompanied by a translation into the official language or one of the official languages of the requested State or, where that is not feasible, a translation into French or English.
However, a Contracting State may object to the use of either French or English, but not both, by making the reservation provided in article X.

Article 25

Nationals of the Contracting States and persons who are habitually resident in the territory of those States shall be entitled in matters concerned with the application of the Convention to legal aid and advice in any other Contracting State as if they themselves were nationals of and habitually resident in that State.

Article 26

Each Central Authority shall bear its own costs in applying this Convention.
Central Authorities and other public services of Contracting States shall not impose any charges in relation to applications submitted under this Convention. In particular, they may not require any payment from the applicant towards the costs and expenses of the proceedings or, where applicable, those arising from the participation of legal counsel or advisers. However, they may require the payment of the expenses incurred or to be incurred in returning the child.
Upon ordering the return of a child or issuing an order concerning rights of access under this Convention, the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child, or who prevented the exercise of rights of access, to pay necessary travel or other expenses of the applicant, including any costs incurred or payments made for locating the

judiciaire et de retour de l'enfant, ainsi que de tous les coûts et dépenses faits pour localiser l'enfant. [Réserve à être ajoutée.]

Article 27

Lorsqu'il est manifeste que les conditions requises par la Convention ne sont pas remplies ou que la demande n'est pas fondée, une Autorité centrale n'est pas obligée d'accepter une telle demande. En ce cas, elle informe immédiatement de ces objections le demandeur ou, le cas échéant, l'Autorité centrale qui lui a transmis la demande.

Article 28

Une Autorité centrale peut requérir que la demande soit accompagnée d'une autorisation par écrit lui donnant le pouvoir d'agir pour le compte du demandeur, ou de désigner un représentant habilité à agir en son nom.

Article 29

La Convention ne fait pas obstacle à la faculté pour la personne, l'institution ou l'entité qui prétend qu'il y a eu une violation du droit de garde ou de visite au sens des articles 3 ou 21, de s'adresser directement sous le régime de la présente Convention aux autorités judiciaires ou administratives des Etats contractants.

Article 30

Toute demande soumise aux Autorités centrales ou directement aux autorités judiciaires ou administratives des Etats contractants, ainsi que tout document ou information qui y serait annexé ou fourni par une Autorité centrale, pourront être recevables devant les tribunaux ou les autorités administratives des Etats contractants.

child, and the costs of legal representation and of return of the child. [Reservation to be added.]

Article 27

When it is manifest that the requirements of this Convention are not fulfilled or that the application is otherwise not well founded, a Central Authority is not obliged to accept the application. In that case, the Central Authority shall forthwith inform the applicant or the Central Authority through which the application was submitted, as the case may be, of its objections.

Article 28

A Central Authority may require that any application be accompanied by a written authorization empowering it to act on behalf of the applicant, or to designate a representative so to act.

Article 29

This Convention shall not preclude any person, institution or body who claims that there has been a breach of custody or access rights within the meaning of article 3 or 21 from applying directly under this Convention to the judicial or administrative authorities of a Contracting State.

Article 30

Any application submitted to the Central Authority or directly to the judicial or administrative authorities of a Contracting State in accordance with the terms of this Convention, together with documents and any other information appended thereto or provided by a Central Authority, may be admissible in the courts or administrative authorities of the Contracting States.

Procès-verbal No 15

Séance du mercredi 22 octobre 1980 (matin)
Meeting of Wednesday 22 October 1980 (morning)

The meeting was opened at 9.30 a.m. Mr Anton (United Kingdom) was in the Chair. Miss Pérez-Vera (Spain) was Rapporteur.

The Chairman asked the Secretary General to indicate the order of future meetings.

Le Secrétaire général indique que, en raison de l'état d'avancement de ses travaux, la Commission devra se réunir le 23 octobre en même temps que se tiendra la séance plénière devant adopter le projet de Convention en matière de procédure civile.
Il formule l'espoir que cette nécessité ne gêne pas trop les délégations.

The Chairman observed that there was general agreement on this point. He said that there was one other matter: the Commission must appreciate that the Drafting Committee was '*à bout de force*' and, in order that they might work during the day time, it would be desirable that the afternoon session finish by 4 p.m. The Chairman now turned to article 7, paragraph 2*a* of Working Document No 45.

*Article 7*a *was read.*

The Chairman noted that in the English text, the word 'children' appeared in the plural, whereas '*enfant*' was in the singular in French. He proposed amending the English text and substituting the word 'child'. Observing that there was no opposition to the suggestion, the Chairman considered the text as adopted. He now turned to paragraph *b*.

*Article 7*b *was read.*

Again the Chairman pointed out a discrepancy between the French and English versions. He felt that the French text was better. The text read in French '. . . *en prenant ou faisant prendre*'.
It seemed advisable to insert 'by taking or causing to be taken' in the English text. Observing that there was no opposition to this suggestion, he considered paragraph *b* as adopted.

*Article 7*c *was read.*

M. Jenard (Belgique) dit ne toujours pas comprendre la répétition existant entre l'alinéa *c* et l'article 10. Mais il déclare ne pas vouloir insister sur ce point qui a déjà été débattu.

M. Chatin (France) demande que la décision déjà intervenue soit prise en considération et maintenue.

The Chairman asked whether there was any opposition on this point.

Mr Yadin (Israel) proposed substituting in the English text the word 'solution' for resolution.

Mr Leal (Canada) said that it was largely a matter of personal preference. He preferred the term 'resolution'.

Mr Yadin (Israel) suggested the point be referred to the Drafting Committee.

The Chairman pointed out that it was the desire of the Commission to refer as few matters as possible to the Drafting Committee at this stage. So unless there was further opposition, the text would be maintained as '. . . resolution of the issues'.

*Article 7*d *was read.*

Mr Müller-Freienfels (Federal Republic of Germany) asked whether the English text should not read 'informations', as the noun was in the plural in French.

The Chairman replied that 'information' must be in the singular in English. Observing that there was no other opposition to paragraph *d*, he considered that this text was adopted.

*Article 7*e *was read.*

M. Jenard (Belgique) demande s'il est bien nécessaire de qualifier de «générales» les informations.

The Chairman said that the question had already been discussed at great length. It would mean reopening the issue of principle, and an absolute majority would be necessary.

Mr Yadin (Israel) pointed out another discrepancy between the English and the French texts. The French text read '*favorisant l'application de la Convention*', whereas the English text read, '*in connection with* the application of the Convention'. The English text was preferable.

The Chairman agreed that the English text was preferable. Could Mr Chatin propose a French version to conform to the English text.

M. Chatin (France) propose «informations . . . relatives à l'application de la Convention».

The Chairman asked whether there were any other proposals concerning paragraph *e*.

Le Secrétaire général adjoint propose la suppression d'une virgule.

The Chairman said this was agreed. In the absence of other opposition, he would consider paragraph *e* with the amendments proposed, adopted.

*Article 7*f *was read.*

The Chairman pointed out a discrepancy between the French and English texts. He referred to *Procès-verbal* No 5, where the decision on the drafting of paragraph *f* had been reserved for later consideration. It was now the time to align the French text on the English version.

Le Rapporteur recommande que la version anglaise soit alignée sur la version française.

The Chairman said that he did not think it possible to resolve the precise question here. However, the Drafting Committee would take into account the sense of these observations.

Mr Creswell (Australia) observed that a comma should be inserted in the English text after the word 'case'.

The Chairman observed, in the absence of opposition, that paragraph *f* was approved in principle, and the text referred to the Drafting Committee.

*Article 7*g *was read.*

In the absence of any opposition, the Chairman declared paragraph *g* adopted.

*Article 7*h *was read.*

The Chairman asked if there were any observations on this paragraph.

M. Voulgaris (Grèce) fait remarquer que les verbes «faciliter» et «*secure*» ne sont pas exactement synonymes. Il demande que la correspondance soit assurée entre les textes, dans un sens ou dans l'autre.

M. Batiffol (France) exprime ses doutes sur l'élégance de la formule «si nécessaire et approprié» et recommande que l'on cherche une autre expression.

The Chairman said that he had the impression from the Chair that the French text did not quite carry the sense of the English text, as the former contained a slight conditional nuance. He preferred the English text. He proposed referring this matter to the Drafting Committee.

*Article 7*i *was read.*

In the absence of opposition, the Chairman declared paragraph *i* adopted.

The title of Chapter III and article 8 were read.

The Chairman asked whether there were any observations on this text.

Mr Creswell (Australia) asked whether, in view of the definition of article 3, the words 'breach of custody rights' could be deleted, and the words 'wrongfully' be inserted before the word 'removed'?

Le Rapporteur demande que, en conformité des décisions rédactionnelles prises pour l'article 3, «organisme» soit substitué à «entité». Mlle Pérez-Vera fait en outre observer que le cumul d'«illégalement» avec «violation» serait tautologique.

The Chairman agreed. Would Mr Creswell withdraw his proposal?

Mr Creswell (Australia) withdrew his proposal.

The Chairman said that the Drafting Committee would take note of this point.

Miss Selby (United States) said that there was a difference in formulation between the French and English versions, and she felt that the French text should be aligned on the English text.

The Chairman wondered whether there was a real difference.

Mr van Boeschoten (Netherlands) said that there *was* a difference. The French text implied that the Central Authority itself must take measures, whereas the English text meant simply that the Central Authority must provide the means for taking these measures.

The Chairman observed that in the absence of opposition to Miss Selby's amendment, the text would be referred to the Drafting Committee.

*Article 8*a *was read.*

Mr Creswell (Australia) asked whether the French word '*présumée*' was equivalent to the English term 'alleged'. He referred to the end of paragraph *d* where 'presume' had been rendered by '*présumée*'.

The Chairman asked whether a French member of the Drafting Committee would like to comment on this.

M. Batiffol (France) exprime son accord sur les observations du Délégué australien. Et il propose pour formule: «la personne dont il est allégué . . .».

The Chairman asked Mr Creswell whether he would be satisfied by the version proposed by Mr Batiffol. He then referred the text to the Drafting Committee, with instructions that the French text should be aligned on the English text.

*Article 8*b *was read.*

Mr Walsh (Ireland) thought that in view of the mandatory terms of article 8, it would be best to add to paragraph *b* the words 'if known', otherwise paragraph *b* could constitute a stumbling-block if the applicant did not have knowledge of the date of the birth of the child.

The Chairman thanked Mr Walsh for making a very valuable point.

M. Barile (Italie) fait observer que les détails pour la formulation de la demande seront évidemment des détails connus, ainsi, en particulier, pour ce qui concerne la localisation de l'enfant.

The Chairman pointed out that the child may have been found abandoned in the woods, his birth date unknown. In this sense, Mr Walsh's observation was surely very sound.

Miss Selby (United States) said that there should be a reference to the age of the child since the maximum age of children considered by this Convention had been fixed at 16.

Mr Yadin (Israel) said that the same situation might arise in relation to every one of the details listed in article 8. The applicant might be obliged to admit for each one of them that he did not know. The sense of article 8 was that if the date of birth was unknown, then the applicant should give the information he *did* possess. The same principle could be applied to the other paragraphs.

The Chairman suggested that the article might read: 'the applicant must state to the best of his knowledge . . .'.

Mr van Boeschoten (Netherlands) suggested replacing in paragraph *b* 'the date of birth of the child' by 'the age of the child'. This would avoid having to indicate the exact date of birth.

M. Voulgaris (Grèce) fait observer que ce n'est pas au demandeur que doit incomber la charge de la preuve de l'âge de l'enfant. Cette charge doit peser sur celui qui excipe de l'inapplicabilité de la Convention.

Mr Jones (United Kingdom) wondered whether, in order to simplify matters, it would be possible to add: 'if known to the applicant'.

The Chairman said that this would not work in relation to paragraph *c*.

Mr Jones (United Kingdom) said that if the applicant did not know the grounds of his claim, it was unlikely that the claim would be admitted.

The Chairman said that the sensible thing to do would be to refer the text to the Drafting Committee.

Article 8c was read.

The Chairman observed that there was no opposition to the text, and declared paragraph *c* adopted.

Article 8d was read.

M. Schockweiler (Luxembourg) suggère que, par alignement sur les décisions déjà prises, l'expression «personne dont il est allégué qu'elle a l'enfant» soit reprise ici.

The Chairman said that the two texts were different here. Would the substitution of 'thought to be' for 'presumed' be acceptable?

Le Rapporteur exprime l'opinion que l'emploi du verbe «avoir» n'est peut-être pas approprié, car il marque trop une possession.

The Chairman said that the text would be referred to the Drafting Committee, to align the French version on the English text.

Article 8e was read.

The Chairman observed that there was no opposition to this text, and declared paragraph *e* adopted.

Article 8f was read.

Mr Creswell (Australia) raised a punctuation point which was almost a matter of substance. A comma should come after the word 'person' in English.

M. Deschenaux (Suisse) fait observer que le terme «*other*» ne trouve pas son correspondant dans le texte française.

Le Rapporteur reconnaît qu'il y a là une omission, purement matérielle.

M. Batiffol (France) doute de l'exacte concordance entre les expressions «*sworn affirmation*» et «déclaration avec affirmation». L'idée de serment contenue dans l'expression anglaise lui paraît ne pas se trouver dans l'expression française.

Mr Jones (United Kingdom) asked whether the objection was to the words 'sworn declaration'.

The Chairman said that Mr Batiffol had drawn the attention of the Commission to the discrepancy between the French and English texts. There was a difference between an affirmation under oath, and a simple affirmation. There were advantages here in aligning the English text on the French text.

Mr Leal (Canada) said that this did not solve the problem. In Canada, a simple declaration was also sworn. Nothing could be gained by the change, unless the intention of the Commission was to include a declaration without certificate from common law countries.

The Chairman replied that in some legal systems a declaration implied a reference to a religious oath. This was not the case in connection with an affirmation. It was desirable in an international convention to avoid even an implicit reference to a religious oath.

Mr Creswell (Australia) said that in Australia, a solemn declaration was an alternative to a sworn statement for those who objected to making an oath. The solemn declaration had exactly the same status as the oath.

The Chairman asked Mr Leal if he would accept the term 'solemn statement'.

Mr Leal (Canada) fully agreed, and said he was well aware of the difficulties.

M. Chatin (France) précise que l'attestation est en France un document établi engageant la responsabilité pénale de son auteur. La déclaration avec affirmation est la même attestation, mais recueillie par un officier ministériel. Il lui semble que la version française marque bien la différence existant entre ces deux sortes de documents.

Mr Yadin (Israel) suggested replacing the words 'sworn declaration' by the word 'affidavit'.

Mr Leal (Canada) agreed, but pointed out that an affidavit was also *sworn*.

Mr Creswell (Australia) said that in Australia, an affidavit might be sworn *or* solemnly affirmed.

The Chairman suggested, in that case, replacing the words 'sworn declaration' by the word 'affidavit'.

Le Secrétaire général adjoint suggère l'insertion d'une virgule après «*from a Central Authority*».

The Chairman agreed that the comma should be inserted. He declared that if there was no opposition, paragraph *f* was now adopted.

Article 8g was read.

In the absence of opposition, the Chairman declared paragraph *g* adopted.

Article 9 was read.

M. Voulgaris (Grèce) souligne une divergence entre les versions française et anglaise: «a toutes raisons» et «*has reason*».

Le Rapporteur indique qu'il lui semblait que la langue française requérait l'expression «toutes raisons».

M. Chatin (France) suggère «des raisons sérieuses».

The Chairman said that in the English text, it would be appropriate to say, 'has good reason to believe'. The French text would read '*de raisons sérieuses de croire*'. Were there any other observations?

Le Secrétaire général adjoint traduit: «bonnes raisons».

The Chairman declared article 9 adopted.

Article 10 was read.

Mr Yadin (Israel) said that article 10, as it stood, as a separate provision, would mean the Central Authorities must act. Even if they had not been requested to do so by means

of an application under the Convention. Such a duty was surely too extensive.

The Chairman said that it might be possible for the Drafting Committee to align articles 9 and 10. Thus the text might read 'a Central Authority *receiving* an application . . .'.

Mr Dyer (First Secretary at the Permanent Bureau) said that the same point could be made in relation to article 7. There was no express requirement of an application under the Convention. Certainly, this article referred to 'appropriate measures' which might seem to imply that there had been an application. But there might well be an informal situation under article 9 where the Central Authority might move before such an application.

M. Barile (Italie) fait observer que, si la remise est volontaire, il y a forcément accord entre les parties. Et cet accord peut exister en l'absence de demande.

Le Rapporteur rappelle qu'une règle fondamentale d'interprétation des traités est d'interpréter les articles l'un par rapport aux autres, c'est-à-dire dans leur contexte. Il lui semble donc inutile de répéter certaines conditions d'un article à l'autre. Et il lui paraît évident à la lecture du texte que l'Autorité centrale doit avoir été saisie.

The Chairman said that Mr Yadin had made a point which touched upon the interrelationship of the different articles of the Convention. He made a plea for comprehension of the situation of the Drafting Committee. He added that it would not be desirable to confine the Central Authority to acting only when requested to do so by formal application, on the other hand, the Central Authority obviously did not have a *general duty* to act, and would not act without a certain initiative on the part of the applicant. The Drafting Committee should take these observations into consideration.

Mr Yadin (Israel) said that he would not insist upon this point. However, as the Chairman had suggested, he would be very happy if the Drafting Committee could take up articles 9 and 10 together.

The Chairman said that the point had been noted. He declared article 10 adopted.

Article 11 was read.

The Chairman said that the text should read, in the last line, 'or *to* the applicant'. He asked whether there were any observations relating to article 11.

Mr Yadin (Israel) pointed out that in English, the word 'act' in the first paragraph implied a reference to the whole proceedings. It was a wider term than the French '*statuer*' and appeared more appropriate.

Mr van Boeschoten (Netherlands) said he was disturbed in the French text by the words '*à défaut*' in article 9. It might give rise to contradictory interpretations.

The Chairman said that this point should be referred to the Drafting Committee.

Mr Schneider (Holy See) said concerning article 11, that the English and French texts should be harmonized.

The Chairman agreed that the fact that the English text was wider in this context than the French was disturbing, and the difference should be dealt with.

M. Batiffol (France) propose l'emploi dans le texte français de l'expression «doivent procéder d'urgence en vue de la remise de l'enfant».

The Chairman asked whether Mr Batiffol's suggestion met with approval.

M. Voulgaris (Grèce) met en doute l'exacte concordance entre les expressions «*shall have the right*» et «peut». Il suggère que le texte anglais pourrait être interprété comme reconnaissant un droit de demander des explications, sans accorder pour autant le droit d'obtenir une réponse.

The Chairman asked whether Mr Walsh would care to clarify this point.

Mr Walsh (Ireland) said that in either case it did not make much difference. The text did not say that he *shall* receive a reply.

Miss Selby (United States) said that the word 'application' raised certain difficulties (referred to previously) as it might not be the application *per se* which initiated the proceedings. Could the English text be made to conform to the French? In the first paragraph, she suggested leaving out the word 'application'. In the second paragraph, she wondered whether the temporal precision in the French text '*à partir de sa saisine*' was not closer to the sense intended.

The Chairman, resuming after the coffee break, said that Miss Selby had made a number of interesting suggestions to amend paragraphs 1 and 2 of article 11 in order to make the meaning of those provisions clear. If he might give his own interpretation of those suggested amendments, it appeared that it was proposed to amend paragraph 1 so that the second line would read, 'act expeditiously in proceedings for the return of children'. He took it that there was general agreement on that point. The second suggested amendment would introduce a change into the second line of the second paragraph, so that it would read 'decision within six weeks from the date of commencement of the proceedings'. His interpretation being accepted as correct, he asked if there were any other observations.

Le Secrétaire général adjoint demande la rectification de deux erreurs matérielles dans le texte.

The Chairman agreed. He informed the delegates that the remainder of the text of the Proposal of the Drafting Committee would soon be available. The Drafting Committee had been working very hard and had already reached article 30. While awaiting distribution of that document, he proposed that delegates should turn their attention to non-controversial proposals, which might be more speedily disposed of. Turning to Working Document No 71, the Proposal of the Secretariat, he asked if a member of the Secretariat would speak briefly to it.

Le Secrétaire général adjoint explique qu'il s'agit d'une disposition à insérer dans l'Acte final. Il indique que le seul problème paraît être de déterminer s'il convient d'insérer dans ce préambule une disposition permettant des amendements à la formule.

Mr Yadin (Israel), was in favour of using the plural form 'application' in the English text in order to harmonize it with the French text.

The Chairman replied that that observation was quite correct and would be effected.
There being no other observations, the proposal was declared accepted.

He explained that the Deputy Secretary General had asked if the text of Working Document No 71 might be sent directly to the printers, if there were no prospect of any further changes being made.

Le Secrétaire général adjoint fait observer que, si le texte de la Convention est modifié en ce qui concerne la date de naissance de l'enfant, il convient que la même modification se retrouve dans la formule modèle.

The Chairman asked if there were any delegates who would insist on a change in the title of the Convention at the Plenary Session.

Mr van Boeschoten (Netherlands) replied, that, in his opinion, such matters as the date and place of birth appearing in the model form could be retained there even if they were to be changed in the text of the Convention, for the model form would not have a binding effect.

M. Deschenaux (Suisse) fait observer que, parmi les pièces produites mentionnées en fin de la formule, la «déclaration avec affirmation» doit être substituée à la déclaration sous serment.

The Chairman replied that that was entirely correct, and the Secretariat would ensure alignment.

Mr Creswell (Australia) asked if it were appropriate to address comments at that stage to Working Document No 59.

The Chairman replied that, in order to give the Secretariat every opportunity to ensure early printing, comments ought to be passed directly to the Secretariat.

Mr Dyer (First Secretary at the Permanent Bureau) pointed out that adoption of Working Document No 71 implied a slight change in the text of Working Document No 59. The last line of paragraph 1 should be amended to read 'the form of the model appearing in article F of this Convention'.

M. Jenard (Belgique) fait observer, s'agissant des renseignements concernant l'identité des parents, qu'il peut exister d'autres modes de filiation que le mariage: l'adoption et la reconnaissance, par exemple. Aussi demande-t-il que la rubrique 2.3 soit complétée pour en tenir compte.

Mr Müller-Freienfels (Federal Republic of Germany) replied that marriage was of particular importance in the characterisation of mother and father, and had for that reason been included.

M. Deschenaux (Suisse) fait observer, s'agissant des informations sur l'endroit où devrait se trouver l'enfant, qu'il convient au point 4.1 d'indiquer «Renseignements concernant la personne *dont il est allégué* qu'elle a enlevé ou retenu l'enfant». Ceci par souci d'alignement sur le texte de la Convention.

The Chairman stated that the texts would be aligned. There being no other point raised, Working Document No 71 could be entrusted to the Secretariat who would give very careful attention to relating the language used in Working Document No 59 and that of the Convention as approved in the discussion. It was necessary to give the Secretariat a certain power of appreciation. Turning to Working Document No 70, he asked the Deputy Secretary General to read the text in order to allow the English-language delegates to have the benefit of hearing a translation.

Working Document No 70 was read in the French language.

M. Jenard (Belgique) expose que cette proposition émanant des délégations belge, française et luxembourgeoise, s'inspire d'autres conventions de la Conférence, notamment de la Convention de 1954 sur la procédure civile. Celle-ci prévoit dans son texte la possibilité d'accords complémentaires entre Etats parties à la Convention. Et il s'est avéré à l'usage que cette suggestion était très utile. La proposition du Document de travail No 70 permettrait à certains Etats de s'engager à plus que le strict respect des obligations posées par la Convention. Son adoption permettrait donc des progrès. Et, de plus, souligne le Délégué belge, elle présenterait l'avantage technique de permettre au Gouvernement belge de passer ces accords complémentaires sans être soumis à l'exigence de la ratification.

Miss Selby (United States), although seeing much virtue in the general concept, wished to point out a number of potential dangers. First, the possibility of making agreements to narrow certain exceptions might encourage a broader interpretation of those exceptions where such agreements were not made. Secondly, its use would create a more complicated regime, rendering the attainment of general uniformity more difficult. Thirdly, she felt that the language was too permissive, in that it allowed for use without resort to legislation. However, it was basically a good idea if the States concerned wished to work out something more effective in their relationships.

The Chairman stated that he would invite Mr Jenard to reply at the close of the discussions, and that he wished the interventions to be limited if possible. He would ask the delegates to confine their statement to not more than three minutes.

M. Barile (Italie) exprime des doutes sur la pertinence de la proposition défendue par le Délégué belge. Il lui semble que les conditions de l'article 12*b* sont irréductibles, qu'elles représentent un minimum de justice élémentaire dont les Etats ne doivent pas être admis à s'écarter.

M. Espinar (Espagne) dit être sensible à l'utilité de cette proposition. Mais il craint la possibilité de répercussions négatives. Alors que les délégations ont entendu que l'article 12*b* fut aussi restrictif qu'il était possible, l'insertion dans la Convention de la clause proposée par la délégation belge pourrait induire à une interprétation large de cet article 12*b*. Aussi le Délégué espagnol demande-t-il que le Rapport exclue explicitement toute possibilité d'interprétation en ce sens.

Mr Yadin (Israel) considered that the reasons given by Mr Jenard were convincing. However, he felt that '*pour déroger*' ought to be amended by addition of the express qualification that the privilege was confined to the relationship existing between the States. That the provision was not intended to derogate from the Convention ought to be more explicitly stated.

Mr Savolainen (Finland) expressed himself to be, to some extent, in favour of the proposal. In the interest of clarification, he asked whether it was necessary that the proposal, which referred to two States, in other words, to bilateral relations, be so restricted.

The Chairman asked whether an extension beyond bilateral relationships would be acceptable, perhaps by an amendment along the lines of '*des Etats contractants*'.

M. Jenard (Belgique) propose l'expression «deux ou de plusieurs».

The Chairman stated that the problems could be deferred to the Drafting Committee.

M. Chatin (France) souligne le mérite que cette proposition lui paraît présenter. Elle permettra une personnalisation des relations entre les Etats et l'instauration d'une coopération directement au niveau des autorités judiciaires.

The Chairman explained that there were two options open to the Commission. It had earlier been informally agreed that the principle applied in any event and that it would be referred to in the Rapporteur's Report. Now that a formal proposal had been submitted, the question was whether there was any objection to inclusion of the principle in the text of the Convention.

M. Barile (Italie) demande un vote.

The Chairman stated that he intended to restrict the discussion to two additional speakers, and would then ask Mr Jenard to reply to the debate.

M. Vischer (Suisse) demande au Délégué belge s'il accepterait de supprimer de sa proposition la référence expresse à l'article 12*b*.

M. Jenard (Belgique) répond qu'il accepte cette suppression.
Puis il répond au Délégué italien que, l'article 12*b* étant le résultat d'un compromis, l'exception prévue à l'article 12*b* est peut-être encore trop large entre certains Etats. Ces Etats peuvent en effet souhaiter que l'appréciation des conditions de l'article 12*b* relève des juridictions de l'Etat de départ de l'enfant.

The Chairman said that, in that case, the phrase '*et notamment à celles de l'article 12*b' would be deleted from the text of Working Document No 70. He asked Mr Jenard to repeat the text as amended by the discussions in French so that English-speaking delegations could receive a translation and be perfectly clear on the text.

M. Jenard (Belgique) lit sa proposition amendée: «La présente Convention ne s'oppose pas à ce que un ou plusieurs Etats contractants s'entendent pour déroger entre eux aux dispositions de la présente Convention afin de réduire les conditions auxquelles elle subordonne le retour de l'enfant».

The Chairman moved to a formal vote on inclusion in the Convention of the text, as amended, of Working Document No 70.

Vote

The proposal was adopted by 21 votes in favour (Austria, Belgium, Canada, Czechoslovakia, Denmark, Egypt, Finland, France, Federal Republic of Germany, Greece, Ireland, Israel, Luxemburg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, United Kingdom, United States), with 4 abstentions (Australia, Italy, Japan, Venezuela).

The Chairman drew the attention of the delegates to Working Document No 68, and directed them to *Procès-verbal* No 13 for the previous discussions.

Mr Leal (Canada) explained that the provision was a transitional one intended to make clear that the Convention was to apply, or, to express the matter otherwise, that the State might make a reservation that the Convention would apply, only in those cases where the wrongful removal or retention of the child had occurred after the entry into force between the requesting and the requested States of the Convention.

M. Barile (Italie) dit ne pas être opposé à cette proposition qui lui paraît aller d'elle-même.

Par contre, s'agissant de l'article Y, il attire l'attention du Comité de rédaction pour qu'il en reprenne la rédaction de façon que le texte n'autorise que des élargissements du domaine spatial d'application de la Convention.

The Chairman replied that the Drafting Committee would make a note of the observation.

Mr Minami (Japan) stated that he was not opposed to the proposal, but wished to ask a question. The final clauses were only concerned with the relationship between two Contracting States. What would be the effect of making the declaration provided for in the proposal of Canada where the applicant sent his application directly to another Contracting State? How was that Contracting State then to proceed?

Mr Jones (United Kingdom) said that the delegates would recollect that the United Kingdom had earlier proposed that the Convention contain a general provision going in the opposite direction. He wondered whether it was a good idea to have that general provision and then to allow a power of reservation to the States. He concluded that it would be better to have a provision in the Convention that would only apply in the sense intended by the Canadian proposal. If it were necessary, as it was, to have such a transitional provision, he saw no reason why it should not be in the form of the proposal of Canada, rather than in the form of a reservation. He was, of course, aware that what he was proposing was a change of substance from what had already been adopted by the Commission, and that it would require an absolute majority. Nevertheless, in the interest of simplification of the Convention, perhaps it might be more prudent to adopt the line he was suggesting.

The Chairman reminded the delegates that Working Document No 53 containing the proposal of the United Kingdom had been put forward merely so that a written text would be available for discussions. No strong views had been expressed at that time, although it was clear that there was a need for such a provision. The proposal of the United Kingdom had addressed itself to the temporal application of the Convention, namely whether it was to apply from the date of the alleged breach of custody rights or as of a subsequent moment. He agreed that it would be necessary to obtain an absolute majority for adoption of the approach proposed by Mr Jones under the Rules of Procedure, article 16.

Mr Leal (Canada), in order to assist his colleagues, wished to point out that the result of the adoption of the proposal of the German delegation, contained in Working Document No 25, was that, at least in so far as it was not established that the child was settled in his new environment, the time period remained open-ended. If a Contracting State were not entitled to make the declaration as proposed by his delegation, then it was possible that the Convention might apply to a case of abduction occurring at any time up to the previous sixteen years. He found that a sobering thought.

The Chairman wished to express the view from the Chair that it would be more desirable, in a Convention such as the one under discussion, not to have reservations. That point of view had previously been forceably expressed by Mr Dyer. The issue now was whether the delegates wished to reopen the principle previously accepted in Working Document No 53, third paragraph. He asked Mr Leal whether he wished the matter to be put to the delegates, having regard to the need to obtain an absolute majority.

Mr Leal (Canada) replied that he did not wish it, but he

certainly wished to have the possibility of a declaration included in the Convention.

The Chairman therefore moved to a vote on inclusion of the additional final clause provided for in Working Document No 68, subject to any necessary drafting amendments.

Vote

The proposal was adopted by 13 votes in favour (Australia, Belgium, Canada, Czechoslovakia, Denmark, Egypt, Ireland, Israel, Japan, Norway, Sweden, United Kingdom, Venezuela), 1 against (Italy), with 11 abstentions (Austria, Finland, France, Federal Republic of Germany, Greece, Luxemburg, Netherlands, Portugal, Spain, Switzerland, United States).

Mr Yadin (Israel) pointed out that in order to bring the formulation contained in Working Document No 68 into line with the intention expressed in Working Document No 53, the final clause just adopted ought to be amended so that it would read 'after the coming into force between the requesting and the requested States of the Convention'.

The Chairman replied that that point would be noted by the Drafting Committee. He moved the discussions to Working Document No 73 and invited Mr Leal to introduce the proposal.

Mr Leal (Canada) explained that the introduction of the proposal was connected with the proposal of Germany contained in Working Document No 25, which left the prescription period open except where it was established that the child was settled in its new environment. That was so whatever might have been the conduct of the applicant. The thrust of the new proposal was whether the Convention wished to reward indolence or diligence. If the latter, then it should not allow the aggrieved parent to sleep on his rights, to borrow a term from the law relating to laches, and should provide that where the aggrieved parent takes no steps to remedy the situation, then, following the expiry of the period contained in square brackets, the aggrieved parent should be presumed to have acquiesced in the state of affairs. He suggested that the proposal should be seen as an attempt to resolve one of the difficulties left open by the adoption of the proposal of Germany namely, that an abduction could be left hanging for anything up to twelve years by the non-activity of the aggrieved parent. He found that also to be a sobering prospect.

The Chairman stated that the discussions would be limited to three speakers against the proposal and two speakers for, with Mr Leal replying to the debate.

M. D'Almeida Ribeiro (Portugal) dit que cette proposition ne peut pas être acceptée par sa délégation, car elle va à l'encontre de la tendance du droit portugais limitant de plus en plus les présomptions légales. Ces présomptions peuvent être erronées. Et, en l'espèce, le défaut de présentation d'une demande dans le délai de six ou douze mois peut avoir de toutes autres raisons qu'une renonciation.

Mr Yadin (Israel) stated that he was not at that time certain whether he was for or against the proposal. He was not opposed to the basic idea contained therein, but he was certainly opposed to the creation of a presumption simply by lapse of time. He thought that the problem could be solved by adding to the content of the eleventh article, third paragraph, proposed by Working Document No 25, some such clause as 'or that the applicant had consented to the retention or removal of the child'.

The Chairman remarked that he considered that the Drafting Committee would take that matter into consideration when it came to consider articles 11 and 12.

Mr Müller-Freienfels (Federal Republic of Germany) stated that the Commission had already discussed that question when a period of two years had been asked for. That matter was now being reopened.

The Chairman replied that, after consideration of the matter, he did not consider the questions to be identical and felt that he could not impose the rule contained in article 16 of the Rules of Procedure to the present debate.

Mr Müller-Freienfels (Federal Republic of Germany) pointed out that there might very well be reasons germane to the situation pertaining in a large country which would have the effect of extending the presumption too far. That was why the former proposal had been accepted.

M. Espinar (Espagne) exprime l'opinion que le délai de douze mois, s'il était retenu, ne serait pas cohérent avec les autres délais retenus dans la Convention. De plus, souligne-t-il, la proposition canadienne n'ajouterait rien à l'article 12*b*.

M. Jenard (Belgique) dit l'appui de sa délégation à la proposition canadienne, pourvu que le délai soit porté à douze mois. La proposition lui paraît en effet être conforme à la philosophie de la Convention: il s'agit d'agir vite, avant que l'enfant ne s'intègre à son nouveau milieu.

M. Chatin (France) dit ne pas comprendre cette proposition canadienne, compte tenu de ce que l'article 12*a* et la proposition allemande du Document de travail No 25 ont déjà été adoptés par la Commission.
De plus, souligne le Délégué français, si la proposition canadienne devait prendre place dans le cadre de l'article 12*b*, cette insertion aboutirait à inclure un délai que la Commission a déjà décidé de rejeter. Ou bien, s'interroge le Délégué français, ne s'agit-il que d'établir une présomption? Mais, en ce cas, la délégation française préfère que la Convention n'établisse aucune présomption.

Mr Vischer (Switzerland) considered that article 12*b* and the proposal did not sit too well together. If one were to adopt the latter, then one should eliminate the former. Consequently, there was a need to vote upon the matter.

Mr Jones (United Kingdom) said that he was very sympathetic to the proposal but that he had doubts whether it would satisfactorily accomplish the purpose aimed at. The Convention already contained the ground of refusal that the applicant had consented to or acquiesced in the removal or detention. If the applicant took no steps to remedy the situation within the period of twelve months, then there could be little doubt in the judicial mind that the applicant had acquiesced in the state of affairs. In addition, the question of what constituted the steps to be taken raised the burdensome problem of proof and opened up a scale of vagueness. Furthermore, if the proposal were to be adopted, would that imply that where some steps had been taken there could be no question of acquiescence? He concluded that the proposal should not be added to the Convention, but that one should rely on the existing provisions.

Miss Selby (United States) shared the concerns expressed by Mr Jones. An additional question was whether it was clear that, where there was a reference to no steps having been taken, one was referring to the situation where the applicant did not file the necessary application within the period stipulated, so that the application was excluded. If that was

the intention, then the matter had already been decided upon.

M. Voulgaris (Grèce) dit son impression que la proposition canadienne lui paraît créer une présomption en faveur de l'«enleveur», autorisé à exciper de la possession de l'enfant comme s'il s'agissait d'un bien. Cet effet de la possession appliqué à une personne lui déplaît. Il demande que l'on tienne compte de la personnalité de l'enfant et, à cet effet, que la Commission se tienne aux termes de l'article 12*b*.

M. Vischer (Suisse) demande au Délégué canadien si la présomption qu'il propose supporterait la preuve contraire.

Mr Leal (Canada) replied that naturally the presumption was largely rebuttable. Only in the absence of any other evidence could one conclude that there had been acquiescence.

The Chairman drew attention to the wise intervention made by Mr Schwind that one should not introduce proposals into the Convention which were not essential. Although he was personally sympathetic to the proposal of Canada, he was troubled that one was introducing matters which might be desirable in some systems but would prove not to be desirable in others.

Mr Leal (Canada) said that he was prepared to withdraw his proposal and to support the approach of Mr Schwind.

The Chairman thanked Mr Leal for his characteristic reasonableness. He directed the discussion to Working Document No 69, and requested that the discussions be brief. The terms thereof could be left to the Drafting Committee which would, of course, take full account of the proposals put forward by the Commission. He invited an exchange of views on the contents of the Preamble, but warned against creating a UN/EEC type. It should be brief and to the point. He invited Mr Dyer to read Working Document No 69.

Working Document No 69 was read.

The Chairman then requested members of the Drafting Committee to take note of the proposals that would be brought forward in the discussions.

Mr Jones (United Kingdom) considered that the Preamble ought expressly to refer to the welfare of the child, perhaps along the following lines, 'the States signatory to the present Convention, united in the conviction that the welfare of the child is of paramount importance relating to their custody and access'.

Mr Creswell (Australia) pointed out that the Commission had decided that the principle of returning the child to the State of habitual residence had been left open and had not been insisted upon and, consequently, the Preamble appeared to go too far in presenting an unduly positive impression of the decision of the Commission.

Miss Selby (United States) pointed out that the Convention had already built in a number of exceptions and that it was only the exercise of restraint by the judges that would keep the situation from getting out of hand. Reading the Convention made it clear that the interest of the child was paramount. It might be sufficient merely to remind the judges that the return of the child to its own country would often be in its best interest.

M. Chatin (France) rappelle qu'il est de l'intérêt de l'enfant d'éviter des voies de fait. Il demande que la formule fasse bien ressortir ce lien entre l'intérêt de l'enfant et la volonté poursuivie d'empêcher les voies de fait.

The Chairman stated that he would request the Drafting Committee to take note of the interventions that had been made and to prepare a short-form Preamble. He hoped that there would be no long debate during the Plenary Session on this matter and that he could rely on the good sense of the delegates.
It was his intention to defer all questions of the relationship of the Convention to other conventions until the afternoon session, for that was a matter requiring pause for reflection. Accordingly, he would direct the discussion to Working Document No 75.

Article 12 was read.

Mr Leal (Canada), as Chairman of the Drafting Committee, introduced the new proposed text of article 12. He explained that paragraph *a* reflected the decision to adopt a single time-period of one year, that the period was to run from the date of the wrongful removal, and that the reference to unknown whereabouts had been deleted.

Mr Savolainen (Finland) indicated a difference between the English and French texts which might lead to a difference of substance. The English text referred to 'where the child is located', whereas the French text referred to '*où se trouve l'enfant*'. He proposed that 'located' should be deleted from the English text.

Mr Leal (Canada) accepted that as constituting an improvement.

Mr Minami (Japan) queried the necessity of inserting *a b c* before each paragraph.

Mr Leal (Canada) agreed to their removal.

Mr Yadin (Israel) indicated that '*l'autorité saisie*' had been left open in the English text. He proposed that the last line of the latter text should be amended to read '*that* authority shall order'. The amendment would make the intention of the provision clearer.

Mr Dyer (First Secretary at the Permanent Bureau) expressed his dislike of drafting in Commission. He was disturbed by the proposal to delete 'located', but recognised the ambiguity inherent in the concept and suggested as an alternative 'where the child is staying'.

Mr Jones (United Kingdom) was opposed to that proposal. Not only did it not accurately reflect the meaning to be discovered from the French text, it was positively undesirable. It was often the case that one knew that the child was within a particular Contracting State without knowing exactly in that State where the child was to be found. He considered that deleting 'locating' and leaving 'is' constituted a clear expression.

Mr Creswell (Australia) proposed that the use of 'present' might remove Mr Dyer's concern and also covey the meaning intended without introducing the complications surrounding domicile or residence.

Mr Jones (United Kingdom) could agree to that.

Mr Leal (Canada) remarked that 'present' added nothing to 'is'.

The Chairman stated it was undeniably necessary that the text be easily comprehensible to non English-language

States and agreed that 'located' could lead to difficulties of interpretation.

Mr Walsh (Ireland) proposed 'where the child is found'.

The Chairman did not consider that that formulation would be acceptable to the Drafting Committee.

Mr Leal (Canada) proposed that, as the debate seemed to be confined exclusively to members of English language speaking countries, the problem could be referred to the Drafting Committee for resolution.

The Chairman accepted that proposal but underlined that it was essential to find a means of conveying in English the primordial importance of the sense of '*où se trouve l'enfant*'.

Miss Selby (United States) pointed out that this was yet another area where the use of the date of application was liable to create confusion and difficulties. One was faced with two possible situations; first, that the application had been sent to the Central Authority and had found its way to the judicial or administrative authority; secondly, the application constituted the initiation of the proceedings. Clarity was needed in this because one was faced with the critical issue of the running of time. If it were to run from the initiation of proceedings, then that was acceptable.

The Chairman agreed that one appeared to be using the term in different senses within the Convention. He pointed out that article 2 of the Divorce Convention translated '*la demande*' by 'date of institution of the proceedings'. He proposed that the matter be referred to the Drafting Committee and that was agreed. He added that the Drafting Committee would also give attention to the important observation of Mr Yadin that 'the authority' did not fully correspond to '*l'autorité saisie*' and would seek to find a suitable formulation; an example was, 'the authority concerned'.

Mr Savolainen (Finland) drew attention to a situation which did not appear to be covered by the provision, namely, where the application was made in due time but was then withdrawn to be followed by a new application made after the period stipulated had elapsed. He suggested that this particular situation could be covered by, 'the authority, upon such application, shall order the return of the child'.

The Chairman replied that it would rather complicate matters to introduce that at the present stage of the proceedings.

Le Secrétaire général, adjoint propose de renverser la formulation du texte français de façon qu'il se lise: «Lorsqu'un enfant a été déplacé ou retenu illicitement au sens de l'article 3 et qu'une période de moins d'un an s'est écoulée à partir du déplacement ou du non-retour au moment de l'introduction de la demande devant l'autorité judiciaire ou administrative de l'Etat contractant où se trouve l'enfant, l'autorité saisie ordonne son retour immédiat.»

The Chairman found agreement that article 12, paragraph 1, as commented on in the discussions, should be referred to the Drafting Committee.

Article 12, paragraph 2, was read.

The Chairman pointed to a difference between the French and English texts: '*à moins qu'il ne soit établi que l'enfant se soit habitué à son nouveau milieu*' was not an accurate expression of the English text and he suggested that it be amended.

M. Chatin (France) suggère que l'indicatif est le mode approprié et qu'il convient donc d'écrire «s'est habitué».

The Chairman stated that he still had the feeling that the texts did not conform. The thrust of article 12, paragraph 2, was that the child should be 'integrated' in its new environment.
Mr Chatin agreeing, the problem was referred back to the Drafting Committee.

Mr Yadin (Israel) stated that he agreed with the doubts expressed by the Chairman regarding 'settled'. He wished to raise another point. The arrangement of the sentence in the English led to a clear expression of meaning, whereas the French arrangement was unclear.

Mr Creswell (Australia) suggested that 'after expiration of the time period' should be qualified by the insertion of the definite article before expiration.

The Chairman stated that article 2, second paragraph, as commented upon would be referred to the Drafting Committee.

Article 12, paragraph 3, was read.

Mr Leal (Canada) as Chairman of the Drafting Committee, explained that it represented the proposal contained in Working Document No 35, as amended by the Delegate of the Netherlands (see *P.-v.* No 7).

Le Secrétaire général adjoint demande que le texte mentionne la demande «en retour», et non pas «en remise».

The Chairman agreed that that was correct.

Mr Creswell (Australia) proposed that 'the application' be deleted. The provision would then read 'it may stay or dismiss the proceedings for the return of the child'.

Mr Yadin (Israel), referring to '*des raisons*', felt that the intention had been clearly expressed in this text and suggested that the same formulation be adopted in article 9.

The Chairman replied that it might be necessary to retain the intensifier appearing in article 9 and referred the points and article 12, paragraph 3 to the Drafting Committee.

Article 13, chapeau, *was read.*

Le Rapporteur fait remarquer qu'il convient ici encore de substituer «organisme» à «entité».

M. Batiffol (France) demande, pour des raisons de style, que «tenu» soit substitué à «obligé».

The Chairman, eliciting no other comments, moved to paragraph *a.*

Article 13a was read.

Mr Leal (Canada) explained that paragraph *a* had been re-cast to comply with the wishes of the Commission, that the concept of breach had been deleted and that of care introduced in place of the reference to the applicant. He remarked that one might query the necessity of that provision, having regard to the terms of article 8. He added that the notion of bad faith had been deleted and that consent and acquiescence had been added in conformity with Working Document No 21.

Mr Walsh (Ireland) queried why the Deputy Secretary General had read out in the French text *'l'organisme'* when the printed text read *'l'entité'*.

Le Rapporteur explique que le Comité de rédaction a manqué de temps pour apporter les dernières corrections au texte, mais que le mot «organisme» sera bien substitué à «entité» dans l'ensemble du texte.

Mr Holub (Czechoslovakia) had doubts as to the use of the expression 'the care of the person of the child' in the situation where the person previously referred to was not the custodian and removed or retained the child. That fact appeared to be a ground for refusing to return the child. He considered that it was necessary to protect the custodian's rights.

Le Rapporteur dit comprendre le souci de la délégation tchécoslovaque. Mais il lui fait observer que la Commission est déjà convenue de ce que l'organisme n'a pas le droit de garde. Il en résulte que le critère fondamental à prendre en considération est la responsabilité des soins de l'enfant.

The Chairman stated that the matter raised questions of substance which had already been decided upon and asked Mr Holub to give consideration to accepting the provisions as drafted.

M. Jenard (Belgique) fait observer que le texte présente une inutile obscurité puisque l'institution ou l'organisme seront également demandeurs. Aussi propose-t-il que le texte ne mentionne que le demandeur.

The Chairman agreed that was obviously correct and account of it would be taken by the Drafting Committee.

Mr Creswell (Australia) explained that he still had some difficulties with the opening words of the paragraph which fixed the operative point in time and then proceeded to add on a reference to subsequent events. He was troubled by the apparent disharmony in these two provisions.

The Chairman considered that to raise mixed questions of drafting and substance was inadvisable and he hesitated to embark upon a revision of the text on this matter.

Mr Creswell (Australia) repeated that he was not happy with the disharmony in the provision as drafted.

The Chairman replied that he could not see clearly the difficulty referred to. Bearing in mind that the text was rather more syncopated than one might be used to in national legislation, the point was that the time of the removal or retention referred to the fact that at that moment there was no exercise of custody rights or that at that time the person had acquiesced in the removal or retention. He was sure that Mr Creswell could understand the difficulty of the Chair in embarking upon a substantial amendment at the present stage of proceedings.

Article 13*a*, as amended by the proposal of Mr Jenard, was referred to the Drafting Committee.

*Article 13*b *was read.*

The Chairman pointed out that the reference to 'the return' appearing in the first line could be more elegantly rendered by 'his or her return' or 'its return'.

Mr Dyer (First Secretary at the Permanent Bureau) noted that the English text referred to 'physical and psychological harm', whereas the French text used *'ou'*.

The Chairman indicated that the original Draft coming from the Special Commission had used *'ou'* and recommended that the English text be aligned in favour of the French.

Mr Yadin (Israel) pointed out that 'substantial risk', also appearing in the first line, was not the same as *'risque grave'*, which was a stronger formulation. The risk might very well be substantial but not necessarily grave. He proposed that the text should be harmonised.

The Chairman stated that the original text of the Draft had contained that difference. The issue was what degree of intensity of language was required in this context.

Mr Walsh (Ireland) explained that the notion of substantial was subjected to a range of interpretations extending from not fanciful to very probable. He had a personal preference for the use of probable. It was also clear that *'grave'* was more strong than *'sérieuse'*. It was equally certain that substantial was more uncertain in its meaning than grave.

The Chairman stated that the issue raised was virtually one of substance rather than drafting. Accordingly, he would propose that the delegates express a preference for deletion of 'substantial' and insertion of 'grave'.

M. Chatin (France) suggère de substituer «important» à «grave», puisque le sens à rechercher ici doit être restrictif.

The Chairman agreed that that was correct. The issue before the delegates was whether they wanted an intensive qualifier. Clearly, grave was more intensive than substantial. If it was desired to have that more intensive qualifier, then one should vote for deletion and substitution.

Vote

The proposal to delete 'substantial' *and insert* 'grave' *was adopted by 15 votes in favour (Austria, Belgium, Canada, Egypt, France, Federal Republic of Germany, Greece, Ireland, Israel, Italy, Japan, Luxemburg, Netherlands, Spain, United States), with 9 against (Australia, Denmark, Finland, Norway, Portugal, Sweden, Switzerland, Turkey, United Kingdom). Article 13, as amended, was approved.*

The meeting was closed at 1 p.m.

Procès-verbal No 15

Distribué le 22 octobre 1980 (après-midi)
Distributed on 22 October 1980 (afternoon)

Proposal of the United Kingdom delegation
Proposition de la délégation du Royaume-Uni

Alternative version of article V (relations with other conventions) (if the matter is reopened)

The present Convention shall take priority in matters within its scope to the Hague Convention of 5 October 1961 concerning the competence of authorities and the applicable law in relation to the protection of minors. Otherwise this Convention shall not restrict the application of an international instrument in force between the State of origin and the State addressed or other law of the States addressed for the purposes of obtaining the return of a child who has been wrongfully removed or retained.

La présente Convention prendra priorité en matières auxquelles elle s'applique sur la Convention de La Haye du 5 octobre 1961 concernant la compétence des autorités et la loi applicable en matière de protection des mineurs. Autrement cette Convention n'empêche pas qu'un autre instrument international liant l'Etat d'origine et l'Etat requis ou que le droit non conventionnel de l'Etat requis soient invoqués pour obtenir le retour d'un enfant qui a été déplacé ou retenu illicitement.

NOTE: *A provision on these lines seems necessary as regards the Hague Convention of 1961 because there could be a conflict between the two Conventions. If, for example, the State addressed had ratified the Hague Convention of 1961 as well as the present Convention and the child was a national of a State other than that of his habitual residence, a kidnapper might otherwise evade the effect of the present Convention by obtaining a custody order in his favour (either before or after the kidnapping) in the State of nationality. For this reason, the provision in article 23 of the Maintenance Convention does not cover the present situation.*

Séance du mercredi 22 octobre 1980 (après-midi)
Meeting of Wednesday 22 October 1980 (afternoon)

The meeting was opened at 3.10 p.m. Mr Anton (United Kingdom) was in the Chair. Miss Pérez-Vera (Spain) was Rapporteur.

The Chairman turned first to Working Document No 72, and to the problem concerning the relationship of this Convention with other conventions. He announced that Mr Jenard wished to reopen discussion of the text proposed in Working Document No 53, which had been approved by the delegates. In terms of article 16 of the Rules of Procedure of the Conference, a vote by an absolute majority of all delegates present was required before this question could be re-debated. He asked therefore that Mr Jenard first state his reasons for requesting such re-debate, that the delegates then vote on whether or not to reopen the discussion, and that the merits of the proposal would be discussed in the event of an affirmative vote by the required majority.

M. Jenard (Belgique) relève que le texte du Document de travail No 53 est inexplicable: il est contraire au bon sens lorsqu'il prévoit que les autres accords ne l'emporteraient que si les Etats s'entendaient en ce sens; cette procédure prendrait beaucoup de temps et entraînerait des négociations fastidieuses. De surcroît, on obligerait les Etats à revoir les accords conclus en matière de reconnaissance et d'exécution des jugements, notamment des conventions bilatérales qui ont prouvé leur grande efficacité. M. Jenard cite la Convention franco-belge dont le bon fonctionnement est illustré par un exemple d'exequatur en Belgique où l'enfant et le père étaient Français.
Il est donc impraticable de renégocier toutes les conventions bilatérales. M. Jenard propose de suivre la ligne classique de la Convention sur la reconnaissance des jugements en matière d'obligations alimentaires pour règler le problème des conflits de conventions.

The Chairman observed that several delegates supported Mr Jenard's proposal.

Mr Savolainen (Finland), referring to Working Document No 74, wondered whether discussion of the proposal therein (which was closely linked to that in Working Document No 72), also depended upon a prior affirmative vote being taken by an absolute majority of delegates.

The Chairman replied that, if the meeting finally accepted the proposal in Working Document No 72, it would by implication have accepted also those in Working Documents Nos 74 and 76.

M. Jenard (Belgique) approuve la proposition.

The Chairman, after noting that no delegate opposed the reopening of discussion of the text proposed in Working Document No 53, declared that the matter would now be

re-debated. He stated that Working Documents Nos 72, 76 and 74 were to be discussed in that order.

Le Secrétaire général rappelle les bonnes relations que la Conférence de La Haye a entretenues jusqu'alors avec les organisations internationales; il ne faut pas introduire des éléments de concurrence entre les différentes conventions qui bien souvent se complètent.
Le Secrétaire général est convaincu que la Convention de Strasbourg et la présente Convention seront des documents complémentaires.
On pourrait aussi invoquer le caractère de *lex specialis* pour accorder à la présente Convention la prédominance sur la Convention de La Haye de 1961; il semble cependant que cela va de soi sans référence explicite à ce principe. En conclusion le Secrétaire général fait appel aux Etats pour témoigner de leur modération et d'un peu de diplomatie car une formulation trop absolue est souvent l'amorce d'un effet de boomerang.

Mr Jones (United Kingdom) stated that he had listened with the greatest respect to the interventions of Mr Savolainen and the Secretary General. However, a fundamental difficulty still remained, of which Working Document No 76 was designed to take account, *i.e.* the possibility of there being totally contradictory provisions in different agreements on the same subject-matter. The situation would be aggravated considerably if an applicant were to be allowed a free choice as to which Convention should apply.
This problem was particularly acute in relation to the 1961 Convention on the Protection of Minors, which contained a substantial number of provisions concerning the recognition of orders rendered in the State of nationality. This Convention, by contrast, was concerned with the removal of a child from the country of its habitual residence. Thus, there could be a direct conflict between the Convention under consideration and the 1961 Convention and Mr Jones referred in this context to paragraphs 47 and 48 of the Report in which the Rapporteur had suggested that the provisions of this Convention would have to override those of any other convention on child custody. While Mr Jones recognised the solution proposed in Working Document No 76 might not be acceptable to other delegations, it was intended simply to add to the general thrust of the proposal in Working Document No 72, by stating explicitly that the present Convention would have priority over the Convention of 1961. Mr Jones confessed that he was uneasy about the purely technical relationship between articles 19 and 20 of the Strasbourg Convention, on the one hand, and the present Convention, on the other. These articles envisaged the possibility of conflict between different conventions, and this could cause problems due to the reference in article 19 to 'obtaining recognition or enforcement of a decision'. He noted that he had put forward no specific proposal to cover this point, since it was extremely difficult to do so.
Mr Jones entirely agreed with Mr Jenard's point that other conventions, particularly bilateral ones, were likely to work much more to the advantage of the applicant than the present Convention was likely to do. In this regard, he referred to the Strasbourg Convention's more generous provisions concerning legal assistance.

Mr Savolainen (Finland) observed, as a preliminary point, that States could have rather different interests concerning the point under discussion. So far as the Nordic countries were concerned, the purely practical problems involved were exactly the opposite of those expressed by Mr Jenard. In the first place, Scandinavian States had adopted a multilateral Nordic Convention of general application covering the subject-matter of this Convention, and in the second place, they had subscribed to a more general multilateral Convention concerning the enforcement and recognition of civil judgments, a Convention which applied also to the enforcement of custody orders. Thus, so far as the Scandinavian States were concerned, the simplest solution would be to use the mechanism proposed in Working Document No 53, article 5.
Mr Savolainen fully understood the practical problems referred to by Mr Jenard. The Finnish proposal in Working Document No 74 had been put forward in the form of a compromise designed to take account of the different practical difficulties encountered by Belgium and the Scandinavian countries. He felt that the proposal in Working Document No 73 would also in large measure alleviate the problem outlined by Mr Jenard. He was fully cognisant also of the points made by the Secretary General, and admitted that the adoption of Working Document No 74 would result in a slight priority being given to the Hague Convention vis-à-vis the others. However, this priority would be more formal than substantive, and the end result would be that the Hague Convention would complement other conventions on similar topics.

Mr Dyer (First Secretary at the Permanent Bureau) observed that some of the problems raised might have been resolved in earlier discussion. However, some of the provisions of the Strasbourg Convention, notably article 19 thereof, could cause great difficulties, and he read out to the meeting the terms of this article. He recalled that during the preparatory stages of the Strasbourg Convention, while amendments were still being considered, he had contacted the Council of Europe Secretariat and other interested parties, and requested that the words 'and on restoration of custody of children' be added to the text, so that article 19 would be changed accordingly. This would have made it clear that the Strasbourg Convention was not intended to override the provisions of the Hague Convention. Unfortunately, the Council of Europe Secretariat had made no such amendment to the final text of article 19, and he doubted whether the provisions of article 19 would allow the Hague Convention to operate on an equal basis.

M. Jenard (Belgique) se réfère à l'article 19 de la Convention du Conseil de l'Europe pour montrer qu'elle permet au demandeur d'invoquer une autre convention, par exemple, celle de La Haye; l'article 19 énonce le principe fondamental du respect des conventions élaborées par des organisations internationales ou dans les rapports entre les deux Etats.
M. Jenard répond ensuite à M. Jones et fait observer que la Convention du Conseil de l'Europe et celle de la Conférence de La Haye offriront selon les cas, tantôt l'une tantôt l'autre, des solutions plus favorables au retour de l'enfant.
M. Jenard accepte de retirer sa proposition et d'appuyer celle prévue dans le Document de travail No 76.

The Chairman asked Mr Dyer to reply to Mr Jenard concerning the acceptability to the Secretariat of his proposal.

Mr Dyer (First Secretary at the Permanent Bureau) replied that Mr Jenard's proposal also related to the interpretation of article 19 of the Strasbourg Convention.

The Chairman observed that agreement between the proponents of the three Working Documents appeared to be close, but that Mr Dyer had raised an extremely important point concerning article 19 of the Strasbourg Convention. This article referred to the possibility of relying on other international instruments *for the purpose of obtaining the recognition or enforcement of a decision.* However, the present Convention did not relate to the recognition and enforcement of decisions. There therefore arose, within the context of article 19 of the Strasbourg Convention, a serious problem of interpretation, both internationally and within

the United Kingdom, and this could be one reason why many delegates appeared to wish that an order of priority of conventions be established.

M. Jenard (Belgique) demande quelques explications.

Le Secrétaire général s'adressant à M. Jenard, explique que lorsque la Convention de Strasbourg a été étendue à l'«enlèvement d'enfant», le texte de l'article 19 n'a pas été modifié dans ce sens; il y manque la référence à l'enlèvement d'enfant. Le Secrétaire général se réfère ensuite à plusieurs conversations téléphoniques qu'il a tenues avec les Représentants du Conseil de l'Europe sur ce point. L'article 19 néanmoins n'a pas été éclairci dans le sens d'une extension au cas d'enlèvement d'enfant.
Le Secrétaire général exprime ensuite son sentiment personnel; reprenant le Document de travail No 67, il en montre l'intérêt. Il résoud premièrement les conflits de la Convention de 1961 avec celle que nous élaborons; et élément primordial, il écarte la possibilité d'invoquer une disposition d'une autre convention qui aurait pour seul objectif d'ajouter une clause de refus au retour de l'enfant par rapport à la présente Convention.

The Chairman commented that a basis for compromise had been suggested by Mr Jenard. He asked whether Mr Savolainen and those delegates who had voted in favour of accepting Working Document No 53 would be prepared to withdraw their support for that Working Document and vote in favour of Working Document No 76, leaving aside for the moment the drafting points which arose therein.

Mr Jones (United Kingdom) admitted that he was very happy to accept the compromise suggested by Mr Jenard. Although he was not certain whether the concerns of the Scandinavian countries, referred to by Mr Savolainen, would be met thereby, he believed that they would.

Mr Savolainen (Finland) acknowledged that he was prepared to accept Working Document No 76, provided he had understood its terms correctly. In this connection, he asked whether the concept of the 'wrongful removal or retention' of the child which was used in Working Document No 76, was intended to be the same as that used elsewhere in the Hague Convention.

Mr Jones (United Kingdom) admitted that that had been his intention, and that the Drafting Committee could attempt to make the matter quite clear.

Mr Savolainen (Finland) then confirmed his acceptance of the compromise suggested by Mr Jenard.

Mr Yadin (Israel) felt that the present discussion was leading delegates too far afield. He suggested that the meeting look to article 15 of the draft Convention, which was now to be found in article 18, as proposed by the Drafting Committee in Working Document No 75. He observed that the wording of article 18 did not contain the amendment originally proposed and adopted within the context of the old article 15, namely that the words 'either under this Convention or any other Convention' should be added. If the new article 18 were so amended, it would make superfluous the proposals in Working Documents Nos 72 and 74, and probably those in Working Document No 76 as well. It would be quite sufficient to permit a judicial or administrative authority to order the return of a child either under this Convention, within or after the prescribed time-limits, or under any other convention.

The Chairman asked Mr Yadin whether it was his intention that article 18 should end with the following words, *viz.* 'the return of the child otherwise than under the terms of this Convention'. This would allow the authorities concerned to return a child under the terms of this or any other Convention. He confessed that this was an interesting proposal, but felt that it introduced an element of confusion into the debate, since it might have a rather different purpose. He stressed that the meeting must concentrate on issues of principle, and that the proposals which had been submitted in the form of Working Documents should be put to the vote. Mr Yadin's point could be taken up by delegates when article 18, as proposed by the Drafting Committee, was being discussed. The delegates would therefore be asked at this point whether they accepted the proposal in Working Document No 76, which would imply the deletion of the text previously agreed upon and proposed in Working Document No 53, and the withdrawal of Working Documents Nos 74 and 72.

Mr Leal (Canada) wondered whether the words 'international instrument' in Working Document No 76 could be construed as including a reciprocal agreement which did not attain the status of a convention.

The Chairman replied that Working Document No 76 was intended to embrace a wide variety of inter-State agreements.

Mr Parra-Aranguren (Venezuela) pointed out that Working Document No 53 referred also to access rights, whereas Working Document No 76 made no such reference. He wondered whether the deletion of access rights had been intentional.

Mr Jones (United Kingdom) explained that Working Document No 76 contained no reference to access rights because no conflict with the 1961 Convention was foreseen in this regard.

Mr Minami (Japan) harboured two doubts concerning Working Document No 26. Firstly, he was unclear as to what relationship was intended between the present Convention and the 1961 Convention. Was it intended that the former would take priority? Secondly, did 'other law' in Working Document No 76 mean 'uniform law', in the sense used in Working Document No 53, or did it refer to the internal law of the State addressed? If the latter was the case, he feared that a State could then use its own internal law in order to obstruct the operation of the Hague Convention. He therefore felt that the matters referred to in Working Document No 76 should not be included in the present Convention.

The Chairman observed that Mr Minami's points would certainly have to be considered by the Drafting Committee. In his view, acceptance of the proposal in Working Document No 76 would certainly establish the Hague Convention's priority over the 1961 Convention, in so far as the relationship between parties to both Conventions was concerned.

M. Barile (Italie) s'oppose aux propositions qui donneraient au juge et aux parties un pouvoir discrétionnaire trop large.

M. Chatin (France) s'exprime favorablement au sujet de la proposition de M. Jones qui a l'avantage de la clarté; elle facilitera notamment les déclarations des Etats au moment de la signature.
La deuxième proposition de M. Jones a le mérite de trancher un conflit de compétence entre la Convention de 1961 et la présente Convention, notamment le conflit des critères de rattachement: ceux de la nationalité et de la résidence habituelle pour la Convention de 1961 d'une part et le

critère de la résidence habituelle seul retenu dans la Convention que nous élaborons.

The Chairman noted that a number of drafting points had been made which fell to be considered by the Drafting Committee. He mentioned in particular Mr Minami's observation concerning those who were parties only to this Convention and the 1961 Convention, Mr Savolainen's point that it be made clear that the child concerned had been wrongfully removed or retained 'in terms of this Convention', and Mr Parra-Aranguren's point concerning the inclusion of access rights. He then proposed that the meeting proceed to a vote on Working Document No 76.

Vote

Working Document No 76 was approved by a vote of 18 in favour (Australia, Belgium, Canada, Denmark, Finland, France, Federal Republic of Germany, Greece, Ireland, Japan, Luxemburg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, United Kingdom), 2 against (Israel, Italy), with 4 abstentions (Czechoslovakia, Egypt, United States, Venezuela).

The Chairman then turned the attention of the meeting to the text of article 13(2), as proposed by the Drafting Committee in Working Document No 75.

Article 13(2), as proposed in Working Document No 75, was read.

The Chairman noted that no delegation wished to object to the proposed formulation of article 13(2), which was therefore approved.

Article 13(3), as proposed in Working Document No 75, was read.

Mr Creswell (Australia) suggested that the word 'considering' should replace 'evaluating' at the beginning of the third paragraph of article 13.

The Chairman informed the meeting that the Drafting Committee had spent a great deal of time in considering how to align the French and English texts of the third paragraph of article 13, and he decided that article 13(3) had been approved by delegates, subject to the Drafting Committee considering Mr Creswell's point.

Article 14 was read.

Mr Leal (Canada) pointed out that article 14 was in fact article 13 of the draft Convention, which had been reworded so as to cover the evidential points raised during the Commission's first reading. He added that he was not in favour of the words presently placed in square brackets, and suggested that they be replaced by a new word, or alternatively that the sentence be reformulated.

The Chairman suggested the replacement of the words in square brackets by 'rendered or recognised in'.

Le Rapporteur fait observer que l'article reflète le Document de travail No 15. Au cours des délibérations du Comité de rédaction, on s'est demandé si le terme «décision» devait être pris dans son acception large ou étroite.

The Chairman acknowledged that the Rapporteur had raised an important point, but felt that it would be covered adequately by the substitution of the words 'rendered or recognised in'.

M. Barile (Italie) fait remarquer que le terme «en vigueur» se situe exactement dans la ligne du Document de travail No 58 présenté par l'Italie; une décision administrative au niveau judiciaire peut être reçue par un Etat sans y avoir été rendue ni reconnue formellement; l'expression «en vigueur» est plus large et comprend les trois situations.

The Chairman asked Mr Barile to submit a concrete proposal for the amendment of article 14.

M. Barile (Italie) explique encore que le terme «en vigueur» comprend les décisions qui n'émaneraient pas seulement de l'Etat de résidence.

The Chairman conceded that Mr Barile had raised an interesting and logical point. However, although it was true that a decision *'en vigueur'* could be rendered in a State other than that of the child's habitual residence, it would be very difficult to express comprehensively in English the wider sense indicated. In his view, the words 'rendered or recognised in' should be regarded as the acceptable equivalent of *'en vigueur'*.

M. Barile (Italie) reprend son argumentation.

The Chairman asked Mr Barile whether he wished to propose that the following words be inserted in the English text of article 14, *viz.* 'rendered in, recognised in, or susceptible of recognition in'. He noted that a point of substance arose, but proposed that the questions of drafting be sent to the Drafting Committee.

M. Barile (Italie) explique encore une fois que le terme «en vigueur» comprend les expressions «rendu» et «reconnu formellement ou non».

The Chairman observed that the meeting was agreed on the substantive points, and that Mr Barile had raised points which should really be considered by the Drafting Committee. He agreed with the view of the Rapporteur that the words *'rendus ou reconnus formellement ou non'* would be sufficient.

M. Batiffol (France) signale au Comité de rédaction qu'une décision judiciaire ou administrative peut être invoquée comme moyen de preuve en tant que fait sans pour autant avoir été reconnue formellement.

The Chairman replied that all delegates would agree with Mr Batiffol's observation. However, he felt that he should warn delegates that the final English text of article 14 would probably be formulated somewhat differently from the French in regard to the words presently in square brackets.

M. van Keymeulen (Belgique) ajoute la précision des accords qui ont «force de loi».

Le Rapporteur explique qu'on n'a pas voulu inclure dans la Convention le point soulevé par M. van Keymeulen car ces documents peuvent avoir un caractère privé ou un caractère public selon le cas.

M. van Keymeulen (Belgique) se rallie au point de vue du Rapporteur.

The Chairman directed the attention of the meeting to article 15, as proposed by the Drafting Committee in Working Document No 75.

Article 15 was read.

Mr Creswell (Australia) sought to make two points concerning the French text of article 15.

Firstly, the French text referred to a decision which stated that the child had been abducted or retained *wrongfully* (*illicitement*), whereas the English text referred to a decision that the child's removal or retention was 'wrongful'. He suggested that the French text be aligned with the English. Secondly, in the last sentence of article 15, the words '*dans toute la mesure du possible*' could be construed as being more emphatic than the English words 'so far as practicable'.

The Chairman announced that Mr Creswell's points would go to the Drafting Committee for consideration.

Mr Yadin (Israel) pointed out that the 'authorities' referred to in the third line of article 15 should be the authorities of the *State* of the habitual residence of the child, and that the words 'the State of' required to be added.

The Chairman noted that this was an important point which would go to the Drafting Committee. Since no other points were raised in connection with article 15, he declared the meeting closed.

The meeting ended at 4.25 p.m.

Document de travail No 77
Working Document No 77

Distribué le 23 octobre 1980 (matin)
Distributed on 23 October 1980 (afternoon)

Proposition du Président appuyée par le Rapporteur et les délégations de la République fédérale d'Allemagne, de l'Australie, du Canada, de l'Espagne, de la Finlande, de la France, de l'Irlande, du Royaume-Uni et de la Suisse

Proposal of the Chairman supported by the Rapporteur and the delegations of Australia, Canada, Finland, France, the Federal Republic of Germany, Ireland, Spain, Switzerland and the United Kingdom

Article 17

Le seul fait qu'une décision relative à la garde ait été rendue ou soit susceptible d'être reconnue dans l'Etat requis, ne peut justifier le refus de retourner l'enfant dans le cadre de cette Convention, mais les autorités judiciaires ou administratives de l'Etat requis peuvent prendre en considération les motifs de cette décision qui rentreraient dans le cadre de l'application de l'article 13.

Article 17

The sole fact that a decision relating to custody has been given in or falls to be recognized in the requested State shall not be a ground for refusing to return a child under this Convention, but the judicial or administrative authorities of the requested State may take account of the reasons [motifs] for that decision in applying article 13.

Distribué le 23 octobre 1980 (matin)

Distributed on 23 October 1980 (morning)

Proposition du Comité de rédaction (suite)

Article 31

Au regard d'un Etat qui connaît en matière de garde des enfants deux ou plusieurs systèmes de droit applicables dans des unités territoriales différentes:

a toute référence à la résidence habituelle dans cet Etat vise la résidence habituelle dans une unité territoriale de cet Etat;

b toute référence à la loi de l'Etat de la résidence habituelle vise la loi de l'unité territoriale dans laquelle l'enfant a sa résidence habituelle.

Article 32

Au regard d'un Etat contractant connaissant en matière de garde des enfants deux ou plusieurs systèmes de droit applicables à des catégories différentes de personnes, toute référence à la loi de cet Etat vise le système de droit désigné par le droit de celui-ci.

Article 33

Un Etat dans lequel différentes unités territoriales ont leurs propres règles de droit en matière de garde des enfants ne sera pas tenu d'appliquer la présente Convention lorsqu'un Etat dont le système de droit est unifié ne serait pas tenu de l'appliquer.

Article 34

Dans les matières auxquelles elle s'applique, la présente Convention prévaut, entre les Etats Parties aux deux Conventions, sur la *Convention de La Haye du 5 octobre 1961 concernant la compétence des autorités et la loi applicable en matière de protection des mineurs.* Par ailleurs, cette Convention n'empêche pas qu'un autre instrument international liant l'Etat d'origine et l'Etat requis, ni que le droit non conventionnel de l'Etat requis, soient invoqués pour obtenir le retour d'un enfant qui a été déplacé ou retenu illicitement ou l'organisation du droit de visite.

Article 35

La présente Convention s'appliquera aux déplacements ou aux non-retours illicites qui se sont produits avant son entrée en vigueur.
Toutefois, un Etat contractant pourra, conformément à l'article 42, déclarer que la présente Convention ne s'appliquera qu'aux déplacements ou aux non-retours illicites qui se sont produits après son entrée en vigueur dans cet Etat.

Article 36

La présente Convention ne s'oppose pas à ce que deux ou plusieurs Etats contractants s'entendent pour déroger, dans

Proposal of the Drafting Committee (continuation)

Article 31

In relation to a State which in matters of custody of children has two or more systems of law applicable in different territorial units –

a any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit of that State;

b any reference to the law of the State of habitual residence shall be construed as referring to the law of the territorial unit in that State where the child habitually resides.

Article 32

In relation to a State which in matters of custody of children has two or more systems of law applicable to different categories of persons, any reference to the law of that State shall be construed as referring to the legal system specified by the law of that State.

Article 33

A State within which different territorial units have their own rules of law in respect of custody of children shall not be bound to apply this Convention where a State with a unified system of law would not be bound to do so.

Article 34

This Convention shall take priority in matters within its scope over the Hague Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors, as between Parties to both Conventions. Otherwise this Convention shall not restrict the application of an international instrument in force between the State of origin and the State addressed or other law of the State addressed for the purposes of obtaining the return of a child who has been wrongfully removed or retained or organizing access rights.

Article 35

This Convention shall apply to a wrongful removal or retention occurring before its entry into force.

However, a Contracting State may, in accordance with article 42, declare that this Convention shall apply only to wrongful removals or retentions occurring after its entry into force in that State.

Article 36

The present Convention shall not prevent two or more States agreeing to derogate from the provisions of this

leurs relations mutuelles, aux dispositions de la Convention, afin de limiter les exigences auxquelles elle subordonne le retour de l'enfant.

CHAPITRE VI — CLAUSES FINALES

Article 37

La Convention est ouverte à la signature des Etats qui étaient Membres de la Conférence de La Haye de droit international privé lors de sa Quatorzième session.
Elle sera ratifiée, acceptée ou approuvée et les instruments de ratification, d'acceptation ou d'approbation seront déposés auprès du Ministère des Affaires Etrangères des Pays-Bas.

Article 38

Tout autre Etat pourra adhérer à la Convention.
L'instrument d'adhésion sera déposé auprès du Ministère des Affaires Etrangères des Pays-Bas.
La Convention entrera en vigueur, pour l'Etat adhérant, le premier jour du troisième mois du calendrier après le dépôt de son instrument d'adhésion.
L'adhésion n'aura d'effet que dans les rapports entre l'Etat adhérant et les Etats contractants qui auront déclaré accepter cette adhésion. Une telle déclaration devra également être faite par tout Etat membre ratifiant, acceptant ou approuvant la Convention ultérieurement à l'adhésion. Cette déclaration sera déposée auprès du Ministère des Affaires Etrangères des Pays-Bas; celui-ci en enverra, par la voie diplomatique, une copie certifiée conforme, à chacun des Etats contractants.
La Convention entrera en vigueur entre l'Etat adhérant et l'Etat ayant déclaré accepter cette adhésion le premier jour du troisième mois du calendrier après le dépôt de la déclaration d'acceptation.

Article 39

Tout Etat, au moment de la signature, de la ratification, de l'acceptation, de l'approbation ou de l'adhésion, pourra déclarer que la Convention s'étendra à l'ensemble des territoires qu'il représente sur le plan international ou à l'un ou plusieurs d'entre eux. Cette déclaration aura effet au moment où elle entre en vigueur pour cet Etat.
Cette déclaration, ainsi que toute extension ultérieure, seront notifiées au Ministère des Affaires Etrangères des Pays-Bas.

Article 40

Un Etat contractant qui comprend deux ou plusieurs unités territoriales dans lesquelles des systèmes de droit différents s'appliquent aux matières régies par cette Convention pourra, au moment de la signature, de la ratification, de l'acceptation, de l'approbation ou de l'adhésion, déclarer que la présente Convention s'appliquera à toutes ses unités territoriales ou seulement à l'une ou à plusieurs d'entre elles, et pourra à tout moment modifier cette déclaration en faisant une nouvelle déclaration. Ces déclarations seront notifiées au Ministère des Affaires Etrangères du Royaume des Pays-Bas et indiqueront expressément les unités territoriales auxquelles la Convention s'applique.

Article 41

Lorsqu'un Etat contractant a un système de gouvernement en vertu duquel les pouvoirs exécutif, judiciaire et législatif sont partagés entre des autorités centrales et d'autres autorités de cet Etat, la signature, la ratification, l'acceptation, l'approbation ou l'adhésion à la Convention, ou une déclaration faite en vertu de l'article 40, n'emportera aucune implication quant au partage interne des pouvoirs dans cet Etat.

Convention, in order to limit the restrictions to which the return of the child is subject.

CHAPTER VI — FINAL CLAUSES

Article 37

The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Fourteenth Session.
It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 38

Any other State may accede to the Convention.
The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.
The Convention shall enter into force for a State acceding to it on the first day of the third calendar month after the deposit of its instrument of accession.
The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.
The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the first day of the third calendar month after the deposit of the declaration of acceptance.

Article 39

Any State may, at the time of signature, ratification, acceptance, approval or accession, declare that the Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect at the time the Convention enters into force for that State.
Such declaration, as well as any subsequent extension, shall be notified to the Ministry of Foreign Affairs of the Netherlands.

Article 40

If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all its territorial units or only to one or more of them and may amend this declaration by submitting another declaration at any time. Any such declaration shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands and shall state expressly the territorial units to which the Convention applies.

Article 41

Where a Contracting State has a system of government under which executive, judicial and legislative powers are distributed between central and other authorities within that State, its signature or ratification of, acceptance, approval or accession to this Convention, or its making of any declaration under article 40 shall carry no implication as to the internal distribution of powers within that State.

Article 42

Tout Etat contractant pourra, au plus tard au moment de la ratification, de l'acceptation, de l'approbation ou de l'adhésion, ou au moment d'une déclaration faite aux termes de l'article 40, faire une ou plusieurs des réserves prévues aux articles 24, 26 et 35. Aucune autre réserve ne sera admise.
Tout Etat pourra, à tout moment, retirer une réserve qu'il aura faite. Ce retrait sera notifié au Ministère des Affaires Etrangères des Pays-Bas.
L'effet de la réserve cessera le premier jour du troisième mois du calendrier après la notification mentionnée à l'alinéa précédent.

Article 43

La Convention entrera en vigueur le premier jour du troisième mois du calendrier après le dépôt du troisième instrument de ratification, d'acceptation, d'approbation ou d'adhésion prévu par les articles 37 et 38.
Ensuite, la Convention entrera en vigueur:

1 pour chaque Etat ratifiant, acceptant, approuvant ou adhérant postérieurement le premier jour du troisième mois du calendrier après le dépôt de son instrument de ratification, d'acceptation, d'approbation ou d'adhésion;

2 pour les territoires auxquels la Convention a été étendue conformément à l'article 39, le premier jour du troisième mois du calendrier après la notification visée dans cet article.

Article 44

La Convention aura une durée de cinq ans à partir de la date de son entrée en vigueur conformément à l'article 43, alinéa premier, même pour les Etats qui l'auront postérieurement ratifiée, acceptée ou approuvée ou qui y auront adhéré.
La Convention sera renouvelée tacitement de cinq ans en cinq ans, sauf dénonciation.
La dénonciation sera, au moins six mois avant l'expiration du délai de cinq ans, notifiée au Ministère des Affaires Etrangères des Pays-Bas. Elle pourra se limiter à certains territoires ou unités territoriales auxquels s'applique la Convention.
La dénonciation n'aura d'effet qu'à l'égard de l'Etat qui l'aura notifiée. La Convention restera en vigueur pour les autres Etats contractants.

Article 45

Le Ministère des Affaires Etrangères des Pays-Bas notifiera aux Etats Membres de la Conférence, ainsi qu'aux Etats qui auront adhéré conformément aux dispositions de l'article 38:

1 les signatures, ratifications, acceptations et approbations visées à l'article 37;

2 les adhésions visées à l'article 38;

3 la date à laquelle la Convention entrera en vigueur conformément aux dispositions de l'article 43;

4 les extensions visées à l'article 39;

5 les déclarations mentionnées à l'article 40;

6 les réserves prévues aux articles 24, 26 et 35, et le retrait des réserves prévu à l'article 42;

7 les dénonciations visées à l'article 44.

En foi de quoi, les soussignés, dûment autorisés, ont signé la présente Convention.

Fait à La Haye, le ..... 19....., en français et en anglais, les deux textes faisant également foi, en un seul

Article 42

Any State may, not later than the time of ratification, acceptance, approval or accession, or at the time of making a declaration under article 40, make one or more of the reservations provided for in articles 24, 26 and 35. No other reservation shall be permitted.
Any State may at any time withdraw a reservation it has made. The withdrawal shall be notified to the Ministry of Foreign Affairs of the Netherlands.
The reservation shall cease to have effect on the first day of the third calendar month after the notification referred to in the preceding paragraph.

Article 43

The Convention shall enter into force on the first day of the third calendar month after the deposit of the third instrument of ratification, acceptance, approval or accession referred to in articles 37 and 38.
Thereafter the Convention shall enter into force –

1 for each State ratifying, accepting, approving or acceding to it subsequently, on the first day of the third calendar month after the deposit of its instrument of ratification, acceptance, approval or accession;

2 for a territory to which the Convention has been extended in conformity with article 39, on the first day of the third calendar month after the notification referred to in that article.

Article 44

The Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of article 43 even for States which subsequently have ratified, accepted, approved it or acceded to it.
If there has been no denunciation, it shall be renewed tacitly every five years.
Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands, at least six months before the expiry of the five year period. It may be limited to certain of the territories or territorial units to which the Convention applies.
The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 45

The Ministry of Foreign Affairs of the Netherlands shall notify the States Members of the Conference, and the States which have acceded in accordance with article 38, of the following –

1 the signatures and ratifications, acceptances and approvals referred to in article 37;

2 the accessions referred to in article 38;

3 the date on which the Convention enters into force in accordance with article 43;

4 the extensions referred to in article 39;

5 the declarations referred to in article 40;

6 the reservations referred to in articles 24, 26 and 35, and the withdrawals referred to in article 42;

7 the denunciations referred to in article 44.

In witness whereof the undersigned, being duly authorized thereto, have signed this Convention.

Done at The Hague, on the ..... day of ..... 19....., in the English and French languages, both texts being

exemplaire, qui sera déposé dans les archives du Gouvernement des Pays-Bas et dont une copie certifiée conforme sera remise, par la voie diplomatique, à chacun des Etats Membres de la Conférence de La Haye de droit international privé lors de sa Quatorzième session.

equally authentic, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel to each of the States Members of the Hague Conference on Private International Law at the date of its Fourteenth Session.

Procès-verbal No 17

Séance du jeudi 23 octobre 1980 (matin)
Meeting of Thursday 23 October 1980 (morning)

The meeting was opened at 9.40 a.m. Mr Anton (United Kingdom) was in the Chair. Miss Pérez-Vera (Spain) was Rapporteur.

Le Secrétaire général adjoint demande que les délégations munies de pleins pouvoirs les déposent au Secrétariat avant le lendemain matin, afin de permettre leur dépôt en temps utile au Ministère des Affaires Etrangères des Pays-Bas.

Article 16 was read.

Miss Selby (United States) observed that article 16 did not take sufficient account of the possibility of the parties reaching a voluntary settlement. She suggested that the words 'the child is not to be returned' be substituted for 'the child shall not be returned', so that a Court would be given the necessary discretion to decide not to return a child in the event that such a settlement was reached. In this regard, she noted that the French text of article 16 indicated more strongly that a judge should consider the whole convention in deciding whether or not the child should be returned.

Mr Jones (United Kingdom) agreed that the words suggested by Miss Selby would be an improvement. The French text of the article was indeed formulated somewhat differently, and he suggested that the English text should follow the French by substituting the following words: 'until it has been established that the conditions of the present Convention for the return of the child have not been met'.

The Chairman felt that Miss Selby's point applied equally to the existing French text of article 16. He asked Miss Selby whether she would be willing to let the Drafting Committee take note of her comments.

Miss Selby (United States) agreed that her proposal should go to the Drafting Committee. However, she wished to raise a second point which concerned the absence in article 16 of any reference to access rights. She wondered why they had been omitted from the text.

Le Rapporteur rappelle que le chapitre dans lequel l'article est inscrit s'institule «Retour de l'enfant». Il ne lui paraît donc pas nécessaire que l'article fasse référence au droit de visite, puisque celui-ci relève d'un autre chapitre de la Convention.

Miss Selby (United States) expressed satisfaction with the Rapporteur's explanation.

M. van Keymeulen (Belgique) demande que le texte porte «les autorités judiciaires ou administratives de l'Etat contractant où l'enfant *a* été déplacé», le conditionnel utilisé («aurait») ne lui paraissant ni être approprié, ni correspondre au texte anglais.

The Chairman commented that Mr van Keymeulen's comments would be noted by the Drafting Committee.

Mr Creswell (Australia) agreed with Mr van Keymeulen. In addition, he suggested that the comma occurring after *'il soit'* in the fifth line of the French text of article 16 should be removed.

The Chairman announced that article 16 would go to the Drafting Committee, along with the minor amendments which had been suggested. Since the proposal from the Chair, contained in Working Document No 77 for the amendment of article 17, would require an absolute affirmative vote by the delegates before the question could be reopened, he turned the delegates' attention to article 18.

Article 18 was read.

The Chairman recalled Mr Yadin's earlier comments concerning article 18, namely that the words 'at any time' be removed and replaced by 'otherwise than under the terms of this Convention'. He noted the sense of the meeting to be that this substitution ought to be made.

Le Rapporteur explique que le Comité de rédaction a soigneusement étudié la proposition de la délégation israélienne. Mais il lui a semblé que si le texte portait la précision «après l'expiration du délai du paragraphe premier de l'article 11», il risquait de se prêter à une interprétation *a contrario* autorisant le juge à écarter la Convention avant l'expiration du délai.

Mr Leal (Canada) pronounced himself to be strongly in favour of the point made by the Rapporteur. He particularly regretted Mr Yadin's absence today, since it had been the unanimous view of the Drafting Committee that article 18 be written in the broadest possible terms, in order to allow the immediate return of a child within or outwith the terms of this Convention, at any time. In his view, the present formulation of the article was the most appropriate.

The Chairman observed that he had not taken up Mr Chatin's proposal concerning the time at which the return of a child could be ordered, but had referred only to the drafting proposal made by Mr Yadin. He felt that the suggested additional words would make the text clearer to those who had not been involved in the drafting of the Convention.

Mr Savolainen (Finland) suggested that the deletion of the words 'at any time' would suffice to make the clause as wide as possible in its terms.

Mr Vischer (Switzerland) doubted whether article 18 was really necessary in any case, and he proposed that it be deleted from the Convention.

The Chairman replied that the deletion of article 18 would require a prior vote by an absolute majority of delegates for the reopening of discussion on its merits. He asked whether the sense of the meeting was that Mr Savolainen's proposal should be accepted.

M. Chatin (France) dit l'opposition de sa délégation à la proposition du Délégué finlandais. Il indique que, en France au moins, les juges ont en pratique la possibilité de renvoyer l'enfant d'heure à heure. L'expression «à tout moment» lui paraît bien décrire cette possibilité. Aussi le Délégué français en demande-t-il le maintien.

The Chairman proposed that a series of indicative votes, and one vote by nominal roll, should be taken on the proposals concerning article 18.

Vote

Oral proposal of Switzerland that discussion of the merits of article 18 be re-opened with a view to its deletion was supported, on a hand vote by 6 delegates.

Oral proposal of Israel that the words 'at any time' *be replaced by* 'otherwise than under the terms of this Convention' *was supported, on a hand vote, by 7 delegates.*

Article 18, as proposed by the Drafting Committee in Working Document No 75, was supported, on a hand vote, by 8 delegates.

The Chairman took the general sense of the meeting to be in favour of retention of the existing text of article 18. However, to avoid any doubt on this matter, he asked that a vote be taken, by nominal roll, concerning the retention of the present text of article 18, as proposed by the Drafting Committee.

Vote

Article 18, as proposed by the Drafting Committee in Working Document No 75, was approved by a vote of 10 in favour (Canada, Denmark, Egypt, Finland, France, Greece, Ireland, Japan, Luxemburg, Portugal), 8 against (Australia, Belgium, Federal Republic of Germany, Netherlands, Norway, Spain, Switzerland, Venezuela), with 5 abstentions (Austria, Italy, Sweden, United Kingdom, United States).

The Chairman confirmed that the existing text of article 18, as proposed in Working Document No 75, had been adopted by the Commission, and he turned the attention of delegates to article 19.

Article 19 was read.

Miss Selby (United States) asked what purpose had been served by changing the original language which, in her view, had been much clearer.

Mr Leal (Canada) replied, firstly, that the addition of the words 'under the Convention' were self-explanatory, and, secondly, that the English text had been aligned with the French.

The Chairman commented that he was sympathetic towards the point raised by Miss Selby. The present text of article 19 might lead to the impression that it dealt with custody rights in general, and not those in any particular case, and he suggested that article 19 should read as follows: 'A decision under the Convention concerning the return of the child shall not be taken to be [construed to be] a decision on the merits of any custody issue between the parties'.

Mr Savolainen (Finland) wondered whether the words 'between the parties' would really be necessary.

The Chairman replied that they would make the English clearer, but that since they were possibly unnecessary, they could be deleted. He also asked whether 'taken to be' would be a more acceptable formulation than 'construed'.

Mr Savolainen (Finland) observed that, for those whose native tongue was not English, 'construed' could cause difficulties, and that 'taken to be' was therefore preferable.

The Chairman asked whether the sense of the meeting was that the Chair's proposed amendment to article 19 should be adopted.

Le Secrétaire général adjoint demande si le texte français est affecté par ce changement.

The Chairman conceded that the Drafting Committee would have to align the French text with the English text. He declared that article 19 had been adopted, and turned to article 20.

Article 20 was read.

Mr Walsh (Ireland) recalled that article 20 attempted to allay some of the disquiet originally expressed by the United States delegation concerning the matters therein. He stressed that the operative words in article 20 related only to the laws of the *requested* State, and were not to be construed as a warrant to judges to embark upon a study of comparative law. The courts were to look exclusively to their own law in this regard, *i.e.* the law of the requested State and *its* fundamental principles.

M. Voulgaris (Grèce) propose que, par respect de la concordance des temps, la rédaction de l'article soit: «le retour de l'enfant . . . peut être refusé quand il n'est pas . . .».

M. Barile (Italie) dit n'être pas opposé à la proposition du

Délégué grec. Mais il veut être sûr qu'elle ne porte aucun changement du sens du texte.

M. Batiffol (France) fait observer que la formule proposée par le Délégué grec est certes possible, mais que la forme actuelle du texte est également correcte. Il pense, quant à lui, que cette dernière formule peut être maintenue.

M. Barile (Italie) demande si les mots «sauvegarde» et «*protection*» employés dans les textes français et anglais sont bien synonymes.

The Chairman requested delegates not to debate such points on the floor, and he referred Mr Barile's point to the Drafting Committee. On a purely linguistic point, he suggested the substitution of 'basic' for 'fundamental' in the second line of article 20, so as to avoid repetition of 'fundamental'.

Mr Walsh (Ireland) agreed with the Chairman's observations. The French language often used different prepositions from the English to express the same idea, but these were merely linguistic points which should be left to the Drafting Committee.

M. van Keymeulen (Belgique) s'interroge si la référence du texte à l'article 12 ne serait pas superflue. Il craint qu'elle puisse être dangereuse dans la mesure où l'article 12 envisage le cas d'enfants emmenés dans un Etat tiers.

The Chairman agreed that the reference in article 20 to article 12 might have to be broadened somewhat in the light of the new text, and he referred this point to the Drafting Committee. Article 20 having been adopted, he opened discussion on article 21.

Article 21 was read.

Mr Leal (Canada) stated his wish that an alternative to the word 'organise', occurring in the first paragraph of article 21, be found.

The Chairman thought that an issue of principle had been raised by Mr Leal, which he should discuss first with Mr Chatin and the Rapporteur.

Le Rapporteur souligne une légère discordance entre les textes anglais et français. Alors que le troisième alinéa du texte français mentionne les «autorités compétentes dans leur Etat», le même paragraphe du texte anglais mentionne seulement «*the competent authorities*».
Mlle Pérez-Vera suggère d'aligner le texte anglais sur le texte français.

The Chairman agreed with the Rapporteur that it was inappropriate to refer to Central Authorities initiating or assisting in the institution of proceedings 'either directly or through their competent authorities', as had been done in article 21(3). He suggested that these words be replaced by 'either directly or through any appropriate agency'. He noted that no further points remained, and he declared that article 21(2) and (3) had been adopted, subject to the amendment suggested by the Rapporteur in article 21(3) and the resultant amendment which would be required in the French text of that paragraph. He then directed the attention of delegates to Working Document No 77.

Working Document No 77 was read.

The Chairman explained that two points were at issue here. Firstly, the existing French text of article 17 contained, within square brackets, the words '*dans une procédure non contradictoire*', while the English contained no such reference. Secondly, both the English and French texts referred to a reservation which was to be added.
Since it was generally undesirable to have reservations in the Convention, the Chairman had attempted to find a compromise, with the help of Mr Chatin and Mr Deschenaux. Thus, the proposal in Working Document No 77 implied the withdrawal of any reservation concerning article 17. However, since its discussion would require the reopening of earlier discussion, he asked whether any delegate was opposed to the reopening of the debate. Since no opposition was indicated, the Chairman reopened the discussion of article 17 on the basis proposed in Working Document No 77.

Mr van Boeschoten (Netherlands) confessed to harbouring certain doubts concerning the proposal in Working Document No 77. He noted that one of the main differences between this Convention and the Strasbourg Convention was that the former did not, in its present form, envisage that a prior decision on custody should be a ground for refusing the return of a child. If the proposal in Working Document No 77 was adopted, and the opportunity for a reservation thereby removed, he was concerned that European States might decide to ratify only the Strasbourg Convention, which was couched in terms of the recognition and enforcement of decrees, and sought the same end (*i.e.* the return of a child) by means of different techniques.
Working Document No 77, at first glance, appeared to contain only evidential matters. To this extent, it was redundant so far as the Netherlands were concerned, since a Dutch court could always have regard to the material grounds which underlay a decision on custody. If, however, it was to be construed as presenting a further ground of refusal, such a ground should be added to article 13 and not placed within the context of article 17.

The Chairman noted that these issues had been extensively debated previously, and that the present discussion should be limited to a few speakers only.

M. Chatin (France) exprime l'appui de sa délégation à la proposition du Document de travail No 77. Cette proposition lui paraît être utile, car la solution précédemment adoptée par la Commission était boiteuse, puisqu'elle prévoyait une faculté de réserve.
Puis, il explique que, si un enfant a été déplacé de France aux Pays-Bas, par exemple, et qu'apparaisse dans ce pays une décision de justice sur la garde, celle-ci sera forcément soit postérieure au déplacement, soit antérieure. Si cette décision est postérieure, elle est entachée de fraude et doit être considérée comme sans intérêt. Et, si elle est antérieure, elle n'aura été suivie d'aucune application pratique, et ne sera donc qu'«une décision de vitrine». Ce d'autant plus que le propre des décisions en matière de garde est qu'elles sont toujours révisables.
Il est donc logique de n'accorder autorité à aucune de ces sortes de décisions. Par contre, il peut être opportun de laisser le juge en prendre connaissance pour y puiser éventuellement des informations utiles à la décision qu'il devra rendre. Et c'est ce que prévoit précisément la proposition du Document de travail No 77.

Mr Minami (Japan) asked why a court which had already decided on the merits of a question regarding custody should eventually decide to return the child, contrary to the terms of its prior decision. Moreover, he was unclear as to the extent of Working Document No 77's scope. In this regard, he noted that there were many different aspects concerning the merits of judicial decisions, but that article 13 permitted a judicial or administrative authority to have regard to only certain aspects of the merits. Therefore, if the proposal in Working Document No 77 were adopted, it

should be made clear that only such limited aspects of the reasons for a prior decision should be considered by the judicial or administrative authorities of the requested State.

The Chairman understood that Mr Minami was in favour of article 17 containing a reference also to article 20, and he proposed that such an addition accordingly be made to the text.

Mr Leal (Canada) sought to reply to Mr Minami's question as to why courts should be asked in effect to change their prior decisions. In his view, the answer was that decisions on matters of custody should never be regarded as final, since circumstances change and decisions ought to take account of this.

M. Barile (Italie) dit son entier accord avec les observations du Délégué japonais.

M. Espinar (Espagne), déclarant compléter à l'intention du Délégué japonais les explications déjà données par M. Leal, rappelle que le problème à l'origine de l'article 17 était la force à reconnaître aux décisions internes. Il a paru que, chaque fois que le juge recevrait une requête, il saurait par là qu'un élément nouveau est intervenu en ce qui concerne la garde. Or les décisions de garde sont toujours provisoires. De plus, il ne faut pas se cacher que la décision dont il sera excipé le plus souvent ne sera qu'une décision obtenue par défaut. La position du Document de travail No 77 a pour mérite de supprimer de façon logique l'obstacle de ces décisions à l'application de la Convention.

Mr Savolainen (Finland) thought that the proposed wording in Working Document No 77 could give rise to a misunderstanding. To state that a prior decision relating to custody should not be a ground for refusing to return a child did not take account of the case where, after abduction, a decision was rendered on the merits of the issue of custody in the State of the child's habitual residence, whereby the abductor became the sole lawful custodian of the child. In this event, such a decision *must* be a ground for refusing the return of the child.

The Chairman replied that Mr Savolainen had really raised a point of detail which should be referred to the Drafting Committee.

Le Secrétaire général adjoint demande s'il est justifié de limiter aux autorités administratives ou judiciaires la possibilité de prendre en considération les décisions intervenues. Cette limitation signifie-t-elle que l'Autorité centrale sera, elle, obligée de renvoyer l'enfant?

The Chairman asked the Deputy Secretary general whether he was proposing that the Central Authorities, as well as the judicial or administrative authorities of the requested State should be permitted to take account of the reasons for a prior decision on custody. He doubted whether this point should be considered when the issue was put to the vote, but suggested that the Drafting Committee might wish to consider it.

Mr Walsh (Ireland) felt that the point raised by Mr Savolainen had been effectively covered in Working Document No 77. He observed that it would be somewhat strange if a judicial or administrative authority were to order the return of a child in the full knowledge that an abductor had been vested with full rights to custody, whereas if the judicial or administrative authority was unaware that the abductor had been given custody, the question should most certainly be reopened.

The Chairman asked that Working Document No 77 be put to the vote.

Vote

Working Document No 77, subject to the addition in the text of the proposed article 17 of a reference to article 20, was approved by a vote of 16 in favour (Australia, Austria, Belgium, Canada, Czechoslovakia, Egypt, Finland, France, Federal Republic of Germany, Greece, Ireland, Luxemburg, Portugal, Spain, Switzerland, United Kingdom), 6 against (Denmark, Italy, Japan, Netherlands, Sweden, Venezuela), with 2 abstentions (Norway, United States).

The Chairman then directed the attention of the meeting to article 22.

Article 22 was read.

Miss Selby (United States) noted that the reference to 'proceedings to which the Convention refers' would cover a whole host of proceedings concerning custody and access. It should be made clear that the prohibition of any requirement for a security, bond or deposit did not extend to, for example, a guarantee bond in connection with the exercise of access rights.

The Chairman observed that the text of article 18 of the draft Convention was rather different from article 22, as proposed by the Drafting Committee, and he asked Mr Leal to explain the discrepancy.

Mr Leal (Canada) explained that the wording had been changed in order to reflect the suggestion of Mr Walsh that the continuation of judicial proceedings (*e.g.* appeals) as well as their initiation should be covered. Since the insertion of words such as 'initiation and continuation' would have unduly complicated the text of the article, the committee had felt that 'in the proceedings' would be adequate. With reference to Miss Selby's point, he conceded that the proposed text might have raised inadvertently another problem, but that it was not intended to preclude the possibility of requiring a guarantee bond from the person exercising access rights.

Mr Dyer (First Secretary at the Permanent Bureau) observed that the text of article 22, as proposed by the Drafting Committee, was the same as that in article 16 of the Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations. In his view, the phraseology should not be construed as precluding the requirement of guarantee bonds in matters of access rights, since the provision referred to the payments of 'costs and expenses', which did not include such guarantee bonds.

The Chairman felt that the Drafting Committee, while taking account of Mr Walsh's point during the first reading of the draft Convention, might inadvertently have borrowed a formula which was inappropriate for this Convention. It was necessary to make it clear that no security, bond or deposit should be required to guarantee the payment of costs and expenses in proceedings within the scope of the Convention under discussion.

Mr Walsh (Ireland) opined that 'costs and expenses' bore a precise meaning which did not extend to guarantee bonds concerning access. Such bonds were merely required as a guarantee of good conduct by the party exercising access rights.

The Chairman replied that the requirement of a guarantee bond in the context of the exercise of access rights had not

been precluded by the original text of article 18. It was certainly not the intention of the meeting to exclude the possibility that guarantee bonds could be required in the context of access rights.

Mr Walsh (Ireland) said that he was simply putting forward a suggestion from the practical point of view of the bench. The fact was that a guarantee bond was never part of the 'costs and expenses' in proceedings. However, he had no objection to any change being made for purposes of clarification.

Mr van Boeschoten (Netherlands) commented that the phraseology of article 22 had become so wide that it might be construed as preventing a lawyer requesting a deposit from his own client! It should perhaps be stated that this was not envisaged.

M. Chatin (France) observe que la délégation américaine manifeste un souci certain au sujet des cautions de sûreté destinées à protéger l'exercice du droit de visite. Mais, fait-il observer, si la Convention entre en application, il ne devrait plus être besoin de pareilles cautions. Et il espère bien que certaines cautions d'un montant souvent abusif, empêchant l'exercice effectif du droit de visite, disparaîtront ainsi.

The Chairman observed that a number of issues of principle had arisen which required a period of reflection, and he proposed that the meeting adjourn for 10 minutes.

The Chairman, resuming the debates, said that he had discussed the drafting of the first paragraph of article 21 with the interested delegates, and now suggested that the text should read in English: 'An application to make arrangements organising or securing the effective exercise . . .'. The French text should be amended to the same effect so as to read: '*Une demande visant l'organisation de la protection de l'exercise . . .*'.
In the absence of opposition, the Chairman declared the first paragraph of article 21 adopted.
He now proceeded to examine article 22. The Chairman said that there were mixed issues here. The main point was that this article, which excluded securities, bonds and deposits required to guarantee the payment of costs in proceedings under the Convention, in no way prejudged the requirements by certain States of deposits for the protection of the applicant's visiting rights. He asked the Rapporteur to speak briefly to this point.

Le Rapporteur précise que l'article 22 envisage ce qu'on appelle les cautions *judicatum solvi* dans les Etats continentaux. Ces cautions sont tout à fait différentes des garanties monétaires qui peuvent être parfois exigées pour la protection du droit de visite.
Mlle Pérez-Vera indique que ce point sera naturellement mentionné dans le Rapport, si cela apparaît comme suffisant.

The Chairman asked whether a reference to this matter in the Report would help Miss Selby.

Miss Selby (United States) indicated that such a reference would be satisfactory.

The Chairman said that the next point was a drafting point. There was a difference between the drafting of article 22 proposed by the Drafting Committee and the original article 18. It had now been agreed, as Mr Justice Walsh had suggested, not to refer to the *initiation* of judicial proceedings. But, it might be desirable to return to a text closer to the original draft. He suggested: no security, bond or deposit, however described, shall be required to guarantee the payment of costs or expenses *in the context of judicial or administrative proceedings falling within the scope of the Convention.*

Mr Leal (Canada), as Chairman of the Drafting Committee, agreed with this suggestion.

Mr Savolainen (Finland) said that he was very impressed by the point raised by Mr van Boeschoten relating to the costs of advocates. It was better to say 'arising from judicial or administrative proceedings' rather than 'in the context of' to cover this point.

Mr van Boeschoten (Netherlands) said he was not quite sure if this modification would resolve the difficulty. He said he would be content with a mention of the problem in the Report.

Mr Savolainen (Finland) agreed to this.

The Chairman then declared article 22 in the English text with the proposed modifications adopted, and for the French text to be referred to the Drafting Committee.

Article 23 was read.

The Chairman asked if there were any observations on article 23. In the absence of opposition, he declared article 23 adopted.

Article 24 was read.

In the absence of opposition, the Chairman declared article 24 adopted.

Article 25 was read.

The Chairman asked whether there were any observations on article 25.

Mr Creswell (Australia) asked why the term 'in the territory of' figured in the second line of the English text, whereas an equivalent expression did not appear in the French text.

Mr Leal (Canada) said that the difference had no further significance here than it did in the original article 21. He had no particular answer on this point.

The Chairman asked whether substituting the word 'within' for 'in the territory of' would be acceptable. In the absence of opposition, and with that alteration, he declared article 25 adopted.

Article 26 was read.

The Chairman observed that the reservation in square brackets was in relation to the *second* paragraph of article 26, and thus the square brackets should be transferred to the end of the second paragraph.

Mr van Boeschoten (Netherlands) proposed a modification in the second to last line of the third paragraph, because the child itself, legally represented, might not be a party to the proceedings.

The Chairman asked Mr van Boeschoten whether he could suggest a textual amendment.

Mr van Boeschoten (Netherlands) replied that he would like to refer the point to the Drafting Committee.

The Chairman agreed to refer the point to the Drafting Committee.

M. Voulgaris (Grèce) observe que, au deuxième alinéa, le texte français parle de «Autorité centrale» au singulier et le texte anglais de «*Central Authorities*» au pluriel. Il souhaite un alignement des textes dans un sens ou dans l'autre.

The Chairman said that this point would be referred to the Drafting Committee. He pointed out another difference between the English and French texts. The English text referred to 'other public services', whereas the French text omitted the word 'other'.

M. Chatin (France) demande que la dernière phrase du deuxième alinéa mentionne «le paiement des dépenses causées ou qui *seraient* causées par le retour de l'enfant».

The Chairman said that the English text should be improved in the sense of Mr Chatin's intervention.

Miss Selby (United States) said that it might be useful to add in the third paragraph after the word 'applicant' in the fifth line, the words 'and any other costs as appropriate', in order to emphasise that the costs and expenses in question were not listed limitatively.

The Chairman asked Miss Selby if she meant that the mention of travel expenses in the present text had a narrowing effect, and if she suggested that following the general reference, these costs should be particularised, in such a way as to show that the list was not limitative.

Miss Selby (United States) agreed and added that it might be useful to say 'including any other costs' so as to emphasise this.

The Chairman said that the point was noted.

Miss Selby (United States) said that she was confused as to the exact result of discussions which had taken place concerning those costs which might be incurred by the petitioner. It had been suggested that the Central Authority might incur such costs on behalf of the applicant. She asked what the exact result of the discussions was.

The Chairman asked Mr Dyer to check whether this point had been settled or not. He added, however, that this point might well lead to difficulties in some legal systems. In the United Kingdom, with one notable exception, courts could not require a person who was not a party to proceedings, to pay costs. Courts could not order such a person to pay costs incurred by a State authority. The Chairman then turned to article 27.

Article 27 was read.

The Chairman asked whether there were any comments on this point.

Mr Růžička (Czechoslovakia) asked whether it would not be better to say, in the third line, 'the Central Authority of the *requested State*'?

Le Rapporteur explique que le Comité de rédaction a bien pris en considération la remarque du Délégué tchécoslovaque, déjà précédemment articulée. Mais il lui a paru que l'Autorité centrale qui rejette la demande devait pouvoir être aussi celle de l'Etat de départ en cas de demandes franchement abusives.

M. Chatin (France) demande un changement purement rédactionnel, déjà accepté s'agissant de l'article 13: le remplacement de «obligée» par «tenue».

Mr Leal (Canada) agreed that the English text should be modified to incorporate this suggestion.

Mr Walsh (Ireland) said that the word 'objections' in English was not right. It would be preferable to substitute the word 'reasons'. In French, the text which read '*ces objections*' seemed more neutral.

The Chairman said that as usual, Mr Justice Walsh had raised a point of great value. The text should indeed read 'reasons' instead of 'objections'. He asked whether the French text could also be modified to this effect.

M. Chatin (France) dit garder sa préférence pour le terme «objections», qui porte en filigrane le sens que la décision de rejet pourra éventuellement être rapportée.

The Chairman asked Mr Walsh whether it would be acceptable to maintain a difference in the two texts.

Mr Walsh (Ireland) said that he would prefer the words '*motifs*' in French. However, the demonstrative adjective '*ces*' made the text more neutral.

The Chairman approved the suggestion and noted that there was no opposition to substituting the word '*motifs*' in the French text. He pointed out that in French the pronoun was in fact possessive, and not demonstrative and should thus read '*ses*'.
He declared article 27 adopted, subject to these modifications.

Article 28 was read.

The Chairman asked whether there were any comments on article 28.

M. van Keymeulen (Belgique) préférerait dans la version française le terme «exiger» à «requérir», ne serait-ce que parce que le mandat de représentation est obligatoire en Belgique.

The Chairman said that he thought that the English text could be left as it stood if the Chairman of the Drafting Committee agreed.

Miss Selby (United States) said that she had an idea which might resolve difficulties arising in relation to article 26. In view of the text of article 28, which made it clear that the Central Authority could act on behalf of the applicant, it might be desirable to modify the third line of article 26 to read 'to pay the necessary expenses incurred by *or on behalf of* the applicant'.

The Chairman said that it seemed to him that even this would raise a question of substance. He asked if the delegates would agree to discuss this question without requiring an absolute majority vote.

Miss Selby (United States) said that she was not sure that this was a question of substance. This must be taken in view of the basic premise in the first line of article 26, and also in view of the fact that the Central Authority or another person, might act on behalf of the applicants. The modification would allow the expenses borne by people other than the applicant and falling within the scope of the Convention, to be covered.

The Chairman asked whether there were any objection to Miss Selby's proposal.

Le Rapporteur demande des précisions pour l'établissement

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du Rapport. Il a été précisé en tête de l'article 26 que «chaque Autorité centrale supportera ses propres frais». Et l'adjonction de «ou pour son compte» à l'alinéa 3 pourrait laisser entendre que l'Autorité centrale pourrait récupérer les frais qu'elle a engagés sur l'«enleveur» de l'enfant. Pour éviter toute confusion, le Rapporteur demande qu'il lui soit bien précisé en quel cas s'appliqueront respectivement le deuxième et le troisième paragraphes de l'article 26.

Mr Leal (Canada) said that the first paragraph of article 26 contained a general principle excluding any charge-back to the applicant. However, the purpose of paragraph 3 was to allow charges to be made against the *abductor*, incurred in cases stipulated in the second half of the paragraph. The point Miss Selby was making as he understood it was, that it surely did not matter if expenses were incurred by the applicant directly or simply on behalf of the applicant by a different person: in either case, the Central Authority should be able to charge these expenses to the abductor.

The Chairman observed that the President of the Drafting Committee had inadvertently said that *Central Authorities* might recover, but the first paragraph of article 26 contained the general principle that Central Authorities could not recover against the applicant. However paragraph 3 meant that *administrative* or *judicial* authorities might in certain cases recover expenses incurred by the applicant against the abductor. What Miss Selby meant was that these expenses might be incurred on behalf of the applicant, and not directly by him.

Le Rapporteur remercie le Délégué canadien de la clarté de ses explications. S'il a bien compris, il est nécessaire pour que l'Autorité centrale puisse récupérer par application de l'alinéa 3 les frais engagés, qu'il ait été fait usage de l'article 28, et que les frais récupérés soient exclusivement ceux résultant de l'exécution du mandat.

The Chairman asked whether any issues relating to article 26 remained.

Mr van Boeschoten (Netherlands) proposed a textual amendment to the last paragraph of article 26.

The Chairman put to the vote Miss Selby's proposal to add to the last paragraph of article 26 'incurred by or on behalf of the applicant' (in the fifth line of the third paragraph).

Vote

17 Countries voted in favour of this insertion (Australia, Austria, Belgium, Canada, Czechoslovakia, Denmark, Egypt, Federal Republic of Germany, Ireland, Norway, Portugal, Spain, Sweden, United Kingdom, United States, Venezuela, Yugoslavia), none against, with 8 abstentions (Finland, France, Greece, Italy, Japan, Luxemburg, Netherlands, Switzerland). As a result of this vote the motion was carried, and the words 'incurred by or on behalf of the applicant' *were inserted in the fifth line of paragraph 3 of article 26.*

Miss Pripp (Sweden) said that she would like to hear the interpretation which was finally to be given to article 26 as a result of the long discussions in preceding meetings on this article.

The Chairman asked Miss Pripp to phrase her request in more precise terms.

Miss Pripp (Sweden) referred to the fact that the second paragraph of article 26 excluded in particular payment from the applicant towards the costs and expenses of proceedings or those arising *from the participation of legal counsel* or advisers. Miss Pripp suggested that the interpretation was that the Central Authorities could not be obliged to bear the cost of counsel taken from outside the State Legal Aid System, if the legal counsel were not applied to by the Central Authority. If counsel were taken from outside the Legal Aid System, without the approval of the Central Authority, the applicant should bear the costs.

Mr Leal (Canada) said that in order to give a helpful explanation, he would need to go back a little. The Drafting Committee had left article 26 paragraph 1 unchanged. Then, in the re-drafting of paragraph 2, the *chapeau* of paragraph 2 had been combined with the former paragraph 6 of the original article 22. The second sentence of paragraph 2 reflected the acceptance by the Commission of Mr Jenard's proposal, and stated in particular, that Central Authorities could not require payment from the applicant of costs of proceedings and (where applicable) costs arising from participation of legal counsel or advisers. The effect of the provision was that without a reserve, if legal counsel were applied to by the Central Authority outside the Government Service, Central Authorities could not charge these costs to the applicant. For this reason, the Commission decided that a reservation should be possible on that point. What the reservation would say (although the text had not yet been prepared for distribution) was that States would be able to charge-back for counsel taken outside the State system. The final sentence of paragraph 2 was once again an exception to the general principle of no charge-back to the applicant. Then paragraph 3 made for the possibility of making a charge-back, within the prescribed limit, to the abductor.

The Chairman, in reply to Miss Pripp, referred to the Belgian proposal in Working Document No 91, and to Working Document No 57 suggesting the possibility of a reservation, which had been approved by the Commission. The discussion related now only to paragraph 3.

M. Chatin (France) attire l'attention sur une maladresse rédactionnelle. Les dépenses récupérables par l'Autorité centrale sont indiquées fin de l'article 26 comme étant «celles qui seraient causées par le retour de l'enfant». L'expression «*retour de l'enfant*» paraît au Délégué français être inadéquate. Interprétée largement, elle pourrait aboutir à vider de son contenu pratique la proposition de l'alinéa premier. Aussi, propose-t-il qu'il soit précisé qu'il s'agit «des dépenses causées ou qui seraient causées par *les opérations matérielles de retour de l'enfant*».

Mr Creswell (Australia) said that a possible way of meeting this point would be to re-phrase the last line, so as to say 'expenses incurred . . . in giving effect to an order to return the child'.

The Chairman agreed with Mr Creswell and referred the point to the Drafting Committee.

Mr Minami (Japan) said that he was worried about the fact that the first line of paragraph 2 referred to 'Central Authorities and other public services'. The draft had referred to other *administrative authorities*, which clearly excluded judicial authorities. With the text as it now stood, he did not know whether judicial authorities were or not included. If they were, he did not understand why article 25 existed. He suggested a re-phrasing to clarify the relationship between articles 24 and 25.

Mr Leal (Canada) replied on this point, that there might well be public services which were *not* administrative authorities, for instance, the police service. But there should be no charge-back for costs incurred by these services.

Le Rapporteur explique que l'expression «services publics» a été choisie afin d'écarter toute idée que l'article 26, alinéa 2, pourrait concerner les autorités administratives compétentes dans certains systèmes juridiques pour statuer sur les demandes de retour de même que les tribunaux judiciaires dans d'autres systèmes juridiques.

Mr Minami (Japan) accepted this explanation.

The Chairman considered that article 26, subject to the drafting point referred to the Drafting Committee, was adopted.

Article 29 was read.

The Chairman asked whether there were any comments on article 29.

Mr Walsh (Ireland) said that it might be useful to indicate, in order to avoid the activity of busy-bodies, that the persons referred to in the first line of article 29 were those persons, institutions and bodies *having an interest to act.*

The Chairman said that he was sympathetic to the idea, but pointed out that most legal systems had a rule requiring an interest on behalf of the person making a direct application. So it would be preferable to leave this question to the law of each State.

Miss Selby (United States) was puzzled by the reference to a breach of *access rights* under the Convention. It appeared to her that the Convention had not provided for a direct action in breach of access rights, but simply a mechanism facilitating the exercise of these rights.

M. Chatin (France) dit ne pas comprendre l'inquiétude de Mlle Selby sur ce point.

The Chairman explained that Miss Selby was questioning whether there should be a reference to access rights in article 29, or whether this reference should be deleted.

M. Chatin (France) dit qu'il serait opposé à l'élimination de ces mots.

The Chairman said that he felt that this was a question of substance. He said that in view of the facultative terms 'shall not preclude' there was no harm in leaving this reference to access rights.

Miss Selby (United States) said that she was just wondering *what* this referred to, since no such action had been provided for under the Convention. And what difference did saying 'under the Convention' make?

The Chairman said that he did not think that this was what the text actually said. The text did not say 'a breach of access rights in judicial proceedings under the Convention', but simply referred to a breach in the sense of the Convention. The article merely imposed a certain caution. There was no harm in maintaining the reference.

Miss Selby (United States) withdrew the suggestion.

The Chairman declared article 29 adopted.

Article 30 was read.

Mr Jones (United Kingdom) said that he wished to raise a question which was certainly considered as a question of substance, since it had been voted upon. After discussion with the delegates principally concerned, particularly with Mr Justice Walsh, he thought that there had been a misunderstanding as to the effect of the vote upon the wording of the text on which the vote had taken place.

Mr Walsh (Ireland) said that he had suggested substituting for *'may* be admissible', *'shall* be admissible'.

The Chairman said he thought that this was a case of pure error. The text made no sense with the word 'may'. Observing that there was no opposition to reopening the discussion on this point, he asked if there was any opposition that the text read 'shall be'. No objection was raised and it was agreed that the text should be amended accordingly.

M. Voulgaris (Grèce) s'étonne de ne pas trouver dans le texte français la traduction de la précision «*in accordance with the terms of this Convention*».

Mr Leal (Canada), as Chairman of the Drafting Committee, agreed that the French text should be amended.

Miss Pripp (Sweden) said that as a small drafting point, she would prefer to see the word 'concerned' added after 'courts or administrative authorities' in the last sentence of article 30. Otherwise, the text was too wide.

The Chairman, noting that in English the word 'relevant' would be preferable to 'concerned', said that the point was noted and referred to the Drafting Committee. The meeting was suspended for 10 minutes awaiting the arrival of Working Document No 78 (articles 31 to 45 of the proposal of the Drafting Committee). The meeting was resumed on distribution of the document.

The meeting was closed at 12.30 p.m.

Procès-verbal No 17

Distribué le 23 octobre 1980 (après-midi)

Proposition finale du Comité de rédaction

PROJET DE CONVENTION SUR LES ASPECTS CIVILS DE L'ENLÈVEMENT INTERNATIONAL D'ENFANTS

Les Etats signataires de la présente Convention,

Profondément convaincu que l'intérêt de l'enfant est d'une importance primordiale pour toute question relative à sa garde,

Désirant protéger l'enfant, sur le plan international, contre les effets nuisibles d'un déplacement ou d'un non-retour illicites et établir des procédures en vue de garantir le retour immédiat de l'enfant dans l'Etat de sa résidence habituelle, ainsi qu'assurer la protection du droit de visite,

Ont résolu de conclure une Convention à cet effet, et sont convenus des dispositions suivantes:

CHAPITRE I — CHAMP D'APPLICATION DE LA CONVENTION

Article premier

La présente Convention a pour objet:

a d'assurer le retour immédiat des enfants déplacés ou retenus illicitement dans tout Etat contractant; et

b de faire respecter effectivement dans les autres Etats contractants les droits de garde et de visite existant dans un Etat contractant.

Article 2

Les Etats contractants prennent toutes mesures appropriées pour assurer, dans les limites de leur territoire, la réalisation des objectifs de la Convention. A cet effet ils doivent recourir à leurs procédures d'urgence.

Article 3

Le déplacement ou le non-retour d'un enfant est considéré comme illicite:

a lorsqu'il a lieu en violation d'un droit de garde, attribué à une personne, une institution ou tout autre organisme, seul ou conjointement par le droit de l'Etat dans lequel l'enfant avait sa résidence habituelle immédiatement avant son déplacement ou son non-retour; et

b que ce droit était exercé de façon effective, seul ou conjointement, au moment du déplacement ou du non-retour, ou l'eût été si de tels événements n'étaient survenus.

Le droit de garde visé en *a* peut notamment résulter d'une attribution de plein droit, d'une décision judiciaire ou administrative, ou d'un accord en vigueur selon le droit de cet Etat.

Distributed on 23 October 1980 (afternoon)

Final proposal of the Drafting Committee

DRAFT CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

The States signatory to the present Convention,

Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,

Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence and to secure protection for rights of access,

Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions –

CHAPTER I — SCOPE OF THE CONVENTION

Article 1

The objects of the present Convention are:

a to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

b to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

Article 2

Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available.

Article 3

The removal or the retention of a child is to be considered wrongful where:

a it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

b at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph *a*, above, may arise in particular by operation of law or by reason of judicial or administrative decisions, or by reason of agreements having legal effect under the law of that State.

Article 4

La Convention s'applique à tout enfant âgé de moins de 16 ans qui avait sa résidence habituelle dans un Etat contractant immédiatement avant l'atteinte aux droits de garde ou de visite.

Article 5

Au sens de la présente Convention:

a le «droit de garde» comprend le droit portant sur les soins de la personne de l'enfant, et en particulier celui de décider de son lieu de résidence;

b le «droit de visite» comprend le droit d'emmener l'enfant pour une période limitée dans un lieu autre que celui de sa résidence habituelle.

CHAPITRE II — AUTORITÉS CENTRALES

Article 6

Chaque Etat contractant désigne une Autorité centrale chargée de satisfaire aux obligations qui lui sont imposées par la Convention.
Un Etat fédéral, un Etat dans lequel plusieurs systèmes de droit sont en vigueur ou un Etat ayant des organisations territoriales autonomes, est libre de désigner plus d'une Autorité centrale et de spécifier l'étendue territoriale des pouvoirs de chacune de ces Autorités. L'Etat qui fait usage de cette faculté désigne l'Autorité centrale à laquelle les demandes peuvent être adressées en vue de leur transmission à l'Autorité centrale compétente au sein de cet Etat.

Article 7

Les Autorités centrales doivent coopérer entre elles et promouvoir une collaboration entre les autorités compétentes dans leurs Etats respectifs, pour assurer le retour immédiat des enfants et réaliser les autres objectifs de la présente Convention.
En particulier, soit directement, soit avec le concours de tout intermédiaire, elles doivent prendre toutes les mesures appropriées:

a pour localiser un enfant déplacé ou retenu illicitement;

b pour prévenir de nouveaux dangers pour l'enfant ou des préjudices pour les parties concernées, en prenant ou faisant prendre des mesures provisoires;

c pour assurer la remise volontaire de l'enfant ou faciliter une solution amiable;

d pour échanger, si cela s'avère utile, des informations relatives à la situation sociale de l'enfant;

e pour fournir des informations générales concernant le droit de leur Etat relatives à l'application de la Convention;

f pour introduire ou favoriser l'ouverture d'une procédure judiciaire ou administrative, afin d'obtenir le retour de l'enfant et, le cas échéant, de permettre l'organisation ou l'exercice effectif du droit de visite;

g pour accorder ou faciliter, le cas échéant, l'obtention de l'assistance judiciaire et juridique, y compris les services d'un avocat;

h pour assurer, sur le plan administratif, si nécessaire et opportun, le retour sans danger de l'enfant;

i pour se tenir mutuellement informées sur le fonctionnement de la Convention et, autant que possible, lever ses obstacles éventuellement rencontrés lors de son application.

Article 4

The Convention shall apply to any child under the age of 16 years who was habitually resident in a Contracting State immediately before any breach of custody or access rights.

Article 5

For the purposes of this Convention:

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

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

CHAPTER II — CENTRAL AUTHORITIES

Article 6

A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.
Federal States, States with more than one system of law or States having autonomous territorial organizations shall be free to appoint more than one Central Authority and to specify the territorial extent of their powers. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which applications may be addressed for transmission to the appropriate Central Authority in that State.

Article 7

Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.

In particular, either directly or through any intermediary, they shall take all appropriate measures –

a to discover the whereabouts of a child who has been wrongfully removed or retained;

b to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;

c to secure the voluntary return of the child or to bring about an amicable resolution of the issues;

d to exchange, where desirable, information relating to the social background of the child;

e to provide information of a general character as to the law of their State in connection with the application of the Convention;

f to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organizing the effective exercise of rights of access;

g where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the services of legal counsel and advisers;

h to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;

i to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.

Article 8

La personne, l'institution ou l'organisme qui prétend qu'un enfant a été déplacé ou retenu en violation d'un droit de garde peut saisir soit l'Autorité centrale de la résidence habituelle de l'enfant, soit celle de tout autre Etat contractant, pour que celles-ci prêtent leur assistance en vue d'assurer le retour de l'enfant.
La demande doit contenir:

a des détails portant sur l'identité du demandeur, de l'enfant et de la personne dont il est allégué qu'elle a emmené ou retenu l'enfant;

b la date de naissance de l'enfant;

c les motifs sur lesquels se base le demandeur pour réclamer le retour de l'enfant;

d toutes informations disponibles concernant la localisation de l'enfant et l'identité de la personne avec laquelle l'enfant est présumé se trouver.

La demande peut être accompagnée ou complétée par:

e une copie authentifiée de toute décision ou de tout accord utiles;

f une attestation ou une déclaration avec affirmation émanant de l'Autorité centrale, ou d'une autre autorité compétente de l'Etat de la résidence habituelle, ou d'une personne qualifiée, concernant le droit de l'Etat en la matière;

g tout autre document utile.

Article 9

Quand l'Autorité centrale qui est saisie d'une demande en vertu de l'article 8 a de bonnes raisons de penser que l'enfant se trouve dans un autre Etat contractant, elle transmet la demande directement et sans délai à l'Autorité centrale de cet Etat contractant et en informe l'Autorité centrale requérante ou, le cas échéant, le demandeur.

Article 10

L'Autorité centrale de l'Etat où se trouve l'enfant prendra ou fera prendre toute mesure propre à assurer son retour volontaire.

Article 11

Les autorités judiciaires ou administratives de tout Etat contractant doivent procéder d'urgence en vue du retour de l'enfant.
Lorsque l'autorité judiciaire ou administrative saisie n'a pas statué dans un délai de six semaines à partir de sa saisine, le demandeur ou l'Autorité centrale de l'Etat requis, de sa propre initiative ou sur requête de l'Autorité centrale de l'Etat requérant,peut demander une déclaration sur les raisons de ce retard. Si la réponse est reçue par l'Autorité centrale de l'Etat requis, cette Autorité doit la transmettre à l'Autorité centrale de l'Etat requérant ou, le cas échéant, au demandeur.

Article 12

Lorsqu'un enfant a été déplacé ou retenu illicitement au sens de l'article 3 et qu'une période de moins d'un an s'est écoulée à partir du déplacement ou du non-retour au moment de l'introduction de la demande devant l'autorité judiciaire ou administrative de l'Etat contractant où se trouve l'enfant, l'autorité saisie ordonne son retour immédiat.
Après l'expiration du délai fixé à l'alinéa précédent, l'autorité judiciaire ou administrative doit aussi ordonner le retour de l'enfant, à moins qu'il ne soit établi que l'enfant

Article 8

Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.
The application shall contain –

a details concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child;

b the date of birth of the child;

c the grounds on which the applicant's claim for return of the child is based;

d all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be.

The application may be accompanied or supplemented by –

e an authenticated copy of any relevant decision or agreement;

f a certificate or an affidavit emanating from a Central Authority, or other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State;

g any other relevant document.

Article 9

If the Central Authority which receives an application referred to in article 8 has good reason to believe that the child is in another Contracting State, it shall directly and without delay transmit the application to the Central Authority of that Contracting State and inform the requesting Central Authority, or the applicant, as the case may be.

Article 10

The Central Authority of the State where the child is to be found shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child.

Article 11

The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.
If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.

Article 12

Where a child has been wrongfully removed or retained in terms of article 3 and, at the date of the introduction of proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.
The judicial or administrative authority shall also order the return of the child after the expiration of the time period set forth in the preceding paragraph unless it is demonstrated

s'est intégré dans son nouveau milieu.
Lorsque l'autorité judiciaire ou administrative de l'Etat requis a des raisons de croire que l'enfant a été emmené dans un autre Etat, elle peut suspendre la procédure ou rejeter la demande en retour de l'enfant.

Article 13

Nonobstant les dispositions de l'article précédent, l'autorité judiciaire ou administrative de l'Etat requis n'est pas tenue d'ordonner le retour de l'enfant, lorsque la personne, l'institution ou l'organisme qui s'oppose à son retour établit:

a qu'à l'époque du déplacement ou du non-retour, le demandeur qui avait le soin de la personne de l'enfant n'exerçait pas effectivement le droit de garde ou avait consenti ou acquiescé postérieurement à ce déplacement ou à ce non-retour; ou

b qu'il existe un risque grave que le retour de l'enfant ne l'expose à un danger physique ou psychique, ou de toute autre manière ne le place dans une situation intolérable.

L'autorité judiciaire ou administrative peut aussi refuser d'ordonner le retour de l'enfant si elle constate que celui-ci s'oppose à son retour et qu'il a atteint un âge et une maturité où il se révèle approprié de tenir compte de cette opinion.

Dans l'appréciation des circonstances visées dans cet article, les autorités judiciaires ou administratives doivent tenir compte des informations fournies par l'Autorité centrale ou toute autre autorité compétente de l'Etat de la résidence habituelle de l'enfant sur sa situation sociale.

that the child is now settled in its new environment.
Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

Article 13

Notwithstanding the provisions of the preceding article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that:

a at the time of the removal or retention, the applicant which had the care of the person of the child was not actually exercising the custody rights, or had consented to or subsequently acquiesced in the removal or retention; or

b there is a grave risk that his or her return would expose the child to physical or phychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.
In considering the circumstances referred to in this article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

Documents de travail Nos 80 à 82
Working Documents Nos 80 to 82

Distribués le 23 octobre 1980 (après-midi)
Distributed on 23 October 1980 (afternoon)

No 80 – Proposal of the United States delegation

Proposed alternative text for article 36:

Nothing in this Convention shall prevent two or more States, in order to limit the restrictions to which the return of the child may be subject, from agreeing among themselves to derogate from any provisions of this Convention which may imply such a limitation.

NOTE: *This proposal is intended as a drafting alternative only, in order to clarify the intention of article 36.*

No 81 – Proposal of the Chairman with the consent of the delegations of Austria, the Federal Republic of Germany, Switzerland and the United Kingdom
– Proposition du Président avec l'accord des délégations de la République fédérale d'Allemagne, de l'Autriche, du Royaume-Uni et de la Suisse

Article 35

This Convention shall apply as between Contracting States only to wrongful removals or retentions occurring after its entry into force in those States.
Where a declaration has been made under article 40 the reference in the preceding paragraph to a Contracting State shall be taken to refer to the territorial unit or units of that State in relation to which this Convention extends.

Article 35

Cette Convention ne doit s'appliquer, entre Etats contractants, qu'aux enlèvements ou non-retours illicites qui se sont produits après son entrée en vigueur dans ces Etats.
Si une déclaration a été faite conformément à l'article 40, la référence de l'alinéa précédent à un Etat contractant signifie l'unité territoriale ou les unités auxquelles cette Convention s'applique.

No 82 – Proposal of the Finnish delegation

Article 4

The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

Procès-verbal No 18

Séance du jeudi 23 octobre 1980 (après-midi)
Meeting of Thursday 23 October 1980 (afternoon)

The meeting was opened at 3.20 p.m. Mr Anton (United Kingdom) was in the Chair. Miss Pérez-Vera (Spain) was Rapporteur.

The Chairman turned the attention of delegates to article 31, as proposed in Working Document No 78.

Article 31 was read.

Mr van Boeschoten (Netherlands) informed the delegates that the Applications Clauses Committee had decided against proposing any further clauses akin to those of article 31, even although the law of the requesting State and the administrative authorities of the requesting State were mentioned in other parts of the Convention. Delegations from Federal States had decided that further clauses of this nature were not necessary. However, he noted that a proposal to amend article 35 would probably be made, perhaps to the effect that a clause in similar terms be added thereto.

The Chairman announced that article 31 had been approved by the Commission.

Article 32 was read.

The Chairman, in the absence of any intervention from the floor, declared article 32 to have been adopted.

Article 33 was read.

The Chairman declared article 33 to have been adopted.

Article 34 was read.

The Chairman noted that the word 'of' should be inserted between the words 'or' and 'organising' in the final line of article 34.

Mr Minami (Japan) was concerned that the words 'other law' in the second sentence of article 34 should be clearly understood as meaning the law 'which is consistent with the purposes of this Convention', and he suggested that these words be added. Otherwise, he feared that Contracting States might apply their own internal law which was less favourable in its terms than the provisions of the Convention, and thus use article 34 in order to evade the purposes of the Hague Convention.

The Chairman pronounced himself to be sympathetic to Mr Minami's observation, but found that the present wording adequately expressed the idea that the 'other law' concerned should be consistent with the purposes of the Convention. However, he asked the Rapporteur to make this point clear in the Report.

Mr Dyer (First Secretary at the Permanent Bureau) pointed out that in many respects, article 16 of this Convention (as proposed in Working Document No 75) obviated the possibility of conflict with the provisions of the 1961 Convention on the Protection of Minors. Article 4 of the 1961 Convention provided that the authorities of the State of which the minor was a national could take action in terms of their own internal law after consulting and notifying the authorities of the State of the minor's habitual residence. Article 16 of the present Convention took up the same point, since notice of a wrongful removal or retention would in fact be given to the authorities of the State of the child's habitual residence.

Miss Selby (United States) observed that the words 'organising access rights' at the end of article 34 had been added. In her view, they might conflict with the main purpose which was to return a child, since it could be claimed during judicial or administrative proceedings that the child had been abducted precisely because the exercise of access rights had not been permitted.

The Chairman replied that the second sentence of article 34 was couched in negative terms, *i.e.* 'this Convention shall not restrict'. He asked Miss Selby whether she intended to propose an amendment.

Miss Selby (United States) said that she did not, provided no serious objections to the existing text were voiced by other delegates.

The Chairman took the sense of the meeting to be that the text should remain as it was, and he declared article 34 to have been adopted. The meeting's discussion of article 35 would be deferred until receipt of the relevant Working Document, and he turned the attention of delegates to article 36.

Article 36 was read.

Miss Selby (United States) read out to the meeting the terms of Working Document No 80.

The Chairman felt that several advantages would flow from the adoption of Working Document No 80, and especially from the addition of the words 'agreeing among themselves'. Since the meeting was in agreement on this point, he referred Working Document No 80 to the Drafting Committee, and turned to article 37.

Article 37 was read.

The Chairman declared article 37 to have been adopted, no comments having been made from the floor.

Article 38 was read.

Mr Dyer (First Secretary at the Permanent Bureau) pointed out to delegates that the final drafting of article 38 had been the work of the Secretariat. Its form followed the traditional form of accession provisions in Hague Conventions, and reflected the decision of the commission that this Convention should reflect the provisions in article 39 of the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. However, the second sentence of the fourth paragraph of article 38 was additional, and was intended to meet a possible ambiguity in the Evidence Convention and make it clear that if a Member State ratified the Convention after a non-Member State had acceded to it, the Member State concerned would have to deposit a declaration of acceptance before the Convention could enter into force as between itself and the acceding State.

Mr Creswell (Australia) asked whether it was intended that Member States, when ratifying, would not have to accept *each others'* ratifications.

Le Secrétaire général adjoint indique que les Etats membres s'acceptent automatiquement dès qu'ils appartiennent à la Convention, sans acceptation mutuelle expresse.

Mr Walsh (Ireland) pointed out that article 39 referred to the Ministry of Foreign Affairs of the Netherlands, whereas article 40 referred to the Ministry of Foreign Affairs of the *Kingdom* of the Netherlands.

The Chairman asked the Secretariat to take note of Mr Walsh's point. He declared article 38 to have been adopted.

Article 39 was read.

M. Barile (Italie) se référant à l'article 39, montre que la clause qui y figure est désuète et qu'on ne l'emploie plus dans les conférences diplomatiques.

The Chairman asked the Secretariat to take note of the comments of Mr Barile. He declared article 39 to have been adopted.

Article 40 was read.

M. Barile (Italie) précise la portée de l'article 40 et des termes «modifier la déclaration»: il estime que la modification doit se faire dans le sens de l'extension aux territoires et non du retrait de ceux-ci de la Convention.

The Chairman observed that Mr Barile had raised a very important point, which however, was partly covered by the reference to possible amendments. He asked the Rapporteur to take note of what Mr Barile had said. He then asked the meeting to discuss article 35, and the proposal relating thereto in Working Document No 81.

Article 35, as proposed in Working Document No 81, was read.

The Chairman explained that the existing text of article 35(1) had emanated from a United Kingdom proposal, and that it had been put forward as a necessary basis for discussion. However, its meaning was rather obscure and did not make it clear that the Convention would apply to wrongful removals or retentions occurring before its entry into force *as between Contracting States.* Moreover, it would give rise to considerable technical difficulties whenever a Contracting State declared that the Convention would extend to only one or more of its territorial units, in terms of article 40. Thus, the Chair had felt it necessary to amend article 35, which had been done with the assistance of Mr Deschenaux, Mr Vischer and Mr Müller-Freienfels.
The Chairman felt that it would be prudent to ask delegates who were in favour of the Convention applying to abductions which occurred before its entry into force to agree to withdraw their preference and agree that the Convention should apply only to wrongful removals and retentions which occurred *after* its entry into force. If this were done, no reservation in the context of this article would be necessary.
Since no delegate objected to the reopening of discussion on this point, he invited the meeting to discuss the proposal in Working Document No 81.

Mr Vischer (Switzerland) stated firstly that the present text of article 35 was not very logical, and secondly, that the problems flowing therefrom would be aggravated wherever States containing two or more territorial units were con-

cerned. He felt that the only possible solution was that proposed in Working Document No 81, which also happened to be the normal solution for such matters in Hague Conventions.

Le Rapporteur propose que la Convention ne soit pas seulement applicable «après» mais aussi dans le délai d'*un an* avant l'entrée en vigueur de la Convention.

The Chairman conceded that he was perfectly amenable to the Rapporteur's suggestion. However, he felt that it would not be prudent to put her amendment to a vote. He observed that another advantage which would result from amending article 35 was the pressure which it could put on States to ratify the Convention quickly.

M. Barile (Italie) appuie la proposition du Rapporteur.

Mr Minami (Japan) asked why Working Document No 81 made no mention of access rights.

The Chairman explained that Working Document No 81 had been drafted in a hurry, and that the Drafting Committee would have to look at it. In his view, however, the words 'wrongful removals or retentions' met the point raised.

Mr Jones (United Kingdom) pointed out that the Drafting Committee had considered the question of access in the context of article 35 but had rejected the inclusion of any reference to access rights, since it was impossible to deal with the breach of such rights before the Convention had entered into force.

M. Chatin (France) exprime ses hésitations. L'ancienne disposition a pour but de favoriser les enfants; si l'on ne peut appliquer la Convention avant son entrée en vigueur, on fait un pas en arrière.
La préoccupation des auteurs de la proposition est d'éviter pendant un certain temps, les dispositions non uniformes entre des Etats; M. Chatin précise que la période transitoire sera très courte.

Mr Savolainen (Finland) shared Mr Chatin's doubts to some extent. He feared that, if the proposal in Working Document No 81 were adopted, the Convention might not be applicable to certain abductions. He gave as an example the abduction of a child from one Contracting State to another, and then a subsequent further abduction of the child to a third State which had recently ratified the Convention. Mr Savolainen indicated that he wished to close all such possible loopholes.

The Chairman thought that Mr Savolainen's argument really worked both ways.

Le Rapporteur accepte que l'on soumette au vote la proposition du Document de travail No 81 telle qu'elle a été amendée par le Rapporteur lui-même.

The Chairman asked that the meeting proceed to vote upon the *principle* in Working Document No 81, as compared with the principle in the existing text of article 35. The delegates should vote on Working Document No 81 as it stood, or with the addition to article 35(1) of the words proposed by the Rapporteur, *i.e.*, 'or within one year prior to that date'.

M. Chatin (France) précise que l'addition proposée par le Rapporteur peut être comprise soit dans l'article 35, soit dans la proposition contenue au Document de travail No 81; dans ce dernier cas, il faudra préciser l'ordre des votes.

The Chairman commented that he had hoped to avoid having to put a series of multiple votes, one after the other, to the meeting. He stressed that a number of issues of policy remained to be considered, as well as the new text proposed by the Drafting Committee, and that there was very little time available.

M. Chatin (France) indique au Président les trois possibilités envisagées: application avant, après ou un an avant l'entrée en vigueur de la Convention.

The Chairman, replying to Mr Chatin, announced that the proposals would be put to the vote in the order suggested by Mr Chatin.

Vote

The principle contained in Working Document No 81 was approved by a vote of 13 in favour (Australia, Austria, Canada, Denmark, Federal Republic of Germany, Ireland, Japan, Netherlands, Norway, Sweden, Switzerland, United Kingdom, Venezuela), 7 against (Belgium, Czechoslovakia, France, Greece, Italy, Luxemburg, United States), with 4 abstentions (Egypt, Finland, Portugal, Spain).

The Chairman confirmed that the delegates had decided to apply the Convention only to wrongful removals and retentions which occurred *after* the Convention had entered into force as between Contracting States. He then sent Working Document No 81 to the Drafting Committee.

Miss Selby (United States) pointed out that the same considerations as had been voiced in the context of article 35 applied to article 39.

The Chairman asked the Drafting Committee to take account of Miss Selby's point.

Mr Dyer (First Secretary at the Permanent Bureau) commented that article 40 had been approved by the Commission as former article Y. This provision had its source in article 21 of the Convention on the Law Applicable to Agency. However, since the Agency Convention used the word 'modify' which corresponded to the French, he felt that 'modify' should be substituted for 'amend' for purposes of consistency. He added that the provision in article 40 meant that a declaration could be withdrawn at any time, subject to use of the denunciation clause.

M. Barile (Italie) indique qu'il est évident que les clauses de dénonciation permettent à l'Etat fédéral de faire ce qu'il veut; il semble néanmoins que l'Etat fédéral ne pourrait faire une déclaration simple dans le but de restreindre l'application territoriale de la Convention; on ne peut se retirer de cette dernière sans se plier à la procédure de dénonciation.

Mr Leal (Canada) declared that he had always understood article 40 to mean that a State could disapply the Convention to any of its territorial units but only by using the denunciation clause. However, the denunciation clause need not come into play whenever a State wished to *extend* the application of the Convention to other territorial units.

The Chairman felt that Mr Barile's concerns might be alleviated by the provision in article 44(3). He emphasized that delegates should not discuss issues of principle concerning the final clauses of the Convention, declared article 40 to have been adopted and turned the attention of the meeting to article 41.

Article 41 was read.

Mr Dyer (First Secretary at the Permanent Bureau) noted that the terms of article 41 had been drawn from article Z, adopted by the Fourth Commission.

The Chairman pointed out that the Commission should not attempt to change formulas agreed upon in the Fourth Commission and he wondered whether Mr Creswell might prefer the substitution of the word 'or' for 'and' between the words 'judicial' and 'legislative' in article 41.

Le Secrétaire général adjoint donne quelques précisions sur l'ordre d'énumération des pouvoirs: pouvoirs législatifs, judiciaires ou administratifs sont désignés ainsi dans l'ordre logique.

The Chairman asked the Secretariat to deal with the prepositional problems of 'of' and 'to', and declared that article 41 had been adopted.

Article 42 was read eliminating any reference to article 35.

Miss Selby (United States) pointed out the need to refer also to declarations made under article 39, as well as article 40.

The Chairman asked the Secretariat to note Miss Selby's point.

Le Secrétaire général adjoint propose la formule «en vertu de l'article 40».

The Chairman stated that the Deputy Secretary General's point would be noted. He suggested that the words 'in terms of', rather than 'under', should be used to refer to article 40. He asked the Deputy Secretary General to discuss this point with Mr Creswell, and stressed that the provision *must* be in the same form as its equivalent in other conventions. He then turned to article 43.

Article 43 was read.

The Chairman noted that paragraph 2 of article 43 should refer also to article 40. He declared article 43 to have been adopted.

Article 44 was read.

M. Batiffol (France) propose de suivre l'ordre des mots anglais pour la version française.

The Chairman acknowledged Mr Batiffol's useful clarifications, and noted that in the English text, the comma occurring after 'Netherlands' should be omitted. He declared that article 44, together with the proposed amendment in the French text and the deletion of the comma from the English, was adopted.

Article 45 was read.

Le Rapporteur donne une précision concernant l'article 45, chiffre 2 et propose d'ajouter après «adhésions» le terme «déclarations».

M. Batiffol (France) précise à l'article 45, chiffre 6, que la réserve de l'article 35 doit tomber.

The Chairman agreed that the reference in article 45(6) to article 35 would have to be deleted. For his part, he wondered whether the word 'copy' in the English text was the correct translation of '*exemplaire*' in French, and he asked the Secretariat to take note of this.

Mr Minami (Japan) wondered why numbers instead of small letters had been used in articles 45 and 43. He also pointed out that the Convention was sometimes referred to as 'the present Convention', sometimes as 'this' Convention.

The Chairman explained that the practice in Hague Conventions was to refer firstly to 'the present' Convention and thereafter to 'this' Convention. However, these were matters of '*toilette*' for the Drafting Committee.

Mr Creswell (Australia) felt that the more idiomatic 'through diplomatic channels' should replace the present words 'through the diplomatic channel'.

The Chairman noted the approval of the Chairman of the Drafting Committee of Mr Creswell's proposed change. He then turned to Working Document No 79, containing the new proposals of the Drafting Committee.

Mr Leal (Canada) explained that the Drafting Committee had not accepted all the suggestions made by the Commission; 'dictates' had, of course, been accepted, but not all of the Commission's suggestions had been adopted.

The preamble to the Convention suggested in Working Document No 79 was read.

M. Rizk Salem (Egypte) indique qu'en raison du refus d'accepter une clause d'ordre public, son pays ne pourra pas signer la Convention; l'article 20 ne répond pas aux conditions de la loi islamique telle que l'Egypte la connaît.

The Chairman noted the Egyptian Delegate's position with regret.

Miss Selby (United States) was concerned that the preamble of the Convention should make it quite clear that the abduction of children was contrary to their interests, and that words to this effect should be added.

Mr Leal (Canada) expressed reservations concerning Miss Selby's suggestion. He pointed out that, in certain circumstances, the abduction of a child could be found to be in its best interests. It was in such cases that the exceptions contained in the Convention would apply.

The Chairman commented that Miss Selby's point was that abductions *in general* were against the interests of children.

Mr Walsh (Ireland) thought that the preamble should be left in the form proposed in Working Document No 79. He noted that it referred to 'harmful effects', which was a necessary formulation, since, in some cases, the abduction of children was not harmful. Since the preamble could be used for purposes of construction and its stated object was to protect children from harm the additional words proposed by Miss Selby might have the effect of qualifying the declaration in the preamble.

M. Deschenaux (Suisse) précise que «convaincu» prend s.

Mr Dyer (First Secretary at the Permanent Bureau) pointed out that the English text should contain a comma after the words 'habitual residence', occurring in the third line of the third paragraph of the preamble.

The Chairman suggested that the words 'as well as to secure' should be substituted for 'and' before the phrase 'protection for rights of access'.

Mr Creswell (Australia) suggested that the word 'international' should be inserted before 'protection' in the third paragraph of the Preamble. He felt that this was necessary in view of the decision to separate more clearly the question of access from that of wrongful removal and retention.

The Chairman replied that this point had been considered, but that it would give rise to drafting difficulties.

M. van Keymeulen (Belgique) pense que «illicite» ne prend pas de «s» en raison du «ou» qui sépare les deux termes de la phrase.

The Chairman asked that the question be referred to Mr Chatin or Mr Batiffol. He wondered whether the letter '*s*' should be added to '*illicite*'.

M. Batiffol (France) affirme qu'«illicite» ne prend pas de s.

The Chairman thought that this was a small point which the Secretariat might consider. He noted that the preamble had been approved in the form presented in Working Document No 79. He also pointed out, for the benefit of those States which wished to sign the Convention before leaving The Hague, that the articles contained in Working Document No 79 were now in their definitive form.

Article 1 was read.

M. Deschenaux (Suisse) précise qu'il serait mieux de parler de «l'article premier» plutôt que de l'article 1, selon la formule généralement consacrée dans les autres Conventions.

The Chairman declared article 1 to have been approved, subject to the substitution of '*premier*' in the French text.

Article 2 was read.

Le Secrétaire général adjoint propose de placer une virgule après «cet effet».

The Chairman felt that it was inappropriate to add a comma to the English text, and stated that article 2 had been approved, subject to the amendment proposed by the Deputy Secretary General.

Article 3 was read.

The Chairman referred to the superfluous comma which occurred in article 3(1)*a*.

M. Barile (Italie) demande que l'on insère dans le Rapport une explication concernant son Document de travail No 58.

The Chairman commented that Mr Barile had raised a point which was important also for other States. He declared article 3 to have been adopted.

Article 4 was read.

Mr Savolainen (Finland), referring to Working Document No 82, explained that it was intended to emphasise as clearly as possible that the Convention would at all times cease to apply when a child attained the age of 16, irrespective of the stage reached in any judicial or administrative proceedings. He recalled that Mr Müller-Freienfels had expressed a wish for clarification on this point. Moreover, he proposed that the opening word of article 4 should be 'this', not 'the'.

Mr Müller-Freienfels (Federal Republic of Germany) expressed his gratitude to Mr Savolainen for his proposed amendment. In his view, it was essential to make clear the meaning of the phrase 'under the age of 16'. German lawyers were not accustomed to this language, and indeed German judges had expressed a strong wish that it be clarified beyond all doubt. He therefore was strongly in favour of the meeting's accepting the drafting amendment proposed in Working Document No 82.

The Chairman asked that the meeting proceed to a vote on Working Document No 82.

Vote

Working Document No 82, subject to the oral amendment proposed by Mr Savolainen (substitution of 'this' *for* 'the'*), was accepted by a vote of 15 in favour (Australia, Austria, Canada, Denmark, Finland, Federal Republic of Germany, Ireland, Netherlands, Norway, Spain, Sweden, Switzerland, United Kingdom, United States, Venezuela), 5 against (France, Italy, Japan, Luxemburg, Portugal), with 3 abstentions (Belgium, Egypt, Greece).*

Le Secrétaire général adjoint propose la formule suivante: «Elle ne s'applique plus lorsque l'enfant aura atteint l'âge de seize ans».

M. Batiffol (France) propose la formule «cessera lorsque . . .».

The Chairman felt that this proposal might not be acceptable.

Le Rapporteur estime que la formule «cessera lorsque . . .» n'est pas suffisante et il faudrait comprendre aussi les procédures qui ne sont pas engagées et non pas seulement celles qui sont en cours.

The Chairman suggested that the translation of article 4 be agreed between the Deputy Secretary General and Mr Chatin. Subject to this, he declared article 4 to have been adopted.

Article 5 was read.

The Chairman pointed out that the comma occurring after 'child' in article 5*a* should be removed and placed after 'and'. He declared article 5 to have been adopted.

Article 6 was read.

Mr Dyer (First Secretary at the Permanent Bureau) thought that 'within' should replace 'in' at the end of article 6, paragraph 2.

The Chairman declared article 6 to have been adopted, along with the point proposed by Mr Dyer.

Article 7 was read.

The Chairman noted an inconsistency between the French and English texts in article 7(2)*f*. He recalled that, when discussing article 21, contained in Working Document No 75, the meeting had decided that the article should begin with the words 'An application to make arrangements organising or securing the effective exercise . . .'. He therefore proposed that the English text of article 7(2)*f* be amended by the addition of 'or securing' after the words 'for organising'.

Mr Jones (United Kingdom) explained that the discrepancy between the English and French texts was due simply to the fact that the Drafting Committee had not been able to consider the English text along with the French.

The Chairman declared that article 7 had been approved, subject to the amendment proposed by the Chair.

Article 8 was read.

Mr Walsh (Ireland) recalled that the meeting had agreed to refer only to the *age* of the child in article 8(2)*b*, and not to the date of birth.

Le Rapporteur se réfère aux délibérations du Comité de rédaction qui a décidé d'utiliser les termes «la date de naissance».

The Chairman suggested that article 8(2)*b* should read 'where available, the date of birth of the child'.

Mr Walsh (Ireland) agreed with the President's suggestion, and added that the disposal of cases should not be obstructed by one party's failure to provide tiny and unimportant details.

Mr Leal (Canada) explained that the Drafting Committee had decided that to add the words 'if known' to article 8(2)*b* might put a premium on slothfulness on the part of the applicant. However, he thought that the words 'where available' would be acceptable.

The Chairman referred to the United Kingdom experience that it was often extremely difficult to obtain birth certificates of people from Eastern countries which did not have a registration system similar to that in Britain. He felt that Mr Walsh's proposal was therefore a valuable one.

Mr Creswell (Australia) suggested that, since the question of age was important, the formulation 'age and, where known, the date of birth' might be appropriate.

Mr Leal (Canada) disagreed with Mr Creswell, and referred to the '*terminus a quo*' problem. Thus, a reference to 'age' was not, to his mind, a good idea.

The Chairman commented that article 8(2) was concerned with the date of *application* to the Central Authority, and that there was no reason why an application should necessarily contain a child's date of birth. However, such information would be necessary at a later stage, but not at the stage of application, since Central Authorities were unlikely to contest the validity of an application. Nevertheless, it would be wise for the meeting to agree on a qualifying word to be inserted in the text.

Mr Leal (Canada) pointed out that Mr Walsh appeared to propose the insertion of a reference to 'age', not date of birth.

Mr Walsh (Ireland) explained that this was not his intention. In his view, the addition of the words 'where known' or 'if available' would meet his point. He explained that he had simply wanted to point out a possible impediment to the effective processing of an application.

The Chairman repeated his observation that the relevant context was that of article 8, which concerned applications. He asked that those who were in favour of the addition of 'where available' or similar words in article 8(2)*b* indicate their preference by raising their right hand.

Vote

The proposal to add the words 'where available', *or similar words, to article 8(2)*b, *was approved by a hand vote of 11 in favour, 6 against.*

The Chairman confirmed that the English text of article 8(2)*b* would read 'where available, the date of birth of the child'.

M. van Keymeulen (Belgique) propose de parler de l'âge ou de la date de naissance de l'enfant.

The Chairman replied that age, from a juridical point of view, was calculated from the date of birth. He wondered whether the words '*si disponible*' would meet Mr van Keymeulen's point. He observed that the point was not whether the age of the child could be determined but whether the information concerning the child's age was actually *available* to the applicant.

M. Batiffol (France) donne une nouvelle formulation: «si on peut se la procurer».

The Chairman declared that Mr Batiffol's point concerning the French text was adopted.

M. Voulgaris (Grèce) propose de changer la formulation de l'alinéa 3 pour en montrer le caractère facultatif; il faudrait montrer clairement la distinction entre les éléments qui sont facultatifs et ceux qui sont obligatoires.

Mr Leal (Canada) commented that Mr Voulgaris was clearly correct in his observation.

Le Secrétaire général adjoint fait remarquer que la référence serait très difficile.

The Chairman stated that he would defer to the Deputy Secretary General on this point.

M. Chatin (France) propose d'insérer le terme «informations» en lieu et place du terme «détails».

The Chairman suggested that article 8(2)*a* should refer to '*information* concerning the identity of... the child'. He noted Mr Leal's assent to this suggestion. He then declared article 8 to have been adopted.

Article 9 was read.

The Chairman, in the absence of opposition, declared article 9 adopted.

Article 10 was read.

Mr Leal (Canada) said that the words 'to be' in the English text should be deleted.

The Chairman, in the absence of opposition, declared article 10 adopted with this modification.

Article 11 was read.

Mr Minami (Japan) pointed out that in English, the word 'children' was in the plural, where in the French text, '*enfant*' was in the singular.

Mr Dyer (First Secretary at the Permanent Bureau) said that this difference was also reflected in the title of the chapter. It was a question of language, and not of substance.

The Chairman agreed that this was a simple linguistic nuance.

Mr Dyer (First Secretary at the Permanent Bureau) in connection with this point, referred back to article 3 and read out the last paragraph as it should read following the decision taken on Miss Selby's suggestion to replace the plural form by the singular: 'The rights of custody mentioned in sub-paragraph *a* above may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.'

The Chairman noted that relating to the deletion of the words 'to be' suggested by Mr Leal in connection with article

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10, he felt that the term 'is found' was not the sense conveyed by the French text. He asked whether an equivalent of '*se trouver*' could be found in English. In English, the word 'found' conveyed the result of a search.

Mr van Boeschoten (Netherlands) suggested the word 'situated'.

Mr Walsh (Ireland) thought that it had been agreed upon to say simply 'is'.

Mr Creswell (Australia) said that it seemed to him that the choice was between restoring 'is to be found' and Mr Justice Walsh's suggestion. He could hardly dissent from the latter.

Mr Jones (United Kingdom) said that he approved 'where the child *is*'. There were precedents for this in English statutes.

The Chairman agreed, and hoped that the discussions on this point had terminated. Subject to these amendments, article 11 was adopted.

Article 12 was read.

The Chairman asked whether there were any comments on this text.

M. van Keymeulen (Belgique) propose au troisième alinéa de remplacer les termes «a été emmené» par «se trouve».

Le Rapporteur indique que l'idée était de montrer que l'enfant se trouvait dans le territoire et a été emmené ensuite dans un autre Etat.

M. Batiffol (France) propose la formule «des raisons de penser», au lieu de la formule de l'article 12 «raisons de croire» et celle de l'article 9 «bonnes raisons».

M. Chatin (France) propose de remplacer «en retour» par «de retour».

The Chairman agreed that the text of article 9 should read in English 'has reason to believe', and in French '*a des raisons de croire*'.

Miss Selby (United States) said that the words 'introduction of proceedings' was a much less clear concept than 'the date of commencement of proceedings'.

The Chairman agreed.

M. D'Almeida Ribeiro (Portugal) demande s'il faut préciser le mot «intégré» car l'enfant peut être intégré contre son intérêt.

The Chairman said that the matter was best left to the judicial and administrative authorities concerned. In the absence of other opposition, article 12 was considered adopted, with these amendments.

Article 13 was read.

Mr Creswell (Australia) referring to paragraph *a* said that although certainly the applicant would not always be a natural person, it still seemed odd to say 'the applicant which'. In paragraph *b*, there was a reference 'to his or her', while elsewhere 'its' was used. Was there not virtue in consistency?

The Chairman asked whether it would be acceptable to say 'the applicant having the care of the person of the child'. He asked the Drafting Committee what the policy was concerning the use of his/her/its.

Mr Leal (Canada) replied that the original policy of the Drafting Committee had been to use 'its'. However the Drafting Committee had been told to change to his/her. In the absence of consistency, there was virtue in obedience.

M. Chatin (France) propose la correction du texte à l'alinéa *a* troisième ligne: «a consenti» au lieu de «avait consenti».

Miss Pripp (Sweden) asked whether it would be possible to delete 'having the care of the person of the child'.

The Chairman suggested that if modification was necessary, 'applicant or other person having the care of the person of the child' might be preferable.

Miss Pripp (Sweden) thought that it was unnecessary to say anything more than 'the applicant'. Indeed, in article 3, it had already been said that the custody of the child must be exercised effectively by the custodian, and the same went for an institution. The text should read: 'at the time of the removal or retention, the applicant was not actually exercising the custody rights . . .'.

The Chairman said that this would entail a modification of substance, since the paragraph did not refer necessarily to the applicant. He suggested: 'at the time of the removal or retention, there was no actual exercise of custody rights, and there was no consent to or subsequent acquiescence in the removal or retention'.

Mr Leal (Canada) felt that this was fishing in troubled waters. Mr Creswell had objected simply to the word 'which'. He suggested replacing 'which' by 'who' in order that delegates might go and dress for dinner.

Miss Selby (United States) suggested 'the person or body having' might cover this point.

The Chairman suspended the meeting in order to reflect on this point. On resuming the meeting, he said that after discussions with Miss Pripp and Mr Chatin, he suggested that the paragraph should read instead of 'applicant', 'person, institution or other body'.

Mr Dyer (First Secretary at the Permanent Bureau) pointed out that the adverbial phrase in paragraph *a* 'at the time of the removal or retention' referred to the verb '*was not actually exercising*'; it could also apply to 'had consented'. However, it could obviously *not* apply to 'acquiesced'. So the phrase should be displaced within the paragraph in order to make it clear that it did not apply to 'acquiesced'.

The Chairman read out the paragraph *a* so as to incorporate this suggestion. The text should now read 'the person, institution or other body which had the care of the person of the child at the time of the removal or retention, was not actually exercising the custody rights, or has consented to or subsequently acquiesced in the removal or retention'.

The Deputy Secretary General read out the French text incorporating the same modification: '*que la personne, l'institution ou l'organisme qui avait le soin de la personne de l'enfant n'exerçait pas effectivement le droit de garde à l'époque du déplacement ou du non-retour . . .*'.

Mr Creswell (Australia) asked whether in spite of the different position of the phrase in French, the change was indentical.

The Chairman indicated that this was so. In the absence of opposition he declared article 13 adopted.

The meeting was closed at 6.30 p.m.

Distribué le 24 octobre 1980

Distributed on 24 October 1980

Proposition finale du Comité de rédaction (suite)

Article 14

Pour déterminer l'existence d'un déplacement ou d'un non-retour illicite au sens de l'article 3, l'autorité judiciaire ou administrative de l'Etat requis peut tenir compte directement du droit et des décisions judiciaires ou administratives, reconnues formellement ou non dans l'Etat de la résidence habituelle de l'enfant, sans avoir recours aux procédures spécifiques sur la preuve de ce droit ou pour la reconnaissance des décisions étrangères qui seraient autrement applicables.

Article 15

Les autorités judiciaires ou administratives d'un Etat contractant peuvent, avant d'ordonner le retour de l'enfant, demander la production par le demandeur d'une décision ou d'une attestation émanant des autorités de l'Etat de la résidence habituelle de l'enfant constatant que le déplacement ou le non-retour était illicite au sens de l'article 3 de la Convention, dans la mesure où cette décision ou cette attestation peut être obtenue dans cet Etat. Les Autorités centrales des Etats contractants assistent dans la mesure du possible le demandeur pour obtenir une telle décision ou attestation.

Article 16

Après avoir été informées du déplacement illicite d'un enfant ou de son non-retour dans le cadre de l'article 3, les autorités judiciaires ou administratives de l'Etat contractant où l'enfant a été déplacé ou retenu ne pourront statuer sur le fond du droit de garde jusqu'à ce qu'il soit établi que les conditions de la présente Convention pour un retour de l'enfant ne sont pas réunies, ou jusqu'à ce qu'une période raisonnable soit écoulée sans qu'une demande en application de cette Convention ait été faite.

Article 17

Le seul fait qu'une décision relative à la garde ait été rendue ou soit susceptible d'être reconnue dans l'Etat requis ne peut justifier le refus de retourner l'enfant dans le cadre de cette Convention, mais les autorités judiciaires ou administratives de l'Etat requis peuvent prendre en considération les motifs de cette décision qui rentreraient dans le cadre de l'application de cette Convention.

Article 18

Les dispositions de ce chapitre ne limitent pas le pouvoir de l'autorité judiciaire ou administrative d'ordonner le retour de l'enfant à tout moment.

Final proposal of the Drafting Committee (continued)

Article 14

In ascertaining whether there has been a wrongful removal or retention within the meaning of article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognized or not, in the State of the habitual residence of the child without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.

Article 15

The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the sense of article 3, the judicial or administrative authorities of the Contracting State to which the child has been a decision or other determination that the child's removal or retention was wrongful within the meaning of article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.

Article 16

After receiving notice of a wrongful removal or retention in the sense of article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Conventions fails to be lodged within a reasonable time following receipt of the notice.

Article 17

The sole fact that a decision relating to custody has been given in or falls to be recognized in the requested State shall not be a ground for refusing to return a child under this Convention, but the judicial or administrative authorities of the requested State may take account of the reasons for that decision in applying this Convention.

Article 18

The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time.

Article 19

Une décision sur le retour de l'enfant rendue dans le cadre de cette Convention n'affecte pas le fond du droit de garde.

Article 20

Le retour de l'enfant conformément aux dispositions de l'article 12 peut être refusé quand il ne serait pas permis par les principes fondamentaux de l'Etat requis sur la sauvegarde des droits de l'homme et des libertés fondamentales.

CHAPITRE IV — DROIT DE VISITE

Article 21

Une demande visant l'organisation ou la protection de l'exercice effectif d'un droit de visite peut être adressée à l'Autorité centrale d'un Etat contractant selon les mêmes modalités qu'une demande visant au retour de l'enfant.

Les Autorités centrales sont liées par les obligations de coopération visées à l'article 7 pour assurer l'exercice paisible du droit de visite et l'accomplissement de toute condition à laquelle l'exercice de ce droit serait soumis, et pour que soient levés, dans toute la mesure du possible, les obstacles de nature à s'y opposer.
Les Autorités centrales, soit directement, soit par des intermédiaires, peuvent entamer ou favoriser une procédure légale en vue d'organiser ou de protéger le droit de visite et les conditions auxquelles l'exercice de ce droit pourrait être soumis.

CHAPITRE V — DISPOSITIONS GÉNÉRALES

Article 22

Aucune caution ni aucun dépôt, sous quelque dénomination que ce soit ne peut être imposé pour garantir le paiement des frais et dépens dans le contexte de procédures judiciaires ou administratives visées par la Convention.

Article 23

Aucune légalisation ni aucune formalité similaire ne sera requise dans le contexte de la Convention.

Article 24

Toute demande, communication ou autre document sont envoyés dans leur langue originale à l'Autorité centrale de l'Etat requis et accompagnés d'une traduction dans la langue officielle ou l'une des langues officielles de cet Etat ou, lorsque cette traduction est difficilement réalisable, d'une traduction en français ou en anglais.
Toutefois, un Etat contractant pourra, en faisant la réserve prévue à l'article 42, s'opposer à l'utilisation soit du français, soit de l'anglais, dans toute demande, communication ou autre document adressés à son Autorité centrale.

Article 25

Les ressortissants d'un Etat contractant et les personnes qui résident habituellement dans cet Etat auront droit, pour tout ce qui concerne l'application de la Convention, à l'assistance judiciaire et juridique dans tout autre Etat contractant, comme s'ils étaient eux-mêmes ressortissants de cet autre Etat et y résidaient habituellement.

Article 26

Chaque Autorité centrale supportera ses propres frais en appliquant la Convention.

Article 19

A decision under the Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.

Article 20

The return of the child under the provisions of article 12 may be refused if it would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

CHAPTER IV — RIGHTS OF ACCESS

Article 21

An application to make arrangements for organizing or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child.
The Central Authorities are bound by the obligations of co-operation which are set forth in article 7 to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject. The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights.
The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organizing or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject.

CHAPTER V — GENERAL PROVISIONS

Article 22

No security, bond or deposit, however described, shall be required to guarantee the payment of costs and expenses in the judicial or administrative proceedings falling within the scope of this Convention.

Article 23

No legalization or similar formality may be required in the context of the Convention.

Article 24

Any application, communication or other document sent to the Central Authority of the requested State shall be in the original language, and shall be accompanied by a translation into the official language or one of the official languages of the requested State or, where that is not feasible, a translation into French or English.
However, a Contracting State may object to the use of either French or English, but not both, in any application, communication or other document sent to its Central Authority, by making a reservation in accordance with article 42.

Article 25

Nationals of the Contracting States and persons who are habitually resident within those States shall be entitled in matters concerned with the application of the Convention to legal aid and advice in any other Contracting State as if they themselves were nationals of and habitually resident in that State.

Article 26

Each Central Authority shall bear its own costs in applying this Convention.

L'Autorité centrale et les autres services publics des Etats contractants ne réclameront aucun remboursement de leurs frais occasionnés par l'application de la Convention. Notamment, ils ne peuvent réclamer du demandeur le paiement des frais et dépens du procès ou, éventuellement, des frais entraînés par la participation d'un avocat. Toutefois, ils peuvent demander le paiement des dépenses causées ou qui seraient causées par les opérations liées au retour de l'enfant.

Toutefois, un Etat contractant pourra, en faisant la réserve prévue à l'article 42, déclarer qu'il n'est tenu au paiement des frais visés à l'alinéa précédent, liés à la participation d'un avocat ou d'un conseiller juridique, ou aux frais de justice, que dans la mesure où ces coûts peuvent être couverts par son système d'assistance judiciaire et juridique.

En ordonnant le retour de l'enfant ou en statuant sur le droit de visite dans le cadre de la Convention, l'autorité judiciaire ou administrative peut mettre à la charge, le cas échéant, de la personne qui a déplacé ou qui a retenu l'enfant, ou qui a empêché l'exercice du droit de visite, le paiement de tous frais nécessaires engagés par le demandeur ou en son nom, notamment les frais de voyage, des frais de représentation judiciaire du demandeur et de retour de l'enfant, ainsi que de tous les coûts et dépenses faits pour localiser l'enfant.

Article 27

Lorsqu'il est manifeste que les conditions requises par la Convention ne sont pas remplies ou que la demande n'est pas fondée, une Autorité centrale n'est pas tenue d'accepter une telle demande. En ce cas, elle informe immédiatement de ses motifs le demandeur ou, le cas échéant, l'Autorité centrale qui lui a transmis la demande.

Article 28

Une Autorité centrale peut exiger que la demande soit accompagnée d'une autorisation par écrit lui donnant le pouvoir d'agir pour le compte du demandeur, ou de désigner un représentant habilité à agir en son nom.

Article 29

La Convention ne fait pas obstacle à la faculté pour la personne, l'institution ou l'organisme qui prétend qu'il y a eu une violation du droit de garde ou de visite au sens des articles 3 ou 21 de s'adresser directement par application de la présente Convention aux autorités judiciaires ou administratives des Etats contractants.

Article 30

Toute demande soumise à l'Autorité centrale ou directement aux autorités judiciaires ou administratives d'un Etat contractant par application de cette Convention, ainsi que tout document ou information qui y serait annexé ou fourni par une Autorité centrale, seront revevables devant les tribunaux ou les autorités administratives des Etats contractants.

Article 31

Au regard d'un Etat qui connaît en matière de garde des enfants deux ou plusieurs systèmes de droit applicables dans des unités territoriales différentes:

a toute référence à la résidence habituelle dans cet Etat vise la résidence habituelle dans une unité territoriale de cet Etat;

b toute référence à la loi de l'Etat de la résidence habituelle vise la loi de l'unité territoriale dans laquelle l'enfant a sa résidence habituelle.

Central Authorities and other public services of Contracting States shall not impose any charges in relation to applications submitted under this Convention. In particular, they may not require any payment from the applicant towards the costs and expenses of the proceedings or, where applicable, those arising from the participation of legal counsel or advisers. However, they may require the payment of the expenses incurred or to be incurred in implementing the return of the child.

However, a Contracting State may, by making a reservation in accordance with article 42, declare that it shall not be bound to assume any costs referred to in the preceding paragraph resulting from the services of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.

Upon ordering the return of a child or issuing an order concerning rights of access under this Convention, the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child, or who prevented the exercise of rights of access, to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child.

Article 27

When it is manifest that the requirements of this Convention are not fulfilled or that the application is otherwise not well founded, a Central Authority is not bound to accept the application. In that case, the Central Authority shall forthwith inform the applicant or the Central Authority through which the application was submitted, as the case may be, of its reasons.

Article 28

A Central Authority may require that any application be accompanied by a written authorization empowering it to act on behalf of the applicant, or to designate a representative so to act.

Article 29

This Convention shall not preclude any person, institution or body who claims that there has been a breach of custody or access rights within the meaning of article 3 or 21 from applying directly under this Convention to the judicial or administrative authorities of a Contracting State.

Article 30

Any application submitted to the Central Authorities or directly to the judicial or administrative authorities of a Contracting State in accordance with the terms of this Convention, together with documents and any other information appended thereto or provided by a Central Authority, shall be admissible in the courts or administrative authorities of the Contracting States.

Article 31

In relation to a State which in matters of custody of children has two or more systems of law applicable in different territorial units –

a any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit of the State;

b any reference to the law of the State of habitual residence shall be construed as referring to the law of the territorial unit in that State where the child habitually resides.

Article 32

Au regard d'un Etat contractant connaissant en matière de garde des enfants deux ou plusieurs systèmes de droit applicables à des catégories différentes de personnes, toute référence à la loi de cet Etat vise le système de droit désigné par le droit de celui-ci.

Article 33

Un Etat dans lequel différentes unités territoriales ont leurs propres règles de droit en matière de garde des enfants ne sera pas tenu d'appliquer la présente Convention lorsqu'un Etat dont le système de droit est unifié ne serait pas tenu de l'appliquer.

Article 34

Dans les matières auxquelles elle s'applique, la présente Convention prévaut, entre les Etats Parties aux deux Conventions, sur la *Convention de La Haye du 5 octobre 1961 concernant la compétence des autorités et la loi applicable en matière de protection des mineurs.* Par ailleurs, cette Convention n'empêche pas qu'un autre instrument international liant l'Etat d'origine et l'Etat requis, ni que le droit non conventionnel de l'Etat requis, soient invoqués pour obtenir le retour d'un enfant qui a été déplacé ou retenu illicitement ou pour organiser le droit de visite.

Article 35

Cette Convention ne doit s'appliquer entre les Etats contractants qu'aux enlèvements ou aux non-retours illicites qui se sont produits après son entrée en vigueur dans ces Etats.
Si une déclaration a été faite conformément aux articles 39 ou 40, la référence à un Etat contractant faite à l'alinéa précédent signifie l'unité ou les unités territoriales auxquelles cette Convention s'applique.

Article 36

Rien dans la Convention n'empêche deux ou plusieurs Etats contractants, afin de limiter les restrictions auxquelles le retour de l'enfant peut être soumis, de convenir entre eux de déroger à celles des dispositions qui impliquent de telles restrictions.

Article 32

In relation to a State which in matters of custody of children has two or more systems of law applicable to different categories of persons, any reference to the law of that State shall be construed as referring to the legal system specified by the law of that State.

Article 33

A State within which different territorial units have their own rules of law in respect of custody of children shall not be bound to apply this Convention where a State with a unified system of law would not be bound to do so.

Article 34

This Convention shall take priority in matters within its scope over the Hague Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors, as between Parties to both Conventions. Otherwise this Convention shall not restrict the application of an international instrument in force between the State of origin and the State addressed or other law of the State addressed for the purposes of obtaining the return of a child who has been wrongfully removed or retained or of organizing access rights.

Article 35

This Convention shall apply as between Contracting States only to wrongful removals or retentions occurring after its entry into force in those States.
Where a declaration has been made under article 39 or 40 the reference in the preceding paragraph to a Contracting State shall be taken to refer to the territorial unit or units of that State in relation to which this Convention extends.

Article 36

Nothing in this Convention shall prevent two or more States, in order to limit the restrictions to which the return of the child may be subject, from agreeing among themselves to derogate from any provisions of this Convention which may imply such a limitation.

Procès-verbal No 19

Séance du vendredi 24 octobre 1980 (matin)
Meeting of Friday 24 october 1980 (morning)

The meeting was opened at 9.30 a.m. Mr Anton (United Kingdom) was in the Chair. Miss Pérez-Vera (Spain) was Rapporteur.

The Chairman expressed his sympathy to the Spanish delegation for the tragedy which had occurred in a school in Northern Spain.

Mr Dyer (First Secretary at the Permanent Bureau) welcomed the participation of observers of the International Federation of Women in Legal Careers.

Article 14, as proposed in Working Document No 83, was read.

M. Barile (Italie) remercie chaleureusement les membres du Comité de rédaction pour leur remarquable travail à propos de la solution du problème qu'il avait posé, dans le Document de travail No 58, sur le contenu de l'article 14. Il est sûr que dans le Rapport la question sera encore mieux clarifiée.

The Chairman, in the absence of opposition, declared article 14 adopted.

Article 15 was read.

Mr Dyer (First Secretary at the Permanent Bureau) said that in the next to last line, it would be preferable to say 'the *latter* State' to avoid confusion.

Mr Savolainen (Finland) replied that the point had been considered by the Drafting Committee, who had decided against such an addition.

The Chairman, in the absence of opposition, declared article 15 adopted.

Article 16 was read.

The Chairman pointed out that in the second to last line 'Convention' in the English text should be in the singular, and suggested substituting 'is not' for 'fails to be'. The French text did not require any modification.

Le Secrétaire général adjoint suggère que l'on mette une négation devant le dernier verbe de l'article 16: «n'ait été faite».

M. Deschenaux (Suisse) propose que l'on mette également une négation à l'avant-dernière ligne de l'article 16: «ne se soit écoulée».

The Chairman declared article 16 adopted, in the absence of opposition.

Article 17 was read.

The Chairman declared article 17 adopted, in the absence of opposition.

Article 18 was read.

The Chairman declared article 18 adopted, in the absence of opposition.

Article 19 was read.

The Chairman declared article 19 adopted, in the absence of opposition.

Article 20 was read.

The Chairman suggested that in the second line, '*it*' should be replaced by '*this*', so that the text should read 'if *this* would not be permitted'.

Miss Selby (United States) questioned the term 'falls to be recognized' in article 17.

Mr Leal (Canada), as President of the Drafting Committee, said that he did not oppose this term, but if his American colleagues had difficulty with these terms, the Chairman could perhaps suggest an alternative.

The Chairman, on a suggestion from Mr Dyer, proposed: 'is entitled to recognition in'.
Article 20 was declared adopted, in the absence of opposition.

Article 21 was read.

The Chairman declared article 21 to be adopted, paragraph by paragraph, in the absence of opposition.

Article 22 was read.

M. Chatin (France) propose de mettre, à l'avant-dernière ligne de l'article 22, «des procédures» au lieu de «de procédures».

Miss Pripp (Sweden) said that it would be preferable to say 'costs *or* expenses', rather than 'costs *and* expenses'.

Le Rapporteur estime qu'il est nécessaire de maintenir, dans la version française, les mots «frais et dépens».

Miss Pripp (Sweden) withdrew her objection.

The Chairman, in the absence of opposition, declared article 22 adopted.

Article 23 was read.

Le Secrétaire général adjoint suggère que l'on supprime la répétition du mot «aucune».

Mr Jones (United Kingdom) said that it would be better to say 'this Convention' rather than 'the Convention'.

The Chairman agreed that it would be better, for consistency, if the Drafting Committee agreed, to substitute 'this' for 'the' in articles 23, 19 and 32.

Le Rapporteur pense qu'il est préférable de dire «la Convention» plutôt que «cette Convention». C'est pourquoi il suggère qu'on change la formulation qui se trouve aux articles 16 et 17.

The Chairman said that in this connection he would leave the final '*toilette*' of the text to the Secretariat. He declared article 23 adopted, in the absence of opposition.

Article 24 was read.

Mr Dyer (First Secretary at the Permanent Bureau) pointed out changes which had taken place in the redrafting of paragraph 2. This followed a written submission from the Japanese Delegate after a request to this effect from the Chairman: 'in any application, communication, or other document sent to a Central Authority' had been added. He also proposed that the order of the second paragraph of article 24 should be modified in order to correspond to the third paragraph of article 26. Thus, the paragraph should read: 'However, a Contracting State may, by making a reservation in accordance with article 42, object to the use of either French or English, but not to both, in any application, communication or other document sent to a Central Authority.'

M. Voulgaris (Grèce) relève que la version française de l'article 24, alinéa 2, ne contient pas l'équivalent des mots «*but not both*» que l'on trouve dans la version anglaise. Afin d'harmoniser les textes, le Délégué de la Grèce suggère soit que l'on supprime ces mots dans la version anglaise, soit que l'on introduise une expression équivalente dans la version française.

The Chairman explained that the modification resulted from a proposal by Mr Minami in English. The task of the Drafting Committee had been to incorporate it into the text. He asked the Deputy Secretary General to speak on this point.

Le Secrétaire général adjoint fait remarquer à M. Voulgaris que le problème qu'il vient de soulever a déjà été longuement débattu. Le Comité de rédaction a considéré que la conjonction «soit . . . soit» donnait au texte français un sens équivalent à celui de la version anglaise.

The Chairman said that the Rapporteur would take note of the point raised by Mr Voulgaris. He declared article 24 adopted, in the absence of opposition.

Article 25 was read.

The Chairman declared article 25 adopted, in the absence of opposition.

Article 26 was read.

The Chairman pointed out a discrepancy in the second paragraph of article 26 between the French and English versions. The English version was the original here. It read: 'shall not impose any charges . . .', whereas the French read: 'shall not reclaim any expenses incurred . . .'.The result was certainly the same in the end, but would French-speaking delegates prefer to align the French text on the English text?

Le Rapporteur estime que la version anglaise de l'alinéa 2 de l'article 26 est préférable à la version française (deuxième ligne) et qu'il conviendrait donc de modifier cette dernière.

The Chairman asked Mr Chatin and the Deputy Secretary General to find an appropriate formula in order to align the French text on the English text. He asked if there were any other observations relating to article 26.

M. van Keymeulen (Belgique) demande quel est le rapport qui existe entre l'article 26 et l'article 7, alinéa 2.

Le Rapporteur rappelle qu'en vertu de l'article 7 les Autorités centrales doivent prendre toutes les mesures appropriées pour réaliser les objectifs de la Convention soit directement, soit avec le concours de tout intermédiaire. Le problème soulevé par la délégation de la Belgique consiste donc à savoir si chaque Autorité centrale doit supporter les frais occasionnés par le concours d'un intermédiaire. Pour le Rapporteur, la réponse est affirmative lorsque l'intermédiaire a été choisi par l'Autorité centrale. Au contraire, la réponse est négative s'il s'agit d'un autre intermédiaire.

The Chairman explained that the object of the first sentence was a clarification in relation to the fact that the Central Authority would bear its own costs. The next paragraph contained totally different ideas. The Belgian Delegate's idea was met by the perfectly general terms of the second paragraph which read 'A Central Authority . . . shall not impose any charges . . .'.

Mr Savolainen (Finland) pointed out, in the fourth paragraph, a slight difference between the English and French texts. It probably did not require an amendment. The English read 'on behalf of', while the French text, somewhat narrower, read '*à son nom*'.

Le Secrétaire général adjoint pense qu'il faudrait lire le début de l'article 26, alinéa 4, de la manière suivante:
«En ordonnant le retour de l'enfant ou en statuant sur le droit de visite dans le cadre de la Convention, l'Autorité judiciaire ou administrative peut, le cas échéant, mettre à la charge de la personne qui a déplacé . . .».

Mr Creswell (Australia) said that in the third paragraph, third line, the English text read rather oddly. The English text read 'resulting from services of legal counsel', while the French text spoke of '*participation*'. The English text could be modified so as to be closer to the French text, and Mr Creswell suggested 'from the use of'.

The Chairman said that the dominant text here was the English text. He did not think that this difference was sufficiently substantial to insist upon it.

Mr Leal (Canada) said that in the second paragraph, fifth line, the term 'participation' was used. It would be possible to use this now equally in the third line of the third paragraph.

The Chairman declared that article 26, with these modifications, was adopted.

Article 27 was read.

The Chairman, in the absence of opposition, declared article 27 adopted.

Article 28 was read.

The Chairman, in the absence of opposition, declared article 28 adopted.

Article 29 was read.

Le Secrétaire général adjoint suggère que l'on supprime les mots «par application de la présente Convention».

The Chairman said that by using the words 'under this Convention', it would be possible to argue *a contrario* that this was impossible *outside* the Convention.

Mr van Boeschoten (Netherlands) pointed out that these provisions should apply even if an application was not made directly to the Central Authority.

The Chairman agreed that the provisions concerning the duties of judicial and administrative authorities should apply even if the applicant had not made an application via the Central Authority. The Report would stress this point.

M. Chatin (France) se déclare opposé à la suggestion formulée par le Secrétaire général adjoint. Toutefois, il estime qu'il serait préférable de préciser qu'il s'agit du chapitre III de la Convention.

The Chairman said, with the agreement of the Rapporteur, that it would be better to delete these words and allow the Report to make clear the point raised by Mr van Boeschoten. The matter was very complex. In fact, it would require the examination of the interrelationship between all the articles, which present conditions did not permit.

Mr Leal (Canada) said that there was no need to rush this decision. In his view, it would be better to leave 'under the Convention' in the text, and to add some qualification.

The Chairman asked whether it would help to delete 'under the Convention, where it applies', and add, at the end, 'whether or not under the provisions of this Convention'.

Mr Leal (Canada) fully agreed with this suggestion.

M. Chatin (France) dit que l'avant-dernière ligne de la version française de l'article 29 devrait alors se lire de la manière suivante:
«directement par application ou non des dispositions de la présente Convention . . .».

The Chairman declared article 29 adopted, in the absence of opposition.

Article 30 was read.

M. Chatin (France) fait valoir qu'étant donné le lien qui unit les articles 30 et 23, il serait souhaitable que ce dernier devienne l'article 30*bis*.

The Chairman thought that Mr Chatin's proposal was a good idea. However, in view of considerable secretarial problems which the retyping of texts would entail, he would be grateful if Mr Chatin would withdraw his proposal.
In the absence of opposition, he declared article 30 adopted.

Article 31 was read.

The Chairman declared article 31 adopted, in the absence of opposition.

Article 32 was read.

The Chairman declared article 32 adopted, in the absence of opposition.

Article 33 was read.

The Chairman declared article 33 adopted, in the absence of opposition.

Article 34 was read.

Mr Dyer (First Secretary at the Permanent Bureau) said that in the version which was to be presented to the Plenary Session, the title of the Convention of 5 October 1961, would figure in italics. The word 'Hague' would be eliminated.

M. Chatin (France) propose que la première phrase de l'article 34 soit rédigée de la manière suivante:
«Dans les matières auxquelles elle s'applique, la présente Convention prévaut sur la *Convention de La Haye du 5 octobre 1961 concernant la compétence des autorités et la loi applicable en matière de protection des mineurs*, entre les États parties aux deux Conventions . . .».

The Chairman declared that article 34 was adopted.

Article 35 was read.

Mr Savolainen (Finland) raised a question of interpretation. Did this article prevent States ratifying the Convention from making it applicable to unlawful removals or retentions occurring before its entry into force?

Mr Dyer (First Secretary at the Permanent Bureau) said on a different point that it would be better if the last line of the article read 'applies', like the French text.

Miss Selby (United States) suggested deleting 'of that State' in view of the reference to 'territories' which might not depend upon a State unit. The French text did not contain 'of that State'.

The Chairman said, in reply to Mr Savolainen, that as between Contracting States, these were perfectly free to apply the Convention at an earlier date. He hoped they would do so. This point could be made clear in the Report.

The Chairman declared article 35, with these modifications, adopted.

Article 36 was read.

Mr Jones (United Kingdom) pointed out that whereas the English text followed the United States proposal in Working Document No 80, the French text did not. He was not sure which text was correct, but one should be modified.

Le Rapporteur considère qu'il est davantage conforme à l'objet de la Convention de parler, à la dernière ligne de l'article 36, de restrictions plutôt que de limitations.

Mr Leal (Canada) said that the English text should be amended so that the last word of the article read 'restriction', rather than 'limitation'. The same word was used in the second line.

M. Chatin (France) propose qu'on lise la dernière ligne de l'article 36 de la manière suivante: «qui peuvent impliquer de telles restrictions».

The Chairman declared article 36, with these amendments, adopted.

Mr Dyer (First Secretary at the Permanent Bureau) indicated that the Drafting Committee had corrected the final clauses, which would be presented to the Plenary Session in the afternoon.

The Chairman expressed his warm appreciation for the collaboration of the Secretariat, interpreters, recording secretaries, the Permanent Bureau, and particularly Mr Dyer, who had worked with Commission I, the Rapporteur, who had finished a magnificent book on private international law just before coming to the Conference, and not least the delegates for their help to the Chair.

Mr Dyer (First Secretary at the Permanent Bureau) expressed his gratitude to the Canadian delegation who had first suggested this project in 1976. Since then a great number of people had contributed to the project, which now

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had many fathers and mothers. He gave particular thanks to the Chairman, the Rapporteur, and to the memory of the Swiss Delegate who had provided the germ for the essential theme, Mr Walter Baechler. Mr Dyer expressed his personal happiness in seeing the project completed.

Mr Leal (Canada) expressed the appreciation of the Commission for the loyalty and hard work that had characterised Mr Anton's Chairmanship and made it a privilege to work with him. He felt that this Convention represented a chance to strike a blow for social justice.

The meeting was closed at 2 p.m.

Séance plénière

Document de travail No 12[1]

Distribué le 24 octobre 1980 (après-midi)

Projet de Convention sur les aspects civils de l'enlèvement international d'enfants, adopté par la Première commission

CONVENTION SUR LES ASPECTS CIVILS DE L'ENLÈVEMENT INTERNATIONAL D'ENFANTS

Les Etats signataires de la présente Convention,

Profondément convaincus que l'intérêt de l'enfant est d'une importance primordiale pour toute question relative à sa garde,

Désirant protéger l'enfant, sur le plan international, contre les effets nuisibles d'un déplacement ou d'un non-retour illicites et établir des procédures en vue de garantir le retour immédiat de l'enfant dans l'Etat de sa résidence habituelle, ainsi que d'assurer la protection du droit de visite,

Ont résolu de conclure une Convention à cet effet, et sont convenus des dispositions suivantes:

CHAPITRE I — CHAMP D'APPLICATION DE LA CONVENTION

Article premier

La présente Convention a pour objet:

a d'assurer le retour immédiat des enfants déplacés ou retenus illicitement dans tout Etat contractant; et

b de faire respecter effectivement dans les autres Etats contractants les droits de garde et de visite existant dans un Etat contractant.

Article 2

Les Etats contractants prennent toutes mesures appropriées pour assurer, dans les limites de leur territoire, la réalisation des objectifs de la Convention. A cet effet, ils doivent recourir à leurs procédures d'urgence.

Article 3

Le déplacement ou le non-retour d'un enfant est considéré comme illicite:

a lorsqu'il a lieu en violation d'un droit de garde, attribué à une personne, une institution ou tout autre organisme, seul ou conjointement, par le droit de l'Etat dans lequel l'enfant avait sa résidence habituelle immédiatement avant son déplacement ou son non-retour; et

[1] N'est reproduit ici que le Document de travail ayant trait au projet de Convention sur l'enlèvement international d'enfants. Les autres Documents de travail sont publiés dans les autres tomes relatifs à la Quatorzième session.

Working Document No 12[1]

Distributed on 24 October 1980 (afternoon)

Draft Convention on the Civil Aspects of International Child Abduction, adopted by the First Commission

CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

The States signatory to the present Convention,

Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,

Desiring to protect children internationally from the harmful efects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,

Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions –

CHAPTER I — SCOPE OF THE CONVENTION

Article 1

The objects of the present Convention are:

a to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

b to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

Article 2

Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available.

Article 3

The removal or the retention of a child is to be considered wrongful where:

a it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

[1] Only the Working Document containing the draft Convention on the Civil Aspects of International Child Abduction is reproduced here. The other Working Documents will be found in the remaining volumes dealing with the Fourteenth Session.

b que ce droit était exercé de façon effective, seul ou conjointement, au moment du déplacement ou du non-retour, ou l'eût été si de tels événements n'étaient survenus.

Le droit de garde visé en *a* peut notamment résulter d'une attribution de plein droit, d'une décision judiciaire ou administrative, ou d'un accord en vigueur selon le droit de cet Etat.

Article 4

La Convention s'applique à tout enfant qui avait sa résidence habituelle dans un Etat contractant immédiatement avant l'atteinte aux droits de garde ou de visite. L'application de la Convention cesse lorsque l'enfant parvient à l'âge de 16 ans.

Article 5

Au sens de la présente Convention:

a le «droit de garde» comprend le droit portant sur les soins de la personne de l'enfant, et en particulier celui de décider de son lieu de résidence;

b le «droit de visite» comprend le droit d'emmener l'enfant pour une période limitée dans un lieu autre que celui de sa résidence habituelle.

CHAPITRE II — AUTORITÉS CENTRALES

Article 6

Chaque Etat contractant désigne une Autorité centrale chargée de satisfaire aux obligations qui lui sont imposées par la Convention.
Un Etat fédéral, un Etat dans lequel plusieurs systèmes de droit sont en vigueur ou un Etat ayant des organisations territoriales autonomes, est libre de désigner plus d'une Autorité centrale et de spécifier l'étendue territoriale des pouvoirs de chacune de ces Autorités. L'Etat qui fait usage de cette faculté désigne l'Autorité centrale à laquelle les demandes peuvent être adressées en vue de leur transmission à l'Autorité centrale compétente au sein de cet Etat.

Article 7

Les Autorités centrales doivent coopérer entre elles et promouvoir une collaboration entre les autorités compétentes dans leurs Etats respectifs, pour assurer le retour immédiat des enfants et réaliser les autres objectifs de la présente Convention.
En particulier, soit directement, soit avec le concours de tout intermédiaire, elles doivent prendre toutes les mesures appropriées:

a pour localiser un enfant déplacé ou retenu illicitement;

b pour prévenir de nouveaux dangers pour l'enfant ou des préjudices pour les parties concernées, en prenant ou faisant prendre des mesures provisoires;

c pour assurer la remise volontaire de l'enfant ou faciliter une solution amiable;

d pour échanger, si cela s'avère utile, des informations relatives à la situation sociale de l'enfant;

e pour fournir des informations générales concernant le droit de leur Etat relatives à l'application de la Convention;

f pour introduire ou favoriser l'ouverture d'une procédure judiciaire ou administrative, afin d'obtenir le retour de l'enfant et, le cas échéant, de permettre l'organisation ou l'exercice effectif du droit de visite;

g pour accorder ou faciliter, le cas échéant, l'obtention de l'assistance judiciaire et juridique, y compris les services d'un avocat;

b at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph *a* above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Article 4

The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

Article 5

For the purposes of this Convention:

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

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

CHAPTER II — CENTRAL AUTHORITIES

Article 6

A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.
Federal States, States with more than one system of law or States having autonomous territorial organizations shall be free to appoint more than one Central Authority and to specify the territorial extent of their powers. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which applications may be addressed for transmission to the appropriate Central Authority within that State.

Article 7

Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.

In particular, either directly or through any intermediary, they shall take all appropriate measures –

a to discover the whereabouts of a child who has been wrongfully removed or retained;

b to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;

c to secure the voluntary return of the child or to bring about an amicable resolution of the issues;

d to exchange, where desirable, information relating to the social background of the child;

e to provide information of a general character as to the law of their State in connection with the application of the Convention;

f to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organizing or securing the effective exercise of rights of access;

g where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the services of legal counsel and advisers;

h pour assurer, sur le plan administratif, si nécessaire et opportun, le retour sans danger de l'enfant;

i pour se tenir mutuellement informées sur le fonctionnement de la Convention et, autant que possible, lever les obstacles éventuellement rencontrés lors de son application.

h to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;

i to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.

CHAPITRE III — RETOUR DE L'ENFANT

Article 8

La personne, l'institution ou l'organisme qui prétend qu'un enfant a été déplacé ou retenu en violation d'un droit de garde peut saisir soit l'Autorité centrale de la résidence habituelle de l'enfant, soit celle de tout autre Etat contractant, pour que celles-ci prêtent leur assistance en vue d'assurer le retour de l'enfant.
La demande doit contenir:

a des informations portant sur l'identité du demandeur, de l'enfant et de la personne dont il est allégué qu'elle a emmené ou retenu l'enfant;

b la date de naissance de l'enfant, s'il est possible de se la procurer;

c les motifs sur lesquels se base le demandeur pour réclamer le retour de l'enfant;

d toutes informations disponibles concernant la localisation de l'enfant et l'identité de la personne avec laquelle l'enfant est présumé se trouver.

La demande peut être accompagnée ou complétée par:

e une copie authentifiée de toute décision ou de tout accord utiles;

f une attestation ou une déclaration avec affirmation émanant de l'Autorité centrale, ou d'une autre autorité compétente de l'Etat de la résidence habituelle, ou d'une personne qualifiée, concernant le droit de l'Etat en la matière;

g tout autre document utile.

Article 9

Quand l'Autorité centrale qui est saisie d'une demande en vertu de l'article 8 a des raisons de penser que l'enfant se trouve dans un autre Etat contractant, elle transmet la demande directement et sans délai à l'Autorité centrale de cet Etat contractant et en informe l'Autorité centrale requérante ou, le cas échéant, le demandeur.

Article 10

L'Autorité centrale de l'Etat où se trouve l'enfant prendra ou fera prendre toute mesure propre à assurer son retour volontaire.

Article 11

Les autorités judiciaires ou administratives de tout Etat contractant doivent procéder d'urgence en vue du retour de l'enfant.
Lorsque l'autorité judiciaire ou administrative saisie n'a pas statué dans un délai de six semaines à partir de sa saisine, le demandeur ou l'Autorité centrale de l'Etat requis, de sa propre initiative ou sur requête de l'Autorité centrale de l'Etat requérant, peut demander une déclaration sur les raisons de ce retard. Si la réponse est reçue par l'Autorité centrale de l'Etat requis, cette Autorité doit la transmettre à l'Autorité centrale de l'Etat requérant ou, le cas échéant, au demandeur.

CHAPTER III — RETURN OF CHILDREN

Article 8

Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.
The application shall contain –

a information concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child:

b where available, the date of birth of the child;

c the grounds on which the applicant's claim for return of the child is based;

d all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be.

The application may be accompanied or supplemented by –

e an authenticated copy of any relevant decision or agreement;

f a certificate or an affidavit emanating from a Central Authority, or other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State;

g any other relevant document.

Article 9

If the Central Authority which receives an application referred to in article 8 has reason to believe that the child is in another Contracting State, it shall directly and without delay transmit the application to the Central Authority of that Contracting State and inform the requesting Central Authority, or the applicant, as the case may be.

Article 10

The Central Authority of the State where the child is shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child.

Article 11

The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.
If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.

Article 12

Lorsqu'un enfant a été déplacé ou retenu illicitement au sens de l'article 3 et qu'une période de moins d'un an s'est écoulée à partir du déplacement ou du non-retour au moment de l'introduction de la demande devant l'autorité judiciaire ou administrative de l'Etat contractant où se trouve l'enfant, l'autorité saisie ordonne son retour immédiat.

Après l'expiration du délai fixé à l'alinéa précédent, l'autorité judiciaire ou administrative doit aussi ordonner le retour de l'enfant, à moins qu'il ne soit établi que l'enfant s'est intégré dans son nouveau milieu.

Lorsque l'autorité judiciaire ou administrative de l'Etat requis a des raisons de croire que l'enfant a été emmené dans un autre Etat, elle peut suspendre la procédure ou rejeter la demande de retour de l'enfant.

Article 13

Nonobstant les dispositions de l'article précédent, l'autorité judiciaire ou administrative de l'Etat requis n'est pas tenue d'ordonner le retour de l'enfant, lorsque la personne, l'institution ou l'organisme qui s'oppose à son retour établit:

a que la personne, l'institution ou l'organisme qui avait le soin de la personne de l'enfant n'exerçait pas effectivement le droit de garde à l'époque du déplacement ou du non-retour, ou avait consenti ou a acquiescé postérieurement à ce déplacement ou à ce non-retour; ou

b qu'il existe un risque grave que le retour de l'enfant ne l'expose à un danger physique ou psychique, ou de toute autre manière ne le place dans une situation intolérable.

L'autorité judiciaire ou administrative peut aussi refuser d'ordonner le retour de l'enfant si elle constate que celui-ci s'oppose à son retour et qu'il a atteint un âge et une maturité où il se révèle approprié de tenir compte de cette opinion.

Dans l'appréciation des circonstances visées dans cet article, les autorités judiciaires ou administratives doivent tenir compte des informations fournies par l'Autorité centrale ou toute autre autorité compétente de l'Etat de la résidence habituelle de l'enfant sur sa situation sociale.

Article 14

Pour déterminer l'existence d'un déplacement ou d'un non-retour illicite au sens de l'article 3, l'autorité judiciaire ou administrative de l'Etat requis peut tenir compte directement du droit et des décisions judiciaires ou administratives reconnues formellement ou non dans l'Etat de la résidence habituelle de l'enfant, sans avoir recours aux procédures spécifiques sur la preuve de ce droit ou pour la reconnaissance des décisions étrangères qui seraient autrement applicables.

Article 15

Les autorités judiciaires ou administratives d'un Etat contractant peuvent, avant d'ordonner le retour de l'enfant, demander la production par le demandeur d'une décision ou d'une attestation émanant des autorités de l'Etat de la résidence habituelle de l'enfant constatant que le déplacement ou le non-retour était illicite au sens de l'article 3 de la Convention, dans la mesure où cette décision ou cette attestation peut être obtenue dans cet Etat. Les Autorités centrales des Etats contractants assistent dans la mesure du possible le demandeur pour obtenir une telle décision ou attestation.

Article 16

Après avoir été informées du déplacement illicite d'un enfant ou de son non-retour dans le cadre de l'article 3, les

Article 12

Where a child has been wrongfully removed or retained in terms of article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority shall also order the return of the child after the expiration of the time period set forth in the preceding paragraph unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

Article 13

Notwithstanding the provisions of the preceding article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that:

a the person, institution or other body having the care of the person of the child at the time of removal or retention was not actually exercising the custody rights, or had consented to or subsequently acquiesced in the removal or retention; or

b there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

Article 14

In ascertaining whether there has been a wrongful removal or retention within the meaning of article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognized or not, in the State of the habitual residence of the child without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.

Article 15

The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the child's removal or retention was wrongful within the meaning of article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.

Article 16

After receiving notice of a wrongful removal or retention in the sense of article 3, the judicial or administrative authori-

autorités judiciaires ou administratives de l'Etat contractant où l'enfant a été déplacé ou retenu ne pourront statuer sur le fond du droit de garde jusqu'à ce qu'il soit établi que les conditions de la présente Convention pour un retour de l'enfant ne sont pas réunies, ou jusqu'à ce qu'une période raisonnable ne soit écoulée sans qu'une demande en application de la Convention n'ait été faite.

Article 17

Le seul fait qu'une décision relative à la garde ait été rendue ou soit susceptible d'être reconnue dans l'Etat requis ne peut justifier le refus de retourner l'enfant dans le cadre de cette Convention, mais les autorités judiciaires ou administratives de l'Etat requis peuvent prendre en considération les motifs de cette décision qui rentreraient dans le cadre de l'application de la Convention.

Article 18

Les dispositions de ce chapitre ne limitent pas le pouvoir de l'autorité judiciaire ou administrative d'ordonner le retour de l'enfant à tout moment.

Article 19

Une décision sur le retour de l'enfant rendue dans le cadre de cette Convention n'affecte pas le fond du droit de garde.

Article 20

Le retour de l'enfant conformément aux dispositions de l'article 12 peut être refusé quand il ne serait pas permis par les principes fondamentaux de l'Etat requis sur la sauvegarde des droits de l'homme et des libertés fondamentales.

CHAPITRE IV — DROIT DE VISITE

Article 21

Une demande visant l'organisation ou la protection de l'exercice effectif d'un droit de visite peut être adressée à l'Autorité centrale d'un Etat contractant selon les mêmes modalités qu'une demande visant au retour de l'enfant.

Les Autorités centrales sont liées par les obligations de coopération visées à l'article 7 pour assurer l'exercice paisible du droit de visite et l'accomplissement de toute condition à laquelle l'exercice de ce droit serait soumis, et pour que soient levés, dans toute la mesure du possible, les obstacles de nature à s'y opposer.
Les Autorités centrales, soit directement, soit par des intermédiaires, peuvent entamer ou favoriser une procédure légale en vue d'organiser ou de protéger le droit de visite et les conditions auxquelles l'exercice de ce droit pourrait être soumis.

CHAPITRE V — DISPOSITIONS GÉNÉRALES

Article 22

Aucune caution ni aucun dépôt, sous quelque dénomination que ce soit, ne peut être imposé pour garantir le paiement des frais et dépens dans le contexte des procédures judiciaires ou administratives visées par la Convention.

Article 23

Aucune légalisation ni formalité similaire ne sera requise dans le contexte de la Convention.

Article 24

Toute demande, communication ou autre document sont envoyés dans leur langue originale à l'Autorité centrale de

ties of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.

Article 17

The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention, but the judicial or administrative authorities of the requested State may take account of the reasons for that decision in applying this Convention.

Article 18

The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time.

Article 19

A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.

Article 20

The return of the child under the provisions of article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

CHAPTER IV — RIGHTS OF ACCESS

Article 21

An application to make arrangements for organizing or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child.
The Central Authorities are bound by the obligations of co-operation which are set forth in article 7 to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject. The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights.
The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organizing or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject.

CHAPTER V — GENERAL PROVISIONS

Article 22

No security, bond or deposit, however described, shall be required to guarantee the payment of costs and expenses in the judicial or administrative proceedings falling within the scope of this Convention.

Article 23

No legalization or similar formality may be required in the context of this Convention.

Article 24

Any application, communication or other document sent to the Central Authority of the requested State shall be in the

l'Etat requis et accompagnés d'une traduction dans la langue officielle ou l'une des langues officielles de cet Etat ou, lorsque cette traduction est difficilement réalisable, d'une traduction en français ou en anglais.
Toutefois, un Etat contractant pourra, en faisant la réserve prévue à l'article 42, s'opposer à l'utilisation soit du français, soit de l'anglais, dans toute demande, communication ou autre document adressés à son Autorité centrale.

Article 25

Les ressortissants d'un Etat contractant et les personnes qui résident habituellement dans cet Etat auront droit, pour tout ce qui concerne l'application de la Convention, à l'assistance judiciaire et juridique dans tout autre Etat contractant, comme s'ils étaient eux-mêmes ressortissants de cet autre Etat et y résidaient habituellement.

Article 26

Chaque Autorité centrale supportera ses propres frais en appliquant la Convention.
L'Autorité centrale et les autres services publics des Etats contractants n'imposeront aucuns frais en relation avec l'application de la Convention. Notamment, ils ne peuvent réclamer du demandeur le paiement des frais et dépens du procès ou, éventuellement, des frais entraînés par la participation d'un avocat. Toutefois, ils peuvent demander le paiement des dépenses causées ou qui seraient causées par les opérations liées au retour de l'enfant.

Toutefois, un Etat contractant pourra, en faisant la réserve prévue à l'article 42, déclarer qu'il n'est tenu au paiement des frais visés à l'alinéa précédent, liés à la participation d'un avocat ou d'un conseiller juridique, ou aux frais de justice, que dans la mesure où ces coûts peuvent être couverts par son système d'assistance judiciaire et juridique.

En ordonnant le retour de l'enfant ou en statuant sur le droit de visite dans le cadre de la Convention, l'autorité judiciaire ou administrative peut, le cas échéant, mettre à la charge de la personne qui a déplacé ou qui a retenu l'enfant, ou qui a empêché l'exercice du droit de visite, le paiement de tous frais nécessaires engagés par le demandeur ou en son nom, notamment les frais de voyage, des frais de représentation judiciaire du demandeur et de retour de l'enfant, ainsi que de tous les coûts et dépenses faits pour localiser l'enfant.

Article 27

Lorsqu'il est manifeste que les conditions requises par la Convention ne sont pas remplies ou que la demande n'est pas fondée, une Autorité centrale n'est pas tenue d'accepter une telle demande. En ce cas, elle informe immédiatement de ses motifs le demandeur ou, le cas échéant, l'Autorité centrale qui lui a transmis la demande.

Article 28

Une Autorité centrale peut exiger que la demande soit accompagnée d'une autorisation par écrit lui donnant le pouvoir d'agir pour le compte du demandeur, ou de désigner un représentant habilité à agir en son nom.

Article 29

La Convention ne fait pas obstacle à la faculté pour la personne, l'institution ou l'organisme qui prétend qu'il y a eu une violation du droit de garde ou de visite au sens des articles 3 ou 21 de s'adresser directement aux autorités judiciaires ou administratives des Etats contractants, par application ou non des dispositions de la Convention.

original language, and shall be accompanied by a translation into the official language or one of the official languages of the requested State or, where that is not feasible, a translation into French or English.
However, a Contracting State may, by making a reservation in accordance with article 42, object to the use of either French or English, but not both, in any application, communication or other document sent to its Central Authority.

Article 25

Nationals of the Contracting States and persons who are habitually resident within those States shall be entitled in matters concerned with the application of this Convention to legal aid and advice in any other Contracting State as if they themselves were nationals of and habitually resident in that State.

Article 26

Each Central Authority shall bear its own costs in applying this Convention.
Central Authorities and other public services of Contracting States shall not impose any charges in relation to applications submitted under this Convention. In particular, they may not require any payment from the applicant towards the costs and expenses of the proceedings or, where applicable, those arising from the participation of legal counsel or advisers. However, they may require the payment of the expenses incurred or to be incurred in implementing the return of the child.
However, a Contracting State may, by making a reservation in accordance with article 42, declare that it shall not be bound to assume any costs referred to in the preceding paragraph resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.
Upon ordering the return of a child or issuing an order concerning rights of access under this Convention, the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child, or who prevented the exercise of rights of access, to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child.

Article 27

When it is manifest that the requirements of this Convention are not fulfilled or that the application is otherwise not well founded, a Central Authority is not bound to accept the application. In that case, the Central Authority shall forthwith inform the applicant or the Central Authority through which the application was submitted, as the case may be, of its reasons.

Article 28

A Central Authority may require that any application be accompanied by a written authorization empowering it to act on behalf of the applicant, or to designate a representative so to act.

Article 29

This Convention shall not preclude any person, institution or body who claims that there has been a breach of custody or access rights within the meaning of article 3 or 21 from applying directly to the judicial or administrative authorities of a Contracting State, whether or not under the provisions of this Convention.

Article 30

Toute demande, soumise à l'Autorité centrale ou directement aux autorités judiciaires ou administratives d'un Etat contractant par application de cette Convention, ainsi que tout document ou information qui y serait annexé ou fourni par une Autorité centrale, seront recevables devant les tribunaux ou les autorités administratives des Etats contractants.

Article 31

Au regard d'un Etat qui connaît en matière de garde des enfants deux ou plusieurs systèmes de droit applicables dans des unités territoriales différentes:

a toute référence à la résidence habituelle dans cet Etat vise la résidence habituelle dans une unité territoriale de cet Etat;

b toute référence à la loi de l'Etat de la résidence habituelle vise la loi de l'unité territoriale dans laquelle l'enfant a sa résidence habituelle.

Article 32

Au regard d'un Etat contractant connaissant en matière de garde des enfants deux ou plusieurs systèmes de droit applicables à des catégories différentes de personnes, toute référence à la loi de cet Etat vise le système de droit désigné par le droit de celui-ci.

Article 33

Un Etat dans lequel différentes unités territoriales ont leurs propres règles de droit en matière de garde des enfants ne sera pas tenu d'appliquer la présente Convention lorsqu'un Etat dont le système de droit est unifié ne serait pas tenu de l'appliquer.

Article 34

Dans les matières auxquelles elle s'applique, la présente Convention prévaut sur la *Convention du 5 octobre 1961 concernant la compétence des autorités et la loi applicable en matière de protection des mineurs*, entre les Etats Parties aux deux Conventions. Par ailleurs, cette Convention n'empêche pas qu'un autre instrument international liant l'Etat d'origine et l'Etat requis, ni que le droit non conventionnel de l'Etat requis, ne soient invoqués pour obtenir le retour d'un enfant qui a été déplacé ou retenu illicitement ou pour organiser le droit de visite.

Article 35

Cette Convention ne s'applique entre les Etats contractants qu'aux enlèvements ou aux non-retours illicites qui se sont produits après son entrée en vigueur dans ces Etats.
Si une déclaration a été faite conformément aux articles 39 ou 40, la référence à un Etat contractant faite à l'alinéa précédent signifie l'unité ou les unités territoriales auxquelles la Convention s'applique.

Article 36

Rien dans la Convention n'empêche deux ou plusieurs Etats contractants, afin de limiter les restrictions auxquelles le retour de l'enfant peut être soumis, de convenir entre eux de déroger à celles des dispositions qui peuvent impliquer de telles restrictions.

CHAPITRE VI — CLAUSES FINALES

Article 37

La Convention est ouverte à la signature des Etats qui étaient Membres de la Conférence de La Haye de droit

Article 30

Any application submitted to the Central Authorities or directly to the judicial or administrative authorities of a Contracting State in accordance with the terms of this Convention, together with documents and any other information appended thereto or provided by a Central Authority, shall be admissible in the courts or administrative authorities of the Contracting States.

Article 31

In relation to a State which in matters of custody of children has two or more systems of law applicable in different territorial units –

a any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit of that State;

b any reference to the law of the State of habitual residence shall be construed as referring to the law of the territorial unit in that State where the child habitually resides.

Article 32

In relation to a State which in matters of custody of children has two or more systems of law applicable to different categories of persons, any reference to the law of that State shall be construed as referring to the legal system specified by the law of that State.

Article 33

A State within which different territorial units have their own rules of law in respect of custody of children shall not be bound to apply this Convention where a State with a unified system of law would not be bound to do so.

Article 34

This Convention shall take priority in matters within its scope over the *Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors*, as between Parties to both Conventions. Otherwise this Convention shall not restrict the application of an international instrument in force between the State of origin and the State addressed or other law of the State addressed for the purposes of obtaining the return of a child who has been wrongfully removed or retained or of organizing access rights.

Article 35

This Convention shall apply as between Contracting States only to wrongful removals or retentions occurring after its entry into force in those States.
Where a declaration has been made under article 39 or 40 the reference in the preceding paragraph to a Contracting State shall be taken to refer to the territorial unit or units in relation to which this Convention applies.

Article 36

Nothing in this Convention shall prevent two or more States, in order to limit the restrictions to which the return of the child may be subject, from agreeing among themselves to derogate from any provisions of this Convention which may imply such a restriction.

CHAPTER VI — FINAL CLAUSES

Article 37

The Convention shall be open for signature by the States which were Members of the Hague Conference on Private

international privé lors de sa Quatorzième session.
Elle sera ratifiée, acceptée ou approuvée et les instruments de ratification, d'acceptation ou d'approbation seront déposés auprès du Ministère des Affaires Etrangères du Royaume des Pays-Bas.

Article 38

Tout autre Etat pourra adhérer à la Convention.
L'instrument d'adhésion sera déposé auprès du Ministère des Affaires Etrangères du Royaume des Pays-Bas.

La Convention entrera en vigueur, pour l'Etat adhérant, le premier jour du troisième mois du calendrier après le dépôt de son instrument d'adhésion.
L'adhésion n'aura d'effet que dans les rapports entre l'Etat adhérant et les Etats contractants qui auront déclaré accepter cette adhésion. Une telle déclaration devra également être faite par tout Etat membre ratifiant, acceptant ou approuvant la Convention ultérieurement à l'adhésion. Cette déclaration sera déposée auprès du Ministère des Affaires Etrangères du Royaume des Pays-Bas; celui-ci en enverra, par la voie diplomatique, une copie certifiée conforme, à chacun des Etats contractants.
La Convention entrera en vigueur entre l'Etat adhérant et l'Etat ayant déclaré accepter cette adhésion le premier jour du troisième mois du calendrier après le dépôt de la déclaration d'acceptation.

Article 39

Tout Etat, au moment de la signature, de la ratification, de l'acceptation, de l'approbation ou de l'adhésion, pourra déclarer que la Convention s'étendra à l'ensemble des territoires qu'il représente sur le plan international ou à l'un ou plusieurs d'entre eux. Cette déclaration aura effet au moment où elle entre en vigueur pour cet Etat.
Cette déclaration, ainsi que toute extension ultérieure, seront notifiées au Ministère des Affaires Etrangères du Royaume des Pays-Bas.

Article 40

Un Etat contractant qui comprend deux ou plusieurs unités territoriales dans lesquelles des systèmes de droit différents s'appliquent aux matières régies par cette Convention pourra, au moment de la signature, de la ratification, de l'acceptation, de l'approbation ou de l'adhésion, déclarer que la présente Convention s'appliquera à toutes ses unités territoriales ou seulement à l'une ou à plusieurs d'entre elles, et pourra à tout moment modifier cette déclaration en faisant une nouvelle déclaration. Ces déclarations seront notifiées au Ministère des Affaires Etrangères du Royaume des Pays-Bas et indiqueront expressément les unités territoriales auxquelles la Convention s'applique.

Article 41

Lorsqu'un Etat contractant a un système de gouvernement en vertu duquel les pouvoirs exécutif, judiciaire et législatif sont partagés entre des Autorités centrales et d'autres autorités de cet Etat, la signature, la ratification, l'acceptation, l'approbation ou l'adhésion à la Convention, ou une déclaration faite en vertu de l'article 40, n'emportera aucune implication quant au partage interne des pouvoirs dans cet Etat.

Article 42

Tout Etat contractant pourra, au plus tard au moment de la ratification, de l'acceptation, de l'approbation ou de l'adhésion, ou au moment d'une déclaration faite en vertu des articles 39 ou 40, faire une ou plusieurs des réserves prévues aux articles 24 et 26, alinéa 3. Aucune autre réserve ne sera admise.

International Law at the time of its Fourteenth Session.
It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 38

Any other State may accede to the Convention.
The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.
The Convention shall enter into force for a State acceding to it on the first day of the third calendar month after the deposit of its instrument of accession.
The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Kingdom of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.
The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the first day of the third calendar month after the deposit of the declaration of acceptance.

Article 39

Any State may, at the time of signature, ratification, acceptance, approval or accession, declare that the Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect at the time the Convention enters into force for that State.
Such declaration, as well as any subsequent extension, shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 40

If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time. Any such declaration shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands and shall state expressly the territorial units to which the Convention applies.

Article 41

Where a Contracting State has a system of government under which executive judicial and legislative powers are distributed between central and other authorities within that State, its signature, ratification, acceptance or approval of, or accession to this Convention, or its making of any declaration in terms of article 40 shall carry no implication as to the internal distribution of powers within that State.

Article 42

Any State may, not later than the time of ratification, acceptance, approval or accession, or at the time of making a declaration in terms of article 39 or 40, make one or more of the reservations provided for in articles 24 and 26 third paragraph. No other reservation shall be permitted.

Tout Etat pourra, à tout moment, retirer une réserve qu'il aura faite. Ce retrait sera notifié au Ministère des Affaires Etrangères du Royaume des Pays-Bas.
L'effet de la réserve cessera le premier jour du troisième mois du calendrier après la notification mentionnée à l'alinéa précédent.

Article 43

La Convention entrera en vigueur le premier jour du troisième mois du calendrier après le dépôt du troisième instrument de ratification, d'acceptation, d'approbation ou d'adhésion prévu par les articles 37 et 38.
Ensuite, la Convention entrera en vigueur:

1 pour chaque Etat ratifiant, acceptant, approuvant ou adhérant postérieurement le premier jour du troisième mois du calendrier après le dépôt de son instrument de ratification, d'acceptation, d'approbation ou d'adhésion;

2 pour les territoires auxquels la Convention a été étendue conformément à l'article 39 ou 40, le premier jour du troisième mois du calendrier après la notification visée dans cet article.

Article 44

La Convention aura une durée de cinq ans à partir de la date de son entrée en vigueur conformément à l'article 43, alinéa premier, même pour les Etats qui l'auront postérieurement ratifiée, acceptée ou approuvée ou qui y auront adhéré.
La Convention sera renouvelée tacitement de cinq ans en cinq ans, sauf dénonciation.
La dénonciation sera notifiée, au moins six mois avant l'expiration du délai de cinq ans, au Ministère des Affaires Etrangères du Royaume des Pays-Bas. Elle pourra se limiter à certains territoires ou unités territoriales auxquels s'applique la Convention.
La dénonciation n'aura d'effet qu'à l'égard de l'Etat qui l'aura notifiée. La Convention restera en vigueur pour les autres Etats contractants.

Article 45

Le Ministère des Affaires Etrangères du Royaume des Pays-Bas notifiera aux Etats Membres de la Conférence, ainsi qu'aux Etats qui auront adhéré conformément aux dispositions de l'article 38:

1 les signatures, ratifications, acceptations et approbations visées à l'article 37;

2 les adhésions visées à l'article 38;

3 la date à laquelle la Convention entrera en vigueur conformément aux dispositions de l'article 43;

4 les extensions visées à l'article 39;

5 les déclarations mentionnées à l'article 38 et 40;

6 les réserves prévues aux articles 24 et 26, alinéa 3, et le retrait des réserves prévu à l'article 42;

7 les dénonciations visées à l'article 44.

En foi de quoi, les soussignés, dûment autorisés, ont signé la présente Convention.

Fait à La Haye, le ..... 19....., en français et en anglais, les deux textes faisant également foi, en un seul exemplaire, qui sera déposé dans les archives du Gouvernement du Royaume des Pays-Bas et dont une copie certifiée conforme sera remise, par la voie diplomatique, à chacun des Etats Membres de la Conférence de La Haye de droit international privé lors de sa Quatorzième session.

Any State may at any time withdraw a reservation it has made. The withdrawal shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.
The reservation shall cease to have effect on the first day of the third calendar month after the notification referred to in the preceding paragraph.

Article 43

The Convention shall enter into force on the first day of the third calendar month after the deposit of the third instrument of ratification, acceptance, approval or accession referred to in articles 37 and 38.
Thereafter the Convention shall enter into force –

1 for each State ratifying, accepting, approving or acceding to it subsequently, on the first day of the third calendar month after the deposit of its instrument of ratification, acceptance, approval or accession;

2 for a territory to which the Convention has been extended in conformity with article 39 or 40, on the first day of the third calendar month after the notification referred to in that article.

Article 44

The Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of article 43 even for States which subsequently have ratified, accepted, approved it or acceded to it.
If there has been no denunciation, it shall be renewed tacitly every five years.
Any denunciation shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands at least six months before the expiry of the five year period. It may be limited to certain of the territories or territorial units to which the Convention applies.
The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 45

The Ministry of Foreign Affairs of the Kingdom of the Netherlands shall notify the States Members of the Conference, and the States which have acceded in accordance with article 38, of the following –

1 the signatures and ratifications, acceptances and approvals referred to in article 37;

2 the accessions referred to in article 38;

3 the date on which the Convention enters into force in accordance with article 43;

4 the extensions referred to in article 39;

5 the declarations referred to in articles 38 and 40;

6 the reservations referred to in articles 24 and 26, third paragraph, and the withdrawals referred to in article 42;

7 the denunciations referred to in article 44.

In witness whereof the undersigned, being duly authorized thereto, have signed this Convention.

Done at The Hague, on the ..... day of ..... 19....., in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the States Members of the Hague Conference on Private International Law at the date of its Fourteenth Session.

Procès-verbal No 4[1]

Séance du vendredi 24 octobre 1980 (après-midi)
Meeting of Friday 24 October 1980 (afternoon)

The meeting was opened at 3.40 p.m. Mr Schultsz (Netherlands), the Chairman of the Fourteenth Session, was in the Chair. Miss Pérez-Vera (Spain) was Rapporteur.

Le Président ouvre la séance plénière et annonce l'examen du Document de travail No 12.
Il demande l'indulgence de l'assemblée en raison du peu de temps à disposition pour la relecture de la Convention.
Le Président demande à M. Anton s'il veut faire quelques remarques.

Mr Anton (Chairman of Commission I) explained to the delegates that the text contained in Working Document No 12 conformed to the main principles of the draft Convention which had already been presented to the Commission. He expressed his hope that it constituted an appropriate and acceptable compromise amongst the sometimes divergent interests represented in the meeting. He asked that delegates stress this point to their governments, when presenting the Convention for signature and ratification.

The Preamble was read and adopted.

Articles 1-6 were read and adopted.

L'article 7 est adopté avec une modification: «services» devient «participation» dans les deux textes français et anglais.

Articles 8 and 9 were read and adopted.

L'article 10 est adopté avec une modification dans la version française: «son retour» devient «sa remise».

Article 11 was read and adopted.

Article 12 was read and adopted, subject to a modification in the second paragraph thereof. After considerable discussion, the English text of article 12(2) was adopted in the following form: 'The judicial or administrative authority, even where the proceedings have been commenced after the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.'

L'article 12 est adopté et subit un amendement dans le deuxième paragraphe; le texte devient: «L'autorité judiciaire ou administrative, même saisie après l'expiration de la période d'un an prévue à l'alinéa précédent, doit aussi ordonner le retour . . .».

Article 13 was read and adopted, subject to the alignment of the English text of paragraph 1*a* with the French text. Article 13(1)*a* was altered to read as follows:

'*a* the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or'

Article 14 was read and adopted.

Article 15 was read and adopted, subject to the deletion in the English text of the word 'child's' occurring in the fifth line of that article.

Article 16 was read and adopted, subject to the addition in the English text of the words 'of a child' after the words 'wrongful removal or retention' occurring in the first line thereof.

Au texte français est ajoutée une légère adjonction: «se» est ajouté et donne «ne se soit écoulé . . .».

L'article 17 est adopté avec deux modifications à la troisième ligne du texte français: «le refus de retourner» devient «le refus de *renvoyer*» l'enfant; et «dans le cadre de *la* Convention» au lieu de «*cette* Convention».

Article 18 was read and adopted.

L'article 19 est adopté avec la modification suivante dans le texte français: *cette* Convention devient *la* Convention.

Les articles 20 à 24 sont adoptés sans modification.

Article 25 was read and adopted, subject to the addition in the English text of the words 'on the same conditions' after 'Contracting State'.

Mr Anton (Chairman of Commission I) proposed this change, on the ground that article 25 was very similar in its terms to article 1 of the Convention on International Access to Justice, and that the two texts should be aligned.

L'article 25 est adopté et subit la modification suivante au texte français: «comme s'ils étaient» devient «dans les mêmes conditions que s'ils étaient . . .».

L'article 26 est adopté avec une adjonction au texte français: «en relation avec l'application» devient «en relation avec les demandes introduites en application . . .».

Article 27 was read and adopted.

Article 28 was read and adopted, subject to the substitution in the English text of the word 'the' for 'any'.

Articles 29 and 30 were read and adopted.

Article 31 was read and adopted. The delegates decided that article 6 was a more appropriate context in which to refer to 'autonomous territorial organisations', since article 31 was concerned purely with a State which had two or more systems of law applicable in different territorial units. Thus, the existing text of article 31, which had been taken from other Conventions, was retained, and no attempt was made

[1] N'est reproduit ici que le Procès-verbal ayant trait au projet de Convention sur les aspects civils de l'enlèvement international d'enfants. Les autres Procès-verbaux sont publiés dans les autres tomes de la Quatorzième session.

Only the *Procès-verbal* dealing with the draft Convention on the Civil Aspects of International Child Abduction is reproduced here. The other *Procès-verbaux* will be found in the remaining volumes about the Fourteenth Session.

to align it with article 6, which was concerned with a rather different question.

L'article 32 est adopté avec une modification: la suppression de «contractants» après «Etats», pour aligner les textes français et anglais.

Article 33 was read and adopted.

Article 34 was read and adopted, subject to the substitution of 'the present' for 'this' at the beginning of the second sentence of the English text of the article.

A la première ligne du texte français, «la présente Convention» devient «la Convention» et à la cinquième ligne «cette Convention» devient «la Convention».

L'article 35 est adopté avec une modification au texte français: «Cette Convention» au début devient «La Convention».

Articles 36-38 were read and adopted, subject to the addition of the word 'Contracting' before 'States' in the English text of article 36.

Article 39 was read and adopted.

Mr Růžička (Czechoslovakia) proposed the deletion of article 39 since in his view it was contrary to the United Nations Declaration granting independence to colonial countries.

The Chairman replied that the provisions of article 39 were essential for the United Kingdom, which would otherwise be unable to extend the provisions of the Convention to, for example, the Isle of Man and the Channel Islands.

A vote was then taken on the proposal of Czechoslovakia to delete article 39.

Vote

The proposal of Czechoslovakia that article 39 be deleted was rejected by a vote of 17 against (Australia, Austria, Belgium, Canada, Denmark, France, Federal Republic of Germany, Greece, Ireland, Japan, Luxemburg, Netherlands, Norway, Portugal, United Kingdom, United States and Sweden), 4 in favour (Czechoslovakia, Italy, Spain, Venezuela,) with 3 abstentions (Finland, Switzerland, Yugoslavia).

Article 39 was thus adopted.

Article 40 was read and adopted.

Mr Anton (Chairman of Commission I) observed that article 40's provisions were intended to permit a federal State to extend the Convention to one or more, but not all, of its territorial units. Since it was important for a State to be able to accede on such a basis, it was felt that the text should make this explicit.

Le Secrétaire général adjoint soulève un problème épineux: s'il est clair qu'un Etat fédéral qui appartient à la Convention puisse n'engager que deux ou plusieurs de ses unités territoriales, la question est beaucoup plus difficile lorsqu'un Etat fédéral non-membre adhère à la Convention: un État membre pourra-t-il limiter l'application de la Convention dans ses rapports avec l'Etat fédéral à certaines unités de cet Etat seulement?

Le Secrétaire général donne son sentiment et pense qu'un Etat accepte l'adhésion d'un Etat fédéral en tant qu'unité de droit international public et ne peut poser des restrictions.

Le Secrétaire général est appuyé ensuite par M. Barile et le Rapporteur.

Le Rapporteur ajoute que l'Etat qui adhère peut mesurer jusqu'où va sa volonté; l'Etat ou les Etats membres ne peuvent modifier unilatéralement la déclaration de l'Etat adhérant.

M. Barile (Italie) déclare qu'un Etat fédéral ne peut avoir qu'une volonté en droit international.

Article 41 was read and adopted, subject to the substitution in the French text of '*conséquences*' for '*implications*'.

Mr Leal (Canada) intimated that his Government, through its delegation, wished to make a statement for the record. It was the opinion of the Canadian Government that article 41 of the Convention on the Civil Aspects of International Child Abduction and article 27 of the Convention on International Access to Justice were hardly necessary within the context of such international instruments. It wished to emphasise that these articles should in no way affect the interpretation of the 'federal State clause' in either Convention, *i.e.* article 40 of the Convention on the Civil Aspects of International Child Abduction, and article 26 of the Convention on International Access to Justice.

The Delegates of Greece, Italy and Portugal expressed support for the declaration of the Canadian Delegate.

Mr Dyer (First Secretary at the Permanent Bureau) noted that certain points of '*toilette*' remained concerning article 41, since it was desirable to have complete uniformity in this respect with the Convention on International Access to Justice.

Article 42 was read and adopted, subject to modifications in the first paragraph of both texts. In the English, the words occurring after '40', were altered to read 'make one or both of the reservations provided for in article 24 and article 26, third paragraph'. The corresponding words in the French text were changed to '*faire soit l'une, soit les deux réserves prévues aux articles 24 et 26, alinéa 3.*'

Article 43 was read and adopted, subject to sub-paragraph 2 of article 43(2) of the English text being re-cast in the following terms:

'2 *For any territory or territorial unit to which the Convention has been extended in conformity with article 39 or 40, on the first day of the third calendar month after the notification referred to in that article.*'

The text in Working Document No 12 was deemed to be deficient, 'territory' in itself being insufficient to embrace the notion of territorial units as well. Since sub-paragraph 2 referred to article 40 of the Convention which was concerned with such territorial units, an appropriate reference was added.

The French text was similarly modified, *viz.*:

'2 *Pour les territoires ou les unités territoriales auxquels la Convention a été étendue . . .*'.

Article 44 was read and adopted.

Article 45 was read and adopted, subject to a slight alteration in the English text of sub-paragraph 6, which was re-formulated thus:

'6 *The reservations referred to in article 24 and article 26, third paragraph, and the withdrawals referred to in article 42;*'

The attestation clause was read and adopted.

Procès-verbal No 4

La Convention en son entier et la formule modèle (Doc. trav. No 6)[1] *sont adoptées à l'unanimité par les Etats présents suivants: République fédérale d'Allemagne, Australie, Autriche, Belgique, Canada, Danemark, Espagne, Etats-Unis, Finlande, France, Grèce, Irlande, Japon, Luxembourg, Norvège, Pays-Bas, Portugal, Royaume-Uni, Suède, Suisse, Tchécoslovaquie, Venezuela, Yougoslavie.*

The meeting was closed at 6.45 p.m.

[1] Le Document de travail No 6 fait l'objet d'une Recommandation adoptée par la Quatorzième session et figure dans les *Actes et documents* de cette Session, Tome I, *Matières diverses*. Le texte de la Recommandation figure également *infra*, p. 423.

Working Document No 6 was the subject of a Recommendation adopted by the Fourteenth Session, which appears in Book I of the *Acts and Documents* of this Session, entitled *Miscellaneous matters*. The text of the Recommendation also appears *infra* at p. 423.

Convention

Convention adoptée par la Quatorzième session et signée le 25 octobre 1980[1]

Convention adopted by the Fourteenth Session and signed on the 25th of October 1980[1]

CONVENTION SUR LES ASPECTS CIVILS DE L'ENLÈVEMENT INTERNATIONAL D'ENFANTS

Les Etats signataires de la présente Convention,

Profondément convaincus que l'intérêt de l'enfant est d'une importance primordiale pour toute question relative à sa garde,

Désirant protéger l'enfant, sur le plan international, contre les effets nuisibles d'un déplacement ou d'un non-retour illicites et établir des procédures en vue de garantir le retour immédiat de l'enfant dans l'Etat de sa résidence habituelle, ainsi que d'assurer la protection du droit de visite,

Ont résolu de conclure une Convention à cet effet, et sont convenus des dispositions suivantes:

CHAPITRE I — CHAMP D'APPLICATION DE LA CONVENTION

Article premier

La présente Convention a pour objet:

a d'assurer le retour immédiat des enfants déplacés ou retenus illicitement dans tout Etat contractant;

[1] Extrait de l'Acte final de la Quatorzième session, signé le 25 octobre 1980; pour le texte complet de l'Acte final, voir *Actes et documents de la Quatorzième Session (1980)*, tome I, *Matières diverses*.

CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

The States signatory to the present Convention,

Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,

Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,

Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions –

CHAPTER I – SCOPE OF THE CONVENTION

Article 1

The objects of the present Convention are –

a to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

[1] Extract from the Final Act of the Fourteenth Session, signed on the 25th of October 1980; for the complete text of the Final Act, see *Acts and Documents of the Fourteenth Session (1980)*, Book I, *Miscellaneous matters*.

b de faire respecter effectivement dans les autres Etats contractants les droits de garde et de visite existant dans un Etat contractant.

Article 2

Les Etats contractants prennent toutes mesures appropriées pour assurer, dans les limites de leur territoire, la réalisation des objectifs de la Convention. A cet effet, ils doivent recourir à leurs procédures d'urgence.

Article 3

Le déplacement ou le non-retour d'un enfant est considéré comme illicite:

a lorsqu'il a lieu en violation d'un droit de garde, attribué à une personne, une institution ou tout autre organisme, seul ou conjointement, par le droit de l'Etat dans lequel l'enfant avait sa résidence habituelle immédiatement avant son déplacement ou son non-retour; et

b que ce droit était exercé de façon effective seul ou conjointement, au moment du déplacement ou du non-retour, ou l'eût été si de tels événements n'étaient survenus.

Le droit de garde visé en *a* peut notamment résulter d'une attribution de plein droit, d'une décision judiciaire ou administrative, ou d'un accord en vigueur selon le droit de cet Etat.

Article 4

La Convention s'applique à tout enfant qui avait sa résidence habituelle dans un Etat contractant immédiatement avant l'atteinte aux droits de garde ou de visite. L'application de la Convention cesse lorsque l'enfant parvient à l'âge de 16 ans.

Article 5

Au sens de la présente Convention:

a le «droit de garde» comprend le droit portant sur les soins de la personne de l'enfant, et en particulier celui de décider de son lieu de résidence;

b le «droit de visite» comprend le droit d'emmener l'enfant pour une période limitée dans un lieu autre que celui de sa résidence habituelle.

CHAPITRE II — AUTORITÉS CENTRALES

Article 6

Chaque Etat contractant désigne une Autorité centrale chargée de satisfaire aux obligations qui lui sont imposées par la Convention.

Un Etat fédéral, un Etat dans lequel plusieurs systèmes de droit sont en vigueur ou un Etat ayant des organisations territoriales autonomes, est libre de désigner plus d'une Autorité centrale et de spécifier l'étendue territoriale des pouvoirs de chacune de ces Autorités. L'Etat qui fait usage de cette faculté désigne l'Autorité centrale à laquelle les demandes peuvent être adressées en vue de leur transmission à l'Autorité centrale compétente au sein de cet Etat.

Article 7

Les Autorités centrales doivent coopérer entre elles et promouvoir une collaboration entre les autorités compétentes dans leurs Etats respectifs, pour assurer le retour immédiat des enfants et réaliser les autres objectifs de la présente Convention.

En particulier, soit directement, soit avec le concours de tout intermédiaire, elles doivent prendre toutes les mesures appropriées:

a pour localiser un enfant déplacé ou retenu illicitement;

b to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

Article 2

Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available.

Article 3

The removal or the retention of a child is to be considered wrongful where –

a it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

b at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph *a* above, may arise in particular by operation of law or by reason of a judicial or administative decision, or by reason of an agreement having legal effect under the law of that State.

Article 4

The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

Article 5

For the purposes of this Convention –

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

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

CHAPTER II — CENTRAL AUTHORITIES

Article 6

A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.

Federal States, States with more than one system of law or States having autonomous territorial organizations shall be free to appoint more than one Central Authority and to specify the territorial extent of their powers. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which applications may be addressed for transmission to the appropriate Central Authority within that State.

Article 7

Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.

In particular, either directly or through any intermediary, they shall take all appropriate measures –

a to discover the whereabouts of a child who has been wrongfully removed or retained;

b pour prévenir de nouveaux dangers pour l'enfant ou des préjudices pour les parties concernées, en prenant ou faisant prendre des mesures provisoires;

c pour assurer la remise volontaire de l'enfant ou faciliter une solution amiable;

d pour échanger, si cela s'avère utile, des informations relatives à la situation sociale de l'enfant;

e pour fournir des informations générales concernant le droit de leur Etat relatives à l'application de la Convention;

f pour introduire ou favoriser l'ouverture d'une procédure judiciaire ou administrative, afin d'obtenir le retour de l'enfant et, le cas échéant, de permettre l'organisation ou l'exercice effectif du droit de visite;

g pour accorder ou faciliter, le cas échéant, l'obtention de l'assistance judiciaire et juridique, y compris la participation d'un avocat;

h pour assurer, sur le plan administratif, si nécessaire et opportun, le retour sans danger de l'enfant;

i pour se tenir mutuellement informées sur le fonctionnement de la Convention et, autant que possible, lever les obstacles éventuellement rencontrés lors de son application.

b to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;

c to secure the voluntary return of the child or to bring about an amicable resolution of the issues;

d to exchange, where desirable, information relating to the social background of the child;

e to provide information of a general character as to the law of their State in connection with the application of the Convention;

f to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organizing or securing the effective exercise of rights of access;

g where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;

h to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;

i to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.

CHAPITRE III — RETOUR DE L'ENFANT

Article 8

La personne, l'institution ou l'organisme qui prétend qu'un enfant a été déplacé ou retenu en violation d'un droit de garde peut saisir soit l'Autorité centrale de la résidence habituelle de l'enfant, soit celle de tout autre Etat contractant, pour que celles-ci prêtent leur assistance en vue d'assurer le retour de l'enfant.
La demande doit contenir:

a des informations portant sur l'identité du demandeur, de l'enfant et de la personne dont il est allégué qu'elle a emmené ou retenu l'enfant;

b la date de naissance de l'enfant, s'il est possible de se la procurer;

c les motifs sur lesquels se base le demandeur pour réclamer le retour de l'enfant;

d toutes informations disponibles concernant la localisation de l'enfant et l'identité de la personne avec laquelle l'enfant est présumé se trouver.

La demande peut être accompagnée ou complétée par:

e une copie authentifiée de toute décision ou de tout accord utiles;

f une attestation ou une déclaration avec affirmation émanant de l'Autorité centrale, ou d'une autre autorité compétente de l'Etat de la résidence habituelle, ou d'une personne qualifiée, concernant le droit de l'Etat en la matière;

g tout autre document utile.

Article 9

Quand l'Autorité centrale qui est saisie d'une demande en vertu de l'article 8 a des raisons de penser que l'enfant se trouve dans un autre Etat contractant, elle transmet la demande directement et sans délai à l'Autorité centrale de cet Etat contractant et en informe l'Autorité centrale requérante ou, le cas échéant, le demandeur.

Article 10

L'Autorité centrale de l'Etat où se trouve l'enfant prendra

CHAPTER III — RETURN OF CHILDREN

Article 8

Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.
The application shall contain —

a information concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child;

b where available, the date of birth of the child;

c the grounds on which the applicant's claim for return of the child is based;

d all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be.

The application may be accompanied or supplemented by —

e an authenticated copy of any relevant decision or agreement;

f a certificate or an affidavit emanating from a Central Authority, or other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State;

g any other relevant document.

Article 9

If the Central Authority which receives an application referred to in Article 8 has reason to believe that the child is in another Contracting State, it shall directly and without delay transmit the application to the Central Authority of that Contracting State and inform the requesting Central Authority, or the applicant, as the case may be.

Article 10

The Central Authority of the State where the child is shall

ou fera prendre toute mesure propre à assurer sa remise volontaire.

Article 11

Les autorités judiciaires ou administratives de tout Etat contractant doivent procéder d'urgence en vue du retour de l'enfant.
Lorsque l'autorité judiciaire ou administrative saisie n'a pas statué dans un délai de six semaines à partir de sa saisine, le demandeur ou l'Autorité centrale de l'Etat requis, de sa propre initiative ou sur requête de l'Autorité centrale de l'Etat requérant, peut demander une déclaration sur les raisons de ce retard. Si la réponse est reçue par l'Autorité centrale de l'Etat requis, cette Autorité doit la transmettre à l'Autorité centrale de l'Etat requérant ou, le cas échéant, au demandeur.

Article 12

Lorsqu'un enfant a été déplacé ou retenu illicitement au sens de l'article 3 et qu'une période de moins d'un an s'est écoulée à partir du déplacement ou du non-retour au moment de l'introduction de la demande devant l'autorité judiciaire ou administrative de l'Etat contractant où se trouve l'enfant, l'autorité saisie ordonne son retour immédiat.

L'autorité judiciaire ou administrative, même saisie après l'expiration de la période d'un an prévue à l'alinéa précédent, doit aussi ordonner le retour de l'enfant, à moins qu'il ne soit établi que l'enfant s'est intégré dans son nouveau milieu.

Lorsque l'autorité judiciaire ou administrative de l'Etat requis a des raisons de croire que l'enfant a été emmené dans un autre Etat, elle peut suspendre la procédure ou rejeter la demande de retour de l'enfant.

Article 13

Nonobstant les dispositions de l'article précédent, l'autorité judiciaire ou administrative de l'Etat requis n'est pas tenue d'ordonner le retour de l'enfant, lorsque la personne, l'institution ou l'organisme qui s'oppose à son retour établit:

a que la personne, l'institution ou l'organisme qui avait le soin de la personne de l'enfant n'exerçait pas effectivement le droit de garde à l'époque du déplacement ou du non-retour, ou avait consenti ou a acquiescé postérieurement à ce déplacement ou à ce non-retour; ou

b qu'il existe un risque grave que le retour de l'enfant ne l'expose à un danger physique ou psychique, ou de toute autre manière ne le place dans une situation intolérable.

L'autorité judiciaire ou administrative peut aussi refuser d'ordonner le retour de l'enfant si elle constate que celui-ci s'oppose à son retour et qu'il a atteint un âge et une maturité où il se révèle approprié de tenir compte de cette opinion.

Dans l'appréciation des circonstances visées dans cet article, les autorités judiciaires ou administratives doivent tenir compte des informations fournies par l'Autorité centrale ou toute autre autorité compétente de l'Etat de la résidence habituelle de l'enfant sur sa situation sociale.

Article 14

Pour déterminer l'existence d'un déplacement ou d'un non-retour illicite au sens de l'article 3, l'autorité judiciaire ou administrative de l'Etat requis peut tenir compte directement du droit et des décisions judiciaires ou administratives reconnues formellement ou non dans l'Etat de la résidence habituelle de l'enfant, sans avoir recours aux procédures spécifiques sur la preuve de ce droit ou pour la

take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child.

Article 11

The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.
If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.

Article 12

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.
The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.
Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

Article 13

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –

a the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

b there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.
In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

Article 14

In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognized or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the

reconnaissance des décisions étrangères qui seraient autrement applicables.

Article 15

Les autorités judiciaires ou administratives d'un Etat contractant peuvent, avant d'ordonner le retour de l'enfant, demander la production par le demandeur d'une décision ou d'une attestation émanant des autorités de l'Etat de la résidence habituelle de l'enfant constatant que le déplacement ou le non-retour était illicite au sens de l'article 3 de la Convention, dans la mesure où cette décision ou cette attestation peut être obtenue dans cet Etat. Les Autorités centrales des Etats contractants assistent dans la mesure du possible le demandeur pour obtenir une telle décision ou attestation.

Article 16

Après avoir été informées du déplacement illicite d'un enfant ou de son non-retour dans le cadre de l'article 3, les autorités judiciaires ou administratives de l'Etat contractant où l'enfant a été déplacé ou retenu ne pourront statuer sur le fond du droit de garde jusqu'à ce qu'il soit établi que les conditions de la présente Convention pour un retour de l'enfant ne sont pas réunies, ou jusqu'à ce qu'une période raisonnable ne se soit écoulée sans qu'une demande en application de la Convention n'ait été faite.

Article 17

Le seul fait qu'une décision relative à la garde ait été rendue ou soit susceptible d'être reconnue dans l'Etat requis ne peut justifier le refus de renvoyer l'enfant dans le cadre de cette Convention, mais les autorités judiciaires ou administratives de l'Etat requis peuvent prendre en considération les motifs de cette décision qui rentreraient dans le cadre de l'application de la Convention.

Article 18

Les dispositions de ce chapitre ne limitent pas le pouvoir de l'autorité judiciaire ou administrative d'ordonner le retour de l'enfant à tout moment.

Article 19

Une décision sur le retour de l'enfant rendue dans le cadre de la Convention n'affecte pas le fond du droit de garde.

Article 20

Le retour de l'enfant conformément aux dispositions de l'article 12 peut être refusé quand il ne serait pas permis par les principes fondamentaux de l'Etat requis sur la sauvegarde des droits de l'homme et des libertés fondamentales.

CHAPITRE IV — DROIT DE VISITE

Article 21

Une demande visant l'organisation ou la protection de l'exercice effectif d'un droit de visite peut être adressée à l'Autorité centrale d'un Etat contractant selon les mêmes modalités qu'une demande visant au retour de l'enfant.

Les Autorités centrales sont liées par les obligations de coopération visées à l'article 7 pour assurer l'exercice paisible du droit de visite et l'accomplissement de toute condition à laquelle l'exercice de ce droit serait soumis, et pour que soient levés, dans toute la mesure du possible, les obstacles de nature à s'y opposer.
Les Autorités centrales, soit directement, soit par des intermédiaires, peuvent entamer ou favoriser une procédure légale en vue d'organiser ou de protéger le droit de visite et les conditions auxquelles l'exercice de ce droit pourrait être soumis.

recognition of foreign decisions which would otherwise be applicable.

Article 15

The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.

Article 16

After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.

Article 17

The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention, but the judicial or administrative authorities of the requested State may take account of the reasons for that decision in applying this Convention.

Article 18

The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time.

Article 19

A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.

Article 20

The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

CHAPTER IV — RIGHTS OF ACCESS

Article 21

An application to make arrangements for organizing or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child.
The Central Authorities are bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject. The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights.
The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organizing or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject.

Article 22

Aucune caution ni aucun dépôt, sous quelque dénomination que ce soit, ne peut être imposé pour garantir le paiement des frais et dépens dans le contexte des procédures judiciaires ou administratives visées par la Convention.

Article 23

Aucune légalisation ni formalité similaire ne sera requise dans le contexte de la Convention.

Article 24

Toute demande, communication ou autre document sont envoyés dans leur langue originale à l'Autorité centrale de l'Etat requis et accompagnés d'une traduction dans la langue officielle ou l'une des langues officielles de cet Etat ou, lorsque cette traduction est difficilement réalisable, d'une traduction en français ou en anglais.
Toutefois, un Etat contractant pourra, en faisant la réserve prévue à l'article 42, s'opposer à l'utilisation soit du français, soit de l'anglais, dans toute demande, communication ou autre document adressés à son Autorité centrale.

Article 25

Les ressortissants d'un Etat contractant et les personnes qui résident habituellement dans cet Etat auront droit, pour tout ce qui concerne l'application de la Convention, à l'assistance judiciaire et juridique dans tout autre Etat contractant, dans les mêmes conditions que s'ils étaient eux-mêmes ressortissants de cet autre Etat et y résidaient habituellement.

Article 26

Chaque Autorité centrale supportera ses propres frais en appliquant la Convention.
L'Autorité centrale et les autres services publics des Etats contractants n'imposeront aucun frais en relation avec les demandes introduites en application de la Convention. Notamment, ils ne peuvent réclamer du demandeur le paiement des frais et dépens du procès ou, éventuellement, des frais entraînés par la participation d'un avocat. Cependant, ils peuvent demander le paiement des dépenses causées ou qui seraient causées par les opérations liées au retour de l'enfant.
Toutefois, un Etat contractant pourra, en faisant la réserve prévue à l'article 42, déclarer qu'il n'est tenu au paiement des frais visés à l'alinéa précédent, liés à la participation d'un avocat ou d'un conseiller juridique, ou aux frais de justice, que dans la mesure où ces coûts peuvent être couverts par son système d'assistance judiciaire et juridique.

En ordonnant le retour de l'enfant ou en statuant sur le droit de visite dans le cadre de la Convention, l'autorité judiciaire ou administrative peut, le cas échéant, mettre à la charge de la personne qui a déplacé ou qui a retenu l'enfant, ou qui a empêché l'exercice du droit de visite, le paiement de tous frais nécessaires engagés par le demandeur ou en son nom, notamment des frais de voyage, des frais de représentation judiciaire du demandeur et de retour de l'enfant, ainsi que de tous les coûts et dépenses faits pour localiser l'enfant.

Article 27

Lorsqu'il est manifeste que les conditions requises par la Convention ne sont pas remplies ou que la demande n'est pas fondée, une Autorité centrale n'est pas tenue d'accepter une telle demande. En ce cas, elle informe immédiatement de ses motifs le demandeur ou, le cas échéant, l'Autorité centrale qui lui a transmis la demande.

Article 22

No security, bond or deposit, however described, shall be required to guarantee the payment of costs and expenses in the judicial or administrative proceedings falling within the scope of this Convention.

Article 23

No legalization or similar formality may be required in the context of this Convention.

Article 24

Any application, communication or other document sent to the Central Authority of the requested State shall be in the original language, and shall be accompanied by a translation into the official language or one of the official languages of the requested State or, where that is not feasible, a translation into French or English.
However, a Contracting State may, by making a reservation in accordance with Article 42, object to the use of either French or English, but not both, in any application, communication or other document sent to its Central Authority.

Article 25

Nationals of the Contracting States and persons who are habitually resident within those States shall be entitled in matters concerned with the application of this Convention to legal aid and advice in any other Contracting State on the same conditions as if they themselves were nationals of and habitually resident in that State.

Article 26

Each Central Authority shall bear its own costs in applying this Convention.
Central Authorities and other public services of Contracting States shall not impose any charges in relation to applications submitted under this Convention. In particular, they may not require any payment from the applicant towards the costs and expenses of the proceedings or, where applicable, those arising from the participation of legal counsel or advisers. However, they may require the payment of the expenses incurred or to be incurred in implementing the return of the child.
However, a Contracting State may, by making a reservation in accordance with Article 42, declare that it shall not be bound to assume any costs referred to in the preceding paragraph resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.
Upon ordering the return of a child or issuing an order concerning rights of access under this Convention, the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child, or who prevented the exercise of rights of access, to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child.

Article 27

When it is manifest that the requirements of this Convention are not fulfilled or that the application is otherwise not well founded, a Central Authority is not bound to accept the application. In that case, the Central Authority shall forthwith inform the applicant or the Central Authority through which the application was submitted, as the case may be, of its reasons.

Article 28

Une Autorité centrale peut exiger que la demande soit accompagnée d'une autorisation par écrit lui donnant le pouvoir d'agir pour le compte du demandeur, ou de désigner un représentant habilité à agir en son nom.

Article 29

La Convention ne fait pas obstacle à la faculté pour la personne, l'institution ou l'organisme qui prétend qu'il y a eu une violation du droit de garde ou de visite au sens des articles 3 ou 21 de s'adresser directement aux autorités judiciaires ou administratives des Etats contractants, par application ou non des dispositions de la Convention.

Article 30

Toute demande, soumise à l'Autorité centrale ou directement aux autorités judiciaires ou administratives d'un Etat contractant par application de la Convention, ainsi que tout document ou information qui y serait annexé ou fourni par une Autorité centrale, seront recevables devant les tribunaux ou les autorités administratives des Etats contractants.

Article 31

Au regard d'un Etat qui connaît en matière de garde des enfants deux ou plusieurs systèmes de droit applicables dans des unités territoriales différentes:

a toute référence à la résidence habituelle dans cet Etat vise la résidence habituelle dans une unité territoriale de cet Etat;

b toute référence à la loi de l'Etat de la résidence habituelle vise la loi de l'unité territoriale dans laquelle l'enfant a sa résidence habituelle.

Article 32

Au regard d'un Etat connaissant en matière de garde des enfants deux ou plusieurs systèmes de droit applicables à des catégories différentes de personnes, toute référence à la loi de cet Etat vise le système de droit désigné par le droit de celui-ci.

Article 33

Un Etat dans lequel différentes unités territoriales ont leurs propres règles de droit en matière de garde des enfants ne sera pas tenu d'appliquer la Convention lorsqu'un Etat dont le système de droit est unifié ne serait pas tenu de l'appliquer.

Article 34

Dans les matières auxquelles elle s'applique, la Convention prévaut sur la *Convention du 5 octobre 1961 concernant la compétence des autorités et la loi applicable en matière de protection des mineurs*, entre les Etats Parties aux deux Conventions. Par ailleurs, la présente Convention n'empêche pas qu'un autre instrument international liant l'Etat d'origine et l'Etat requis, ni que le droit non conventionnel de l'Etat requis, ne soient invoqués pour obtenir le retour d'un enfant qui a été déplacé ou retenu illicitement ou pour organiser le droit de visite.

Article 35

La Convention ne s'applique entre les Etats contractants qu'aux enlèvements ou aux non-retours illicites qui se sont produits après son entrée en vigueur dans ces Etats.
Si une déclaration a été faite conformément aux articles 39 ou 40, la référence à un Etat contractant faite à l'alinéa précédent signifie l'unité ou les unités territoriales auxquelles la Convention s'applique.

Article 28

A Central Authority may require that the application be accompanied by a written authorization empowering it to act on behalf of the applicant, or to designate a representative so to act.

Article 29

This Convention shall not preclude any person, institution or body who claims that there has been a breach of custody or access rights within the meaning of Article 3 or 21 from applying directly to the judicial or administrative authorities of a Contracting State, whether or not under the provisions of this Convention.

Article 30

Any application submitted to the Central Authorities or directly to the judicial or administrative authorities of a Contracting State in accordance with the terms of this Convention, together with documents and any other information appended thereto or provided by a Central Authority, shall be admissible in the courts or administrative authorities of the Contracting States.

Article 31

In relation to a State which in matters of custody of children has two or more systems of law applicable in different territorial units –

a any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit of that State;

b any reference to the law of the State of habitual residence shall be construed as referring to the law of the territorial unit in that State where the child habitually resides.

Article 32

In relation to a State which in matters of custody of children has two or more systems of law applicable to different categories of persons, any reference to the law of that State shall be construed as referring to the legal system specified by the law of that State.

Article 33

A State within which different territorial units have their own rules of law in respect of custody of children shall not be bound to apply this Convention where a State with a unified system of law would not be bound to do so.

Article 34

This Convention shall take priority in matters within its scope over the *Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors*, as between Parties to both Conventions. Otherwise the present Convention shall not restrict the application of an international instrument in force between the State of origin and the State addressed or other law of the State addressed for the purposes of obtaining the return of a child who has been wrongfully removed or retained or of organizing access rights.

Article 35

This Convention shall apply as between Contracting States only to wrongful removals or retentions occurring after its entry into force in those States.
Where a declaration has been made under Article 39 or 40, the reference in the preceding paragraph to a Contracting State shall be taken to refer to the territorial unit or units in relation to which this Convention applies.

Article 36

Rien dans la Convention n'empêche deux ou plusieurs Etats contractants, afin de limiter les restrictions auxquelles le retour de l'enfant peut être soumis, de convenir entre eux de déroger à celles de ses dispositions qui peuvent impliquer de telles restrictions.

CHAPITRE VI — CLAUSES FINALES

Article 37

La Convention est ouverte à la signature des Etats qui étaient Membres de la Conférence de La Haye de droit international privé lors de sa Quatorzième session.
Elle sera ratifiée, acceptée ou approuvée et les instruments de ratification, d'acceptation ou d'approbation seront déposés auprès du Ministère des Affaires Etrangères du Royaume des Pays-Bas.

Article 38

Tout autre Etat pourra adhérer à la Convention.
L'instrument d'adhésion sera déposé auprès du Ministère des Affaires Etrangères du Royaume des Pays-Bas.

La Convention entrera en vigueur, pour l'Etat adhérant, le premier jour du troisième mois du calendrier après le dépôt de son instrument d'adhésion.
L'adhésion n'aura d'effet que dans les rapports entre l'Etat adhérant et les Etats contractants qui auront déclaré accepter cette adhésion. Une telle déclaration devra également être faite par tout Etat membre ratifiant, acceptant ou approuvant la Convention ultérieurement à l'adhésion. Cette déclaration sera déposée auprès du Ministère des Affaires Etrangères du Royaume des Pays-Bas; celui-ci en enverra, par la voie diplomatique, une copie certifiée conforme, à chacun des Etats contractants.
La Convention entrera en vigueur entre l'Etat adhérant et l'Etat ayant déclaré accepter cette adhésion le premier jour du troisième mois du calendrier après le dépôt de la déclaration d'acceptation.

Article 39

Tout Etat, au moment de la signature, de la ratification, de l'acceptation, de l'approbation ou de l'adhésion, pourra déclarer que la Convention s'étendra à l'ensemble des territoires qu'il représente sur le plan international ou à l'un ou plusieurs d'entre eux. Cette déclaration aura effet au moment où elle entre en vigueur pour cet Etat.
Cette déclaration, ainsi que toute extension ultérieure, seront notifiées au Ministère des Affaires Etrangères du Royaume des Pays-Bas.

Article 40

Un Etat contractant qui comprend deux ou plusieurs unités territoriales dans lesquelles des systèmes de droit différents s'appliquent aux matières régies par cette Convention pourra, au moment de la signature, de la ratification, de l'acceptation, de l'approbation ou de l'adhésion, déclarer que la présente Convention s'appliquera à toutes ses unités territoriales ou seulement à l'une ou à plusieurs d'entre elles, et pourra à tout moment modifier cette déclaration en faisant une nouvelle déclaration.
Ces déclarations seront notifiées au Ministère des Affaires Etrangères du Royaume des Pays-Bas et indiqueront expressément les unités territoriales auxquelles la Convention s'applique.

Article 41

Lorsqu'un Etat contractant a un système de gouvernement en vertu duquel les pouvoirs exécutif, judiciaire et législatif sont partagés entre des Autorités centrales et d'autres

Article 36

Nothing in this Convention shall prevent two or more Contracting States, in order to limit the restrictions to which the return of the child may be subject, from agreeing among themselves to derogate from any provisions of this Convention which may imply such a restriction.

CHAPTER VI — FINAL CLAUSES

Article 37

The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Fourteenth Session.
It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 38

Any other State may accede to the Convention.
The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.
The Convention shall enter into force for a State acceding to it on the first day of the third calendar month after the deposit of its instrument of accession.
The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Kingdom of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.
The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the first day of the third calendar month after the deposit of the declaration of acceptance.

Article 39

Any State may, at the time of signature, ratification, acceptance, approval or accession, declare that the Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect at the time the Convention enters into force for that State.
Such declaration, as well as any subsequent extension, shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 40

If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall entend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

Any such declaration shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands and shall state expressly the territorial units to which the Convention applies.

Article 41

Where a Contracting State has a system of government under which executive, judicial and legislative powers are distributed between central and other authorities within that

autorités de cet Etat, la signature, la ratification, l'acceptation ou l'approbation de la Convention, ou l'adhésion à celle-ci, ou une déclaration faite en vertu de l'article 40, n'emportera aucune conséquence quant au partage interne des pouvoirs dans cet Etat.

Article 42

Tout Etat contractant pourra, au plus tard au moment de la ratification, de l'acceptation, de l'approbation ou de l'adhésion, ou au moment d'une déclaration faite en vertu des articles 39 ou 40, faire soit l'une, soit les deux réserves prévues aux articles 24 et 26, alinéa 3. Aucune autre réserve ne sera admise.
Tout Etat pourra, à tout moment, retirer une réserve qu'il aura faite. Ce retrait sera notifié au Ministère des Affaires Etrangères du Royaume des Pays-Bas.
L'effet de la réserve cessera le premier jour du troisième mois du calendrier après la notification mentionnée à l'alinéa précédent.

Article 43

La Convention entrera en vigueur le premier jour du troisième mois du calendrier après le dépôt du troisième instrument de ratification, d'acceptation, d'approbation ou d'adhésion prévu par les articles 37 et 38.
Ensuite, la Convention entrera en vigueur:

1 pour chaque Etat ratifiant, acceptant, approuvant ou adhérant postérieurement le premier jour du troisième mois du calendrier après le dépôt de son instrument de ratification, d'acceptation, d'approbation ou d'adhésion;

2 pour les territoires ou les unités territoriales auxquels la Convention a été étendue conformément à l'article 39 ou 40, le premier jour du troisième mois du calendrier après la notification visée dans ces articles.

Article 44

La Convention aura une durée de cinq ans à partir de la date de son entrée en vigueur conformément à l'article 43, alinéa premier, même pour les Etats qui l'auront postérieurement ratifiée, acceptée ou approuvée ou qui y auront adhéré.
La Convention sera renouvelée tacitement de cinq ans en cinq ans, sauf dénonciation.
La dénonciation sera notifiée, au moins six mois avant l'expiration du délai de cinq ans, au Ministère des Affaires Etrangères du Royaume des Pays-Bas. Elle pourra se limiter à certains territoires ou unités territoriales auxquels s'applique la Convention.
La dénonciation n'aura d'effet qu'à l'égard de l'Etat qui l'aura notifiée. La Convention restera en vigueur pour les autres Etats contractants.

Article 45

Le Ministère des Affaires Etrangères du Royaume des Pays-Bas notifiera aux Etats Membres de la Conférence, ainsi qu'aux Etats qui auront adhéré conformément aux dispositions de l'article 38:

1 les signatures, ratifications, acceptations et approbations visées à l'article 37;

2 les adhésions visées à l'article 38;

3 la date à laquelle la Convention entrera en vigueur conformément aux dispositions de l'article 43;

4 les extensions visées à l'article 39;

5 les déclarations mentionnées aux articles 38 et 40;

6 les réserves prévues aux articles 24 et 26, alinéa 3, et le retrait des réserves prévu à l'article 42;

7 les dénonciations visées à l'article 44.

State, its signature or ratification, acceptance or approval of, or accession to this Convention, or its making of any declaration in terms of Article 40 shall carry no implication as to the internal distribution of powers within that State.

Article 42

Any State may, not later than the time of ratification, acceptance, approval or accession, or at the time of making a declaration in terms of Article 39 or 40, make one or both of the reservations provided for in Article 24 and Article 26, third paragraph. No other reservation shall be permitted.

Any State may at any time withdraw a reservation it has made. The withdrawal shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.
The reservation shall cease to have effect on the first day of the third calendar month after the notification referred to in the preceding paragraph.

Article 43

The Convention shall enter into force on the first day of the third calendar month after the deposit of the third instrument of ratification, acceptance, approval or accession referred to in Articles 37 and 38.
Thereafter the Convention shall enter into force –

1 for each State ratifying, accepting, approving or acceding to it subsequently, on the first day of the third calendar month after the deposit of its instrument of ratification, acceptance, approval or accession;

2 for any territory or territorial unit to which the Convention has been extended in conformity with Article 39 or 40, on the first day of the third calendar month after the notification referred to in that Article.

Article 44

The Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 43 even for States which subsequently have ratified, accepted, approved it or acceded to it.
If there has been no denunciation, it shall be renewed tacitly every five years.
Any denunciation shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands at least six months before the expiry of the five year period. It may be limited to certain of the territories or territorial units to which the Convention applies.
The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 45

The Ministry of Foreign Affairs of the Kingdom of the Netherlands shall notify the States Members of the Conference, and the States which have acceded in accordance with Article 38, of the following –

1 the signatures and ratifications, acceptances and approvals referred to in Article 37;

2 the accessions referred to in Article 38;

3 the date on which the Convention enters into force in accordance with Article 43;

4 the extensions referred to in Article 39;

5 the declarations referred to in Articles 38 and 40;

6 the reservations referred to in Article 24 and Article 26, third paragraph, and the withdrawals referred to in Article 42;

7 the denunciations referred to in Article 44.

En foi de quoi, les soussignés, dûment autorisés, ont signé la présente Convention.

Fait à La Haye, le 25 octobre 1980, en français et en anglais, les deux textes faisant également foi, en un seul exemplaire, qui sera déposé dans les archives du Gouvernement du Royaume des Pays-Bas et dont une copie certifiée conforme sera remise, par la voie diplomatique, à chacun des Etats Membres de la Conférence de La Haye de droit international privé lors de sa Quatorzième session.

In witness whereof the undersigned, being duly authorized thereto, have signed this Convention.

Done at The Hague, on the 25th day of October, 1980, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the States Members of the Hague Conference on Private International Law at the date of its Fourteenth Session.

Recommandation adoptée par la Quatorzième session[1]

La Quatorzième session,

Recommande aux Etats parties à la *Convention sur les aspects civils de l'enlèvement international d'enfants* d'utiliser pour les demandes de retour des enfants déplacés ou retenus illicitement la formule modèle suivante:

Requête en vue du retour

Convention de La Haye du 25 octobre 1980 sur les aspects civils de l'enlèvement international d'enfants

AUTORITÉ CENTRALE REQUÉRANTE OU REQUÉRANT | AUTORITÉ REQUISE

Concerne l'enfant ..... qui aura 16 ans le ..... 19.....

NOTE: Les rubriques suivantes doivent être remplies de la façon la plus complète possible.

I — IDENTITÉ DE L'ENFANT ET DES PARENTS

1 *Enfant*

nom et prénoms .....
date et lieu de naissance .....
résidence habituelle avant l'enlèvement .....
passeport ou carte d'identité No (s'il y a lieu) .....
signalement et éventuellement photo (voir annexes) .....

2 *Parents*

2.1 Mère: nom et prénoms .....
date et lieu de naissance .....
nationalité .....
profession .....
résidence habituelle .....
passeport ou carte d'identité No (s'il y a lieu) .....

2.2 Père: nom et prénoms .....
date et lieu de naissance .....
nationalité .....
profession .....
résidence habituelle .....
passeport ou carte d'identité No (s'il y a lieu) .....

2.3 Date et lieu du mariage .....

II — PARTIE REQUÉRANTE: PERSONNE OU INSTITUTION (qui exerçait la garde effectivement avant l'enlèvement)

3 nom et prénoms .....
nationalité (si personne physique) .....
profession (si personne physique) .....
adresse .....
passeport ou carte d'identité No (s'il y a lieu) .....
relation avec l'enfant .....
nom et adresse du conseiller juridique (s'il y a lieu) .....

III — ENDROIT OÙ DEVRAIT SE TROUVER L'ENFANT

4.1 Renseignements concernant la personne dont il est allégué qu'elle a enlevé ou retenu l'enfant

nom et prénoms .....
profession .....
dernière résidence connue .....
passeport ou carte d'identité No (s'il y a lieu) .....
signalement et éventuellement photo (voir annexes) .....

[1] Extrait de l'Acte final de la Quatorzième session, Partie F.

Recommendation adopted by the Fourteenth Session[1]

The Fourteenth Session,

Recommends to the States Parties to the *Convention on the Civil Aspects of International Child Abduction* that the following model form be used in making applications for the return of wrongfully removed or retained children –

Request for return

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

REQUESTING CENTRAL AUTHORITY OR APPLICANT | REQUESTED AUTHORITY

Concerns the following child: ..... who will attain the age of 16 on ..... 19.....

NOTE: The following particulars should be completed insofar as possible.

I — IDENTITY OF THE CHILD AND ITS PARENTS

1 *Child*

name and first names .....
date and place of birth .....
habitual residence before removal or retention .....
passport or identity card No, if any .....
description and photo, if possible (see annexes) .....

2 *Parents*

2.1 Mother: name and first names .....
date and place of birth .....
nationality .....
occupation .....
habitual residence .....
passport or identity card No, if any .....

2.2 Father: name and first names .....
date and place of birth .....
nationality .....
occupation .....
habitual residence .....
passport or identity card No, if any .....

2.3 Date and place of marriage .....

II — REQUESTING INDIVIDUAL OR INSTITUTION (who actually exercised custody before the removal or retention)

3 name and first names .....
nationality of individual applicant .....
occupation of individual applicant .....
address .....
passport or identity card No, if any .....
relation to the child .....
name and address of legal adviser, if any .....

III — PLACE WHERE THE CHILD IS THOUGHT TO BE

4.1 Information concerning the person alleged to have removed or retained the child

name and first names .....
date and place of birth, if known .....
nationality, if known .....
occupation .....
last known address .....
passport or identity card No, if any .....
description and photo, if possible (see annexes) .....

[1] Extract from the Final Act of the Fourteenth Session, Part F.

4.2 Adresse de l'enfant .....

4.3 Autres personnes susceptibles de donner d'autres informations permettant de localiser l'enfant .....

IV — MOMENT, LIEU, DATE ET CIRCONSTANCES DU DÉPLACEMENT OU DU NON-RETOUR ILLICITES

.....

V — MOTIFS DE FAIT OU LÉGAUX JUSTIFIANT LA REQUÊTE

.....

VI — PROCÉDURES CIVILES EN COURS

.....

VII L'ENFANT DOIT ÊTRE REMIS A:

a nom et prénoms .....
date et lieu de naissance .....
adresse .....
téléphone .....

b arrangements proposés pour le retour .....

VIII — AUTRES OBSERVATIONS

.....

IX — ENUMÉRATION DES PIÈCES PRODUITES*

.....

Fait à .....

le .....

Signature et/ou cachet de l'Autorité centrale requérante ou du requérant

.....

* p. ex. copie certifiée conforme d'une décision ou d'un accord relatif à la garde ou au droit de visite; certificat de coutume ou déclaration avec affirmation relatif à la loi applicable; information sur la situation sociale de l'enfant; procuration conférée à l'Autorité centrale.

4.2 Address of the child .....

4.3 Other persons who might be able to supply additional information relating to the whereabouts of the child .....

IV — TIME, PLACE, DATE AND CIRCUMSTANCES OF THE WRONGFUL REMOVAL OR RETENTION

.....

V — FACTUAL OR LEGAL GROUNDS JUSTIFYING THE REQUEST

.....

VI — CIVIL PROCEEDINGS IN PROGRESS

.....

VII — CHILD IS TO BE RETURNED TO:

a name and first names .....
date and place of birth .....
address .....
telephone number .....

b proposed arrangements for return of the child .....

VIII — OTHER REMARKS

.....

IX — LIST OF DOCUMENTS ATTACHED*

.....

Date .....

Place .....

Signature and/or stamp of the requesting Central Authority or applicant

.....

* *e.g.* Certified copy of relevant decision or agreement concerning custody or access; certificate or affidavit as to the applicable law; information relating to the social background of the child; authorization empowering the Central Authority to act on behalf of applicant.

Rapport

Rapport explicatif de Mlle Elisa Pérez-Vera

Introduction

I *Conclusions des travaux de la Conférence de La Haye de droit international privé*

1 La Convention sur les aspects civils de l'enlèvement international d'enfants a été adoptée en séance plénière le 24 octobre 1980 par la Quatorzième session de la Conférence de La Haye de droit international privé, à l'unanimité des Etats présents.[1] Le 25 octobre 1980, les délégués signèrent l'Acte final de la Quatorzième session contenant le texte de la Convention et une Recommandation qui contient la formule modèle à utiliser pour les demandes de retour des enfants déplacés ou retenus illicitement.

A cette occasion, la Conférence de La Haye s'est écartée de sa pratique, les projets de Conventions adoptés au cours de la Quatorzième session ayant été ouverts à la signature des Etats immédiatement après la séance de clôture. Quatre Etats ont signé la Convention à cette occasion (le Canada, la France, la Grèce et la Suisse), de sorte qu'elle porte la date du 25 octobre 1980.

2 En ce qui concerne le point de départ des travaux qui ont abouti à l'adoption de la Convention, ainsi que les conventions existantes en la matière ou ayant un rapport direct avec elle, nous renvoyons à l'introduction du Rapport de la Commission spéciale.[2]

3 La Quatorzième session de la Conférence, qui a siégé du 6 au 25 octobre 1980, a confié l'élaboration de la Convention à sa Première commission, dont le Président était le professeur A. E. Anton (Royaume-Uni) et le Vice-président le doyen Leal (Canada); l'un et l'autre avaient déjà été respectivement Président et Vice-président de la Commission spéciale. D'autre part, le professeur Elisa Pérez-Vera a été confirmé dans ses fonctions de Rapporteur. M. Adair Dyer, Premier secrétaire au Bureau Permanent, qui avait élaboré d'importants documents pour les travaux de la Conférence, a été chargé de la direction scientifique du secrétariat.

4 Au cours de treize séances, la Première commission a procédé à une première lecture de l'avant-projet élaboré par la Commission spéciale. Simultanément, elle a nommé un Comité de rédaction qui, au fur et à mesure de la pro-

[1] Allemagne, Australie, Autriche, Belgique, Canada, Danemark, Espagne, Etats-Unis, Finlande, France, Grèce, Irlande, Japon, Luxembourg, Norvège, Pays-Bas, Portugal, Royaume-Uni, Suède, Suisse, Tchécoslovaquie, Venezuela et Yougoslavie. Les Représentants de la République Arabe d'Egypte, d'Israël et de l'Italie, quoique ayant pris une part active aux travaux de la Première commission, n'ont pas participé au vote. Le Maroc, le Saint-Siège et l'Union des Républiques Socialistes Soviétiques ont envoyé des observateurs. Au cours des travaux, la Première commission a également disposé du concours précieux des observateurs du Conseil de l'Europe, du Commonwealth Secretariat et du Service Social International.

[2] Rapport de la Commission spéciale, Nos 3 et 7 à 15.

Explanatory Report by Elisa Pérez-Vera

TRANSLATION OF THE PERMANENT BUREAU

Introduction

I *Results of the work of the Hague Conference on private international law*

1 The Convention on the Civil Aspects of International Child Abduction was adopted on 24 October 1980 by the Fourteenth Session of the Hague Conference on private international law in Plenary Session, and by unanimous vote of the States which were present.[1] On 25 October 1980, the delegates signed the Final Act of the Fourteenth Session which contained the text of the Convention and a Recommendation containing the model form which is to be used in applications for the return of children who have been wrongfully abducted or retained.
On this occasion, the Hague Conference departed from its usual practice, draft Conventions adopted during the Fourteenth Session being made available for signature by States immediately after the Closing Session. Four States signed the Convention then (Canada, France, Greece and Switzerland), which thus bears the date 25 October 1980.

2 As regards the starting point of the proceedings which resulted in the adoption of the Convention, as well as the matter of existing conventions on the subject or those directly related to it, we shall refer to the introduction to the Report of the Special Commission.[2]

3 The Fourteenth Session of the Conference, which took place between 6 and 25 October 1980, entrusted the task of preparing the Convention to its First Commission, the Chairman of which was Professor A. E. Anton (United Kingdom) and the Vice-Chairman Dean Leal (Canada), who had already been Chairman and Vice-Chairman respectively of the Special Commission. Professor Elisa Pérez-Vera was confirmed in her position as Reporter. Mr Adair Dyer, First Secretary of the Permanent Bureau, who had prepared important documents for the Conference proceedings, was in charge of the scientific work of the secretariat.

4 In the course of thirteen sittings, the First Commission gave a first reading to the Preliminary Draft drawn up by the Special Commission. At the same time, it named the members of a Drafting Committee which drafted the text

[1] Australia, Austria, Belgium, Canada, Czechoslovakia, Denmark, Finland, France, Germany, Greece, Ireland, Japan, Luxemburg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, United Kingdom, United States, Venezuela and Yugoslavia.
Representatives of the Arab Republic of Egypt, Israel and Italy did not participate in the vote, despite having played an active part in the proceedings of the First Commission. Morocco, the Holy See and the Union of the Soviet Socialist Republics sent observers. In the course of the proceedings, the First Commission also had at its disposal the invaluable assistance of observers from the Council of Europe, the Commonwealth Secretariat and International Social Service.

[2] Report of the Special Commission, Nos 3 and 7 to 15.

gression des travaux, a mis les textes au point.[3] Sept autres séances ont été consacrées à la discussion du texte préparé par le Comité de rédaction,[4] ainsi qu'à celle des clauses visant l'application de la Convention au regard des Etats à systèmes juridiques non unifiés («*Application Clauses*») et de la formule modèle[5] rédigées par des Comités *ad hoc*.[6] Les clauses finales, suggérées par le Bureau Permanent, ont été incorporées dans l'avant-projet établi par le Comité de rédaction.

II *Objet et plan du présent Rapport*

5 Le Rapport explicatif d'un texte destiné à devenir du droit positif, c'est-à-dire d'un texte qui devra être invoqué et appliqué, doit remplir au moins deux objectifs essentiels. D'une part, le Rapport doit mettre en relief aussi fidèlement que possible les principes qui sont à la base de la Convention et, quand cela s'avère nécessaire, l'évolution des idées qui ont conduit à consacrer de tels principes parmi les options existantes. Il ne s'agit certes pas de faire état d'une manière exhaustive des positions adoptées tout au long du processus d'élaboration de la Convention, mais le point de vue retenu par celle-ci sera parfois plus facile à comprendre s'il est confronté à d'autres idées avancées.

Or, étant donné que l'avant-projet de Convention préparé par la Commission spéciale a obtenu un large appui[7] et que, par conséquent, le texte définitif maintient l'essentiel de la structure et des principes fondamentaux de l'avant-projet, le présent Rapport final reprendra, surtout dans sa première partie, certains passages du Rapport de la Commission spéciale préparé en avril 1980 à l'intention de la Quatorzième session.[8]

6 Ce Rapport final doit remplir aussi un autre objectif: fournir à ceux qui auront à appliquer la Convention un commentaire détaillé de ses dispositions. Ce commentaire étant en principe destiné à éclairer la teneur littérale des dispositions conventionnelles, nous nous préoccuperons beaucoup moins d'en retracer la genèse que d'en préciser le contenu.

7 Des considérations précédentes nous pouvons conclure que les deux objectifs envisagés sont nettement différenciés et que les méthodes mêmes d'analyse utilisées pour atteindre l'un et l'autre ne peuvent pas être identiques. Toutefois, la référence dans les deux cas à un texte unique, celui de la Convention, impliquera certaines redites, qui nous semblent inévitables. En dépit de ce risque et étant donné le double objectif souligné, nous avons divisé le Rapport en deux parties: la première est consacrée à l'étude des principes généraux qui inspirent la Convention; la seconde est destinée à l'examen du texte article par article.

8 Finalement, comme le soulignait en 1977 le professeur von Overbeck,[9] il semble opportun de rappeler que ce Rapport a été établi, à l'issue de la Quatorzième session, à partir des procès-verbaux et des notes du Rapporteur. Il n'a

concurrently with the progress of the main proceedings.[3] Seven other sittings were devoted to a discussion of the text prepared by the Drafting Committee,[4] as well as of clauses relating to the application of the Convention to States with non-unified legal systems ('Application Clauses') and of the model form[5] drafted by *ad hoc* Committees.[6] The final clauses had been suggested by the Permanent Bureau and were incorporated into the preliminary draft Convention drawn up by the Drafting Committee.

II *Aim and structure of this Report*

5 The Explanatory Report on a text which is destined to become positive law, that is to say a text which will require to be cited and applied, must fulfil at least two essential aims. On the one hand, it must throw into relief, as accurately as possible, the principles which form the basis of the Convention and, wherever necessary, the development of those ideas which led to such principles being chosen from amongst existing options. It is certainly not necessary to take exhaustive account of the various attitudes adopted throughout the period during which the Convention was being drawn up, but the point of view reflected in the Convention will sometimes be more easily grasped by being set opposite other ideas which were put forward.
Now, given the fact that the preliminary draft Convention prepared by the Special Commission enjoyed widespread support[7] and that the final text essentially preserves the structure and fundamental principles of the Preliminary Draft, this final Report and in particular its first part, repeats certain passages in the Report of the Special Commission prepared in April 1980, for the Fourteenth Session.[8]

6 This final Report must also fulfil another purpose, *viz.* to supply those who have to apply the Convention with a detailed commentary on its provisions. Since this commentary is designed in principle to throw light upon the literal terms of these provisions, it will be concerned much less with tracing their origins than with stating their content accurately.

7 We can conclude from the foregoing considerations that these two objectives must be clearly distinguished and that even the methods of analysis used cannot be the same for each of them. Nevertheless, the need to refer in both cases to the one text, that of the Convention, implies that a certain amount of repetition will be necessary and indeed inevitable. Despite this risk and in view of the emphasis which is placed on a double objective, the Report has been divided into two parts, the first being devoted to a study of the general principles underlying the Convention, the second containing an examination of the text, article by article.

8 Finally, as Professor von Overbeck emphasized in 1977,[9] it would be as well to remember that this Report was prepared at the end of the Fourteenth Session, from the *procès-verbaux* and the Reporter's notes. Thus it has not

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[3] Le Comité de rédaction, sous la présidence de M. Leal en tant que Vice-président de la Première commission, comprenait MM. Savolainen (Finlande), Chatin (France), Jones (Royaume-Uni) et le Rapporteur. M. Dyer et plusieurs des secrétaires rédacteurs lui ont fourni un concours extrêmement précieux.
[4] Doc. trav. Nos 45, 66, 75, 78, 79 et 83.
[5] Doc. trav. No 59, complété par la proposition du Secrétariat contenue dans le Doc. trav. No. 71. Le Sous-comité «*Application Clauses*» a décidé de ne pas changer la teneur des articles élaborés à ce sujet par la Commission spéciale (P.-v. No 12).
[6] Le Sous-comité «Formule-modèle», sous la présidence du professeur Müller-Freienfels (République fédérale d'Allemagne), comprenait MM. Deschenaux (Suisse), Hergen (Etats-Unis), Barbosa (Portugal), Minami (Japon) et Mlle Pripp (Suède). Le Sous-comité «*Application Clauses*», présidé par M. van Boeschoten (Pays-Bas), était formé par MM. Hétu (Canada), Hjorth (Danemark), Creswell (Australie), Salem (Egypte) et Mlle Selby (Etats-Unis).
[7] Voir notamment les *Observations des Gouvernements*, Doc. prél. No. 7.
[8] Doc. prél. No. 6.
[9] Rapport explicatif de la Convention sur la loi applicable aux régimes matrimoniaux, *Actes et documents de la Treizième session*, tome II, p. 329.

[3] The Drafting Committee, under the chairmanship of Mr Leal as Vice-Chairman of the First Commission, included Messrs Savolainen (Finland), Chatin (France), Jones (United Kingdom) and the Reporter. Mr Dyer and several recording secretaries provided the Committee with extremely valuable assistance.
[4] Working Documents Nos 45, 66, 75, 78, 79 and 83.
[5] Working Document No 59, supplemented by the proposal of the Secretariat in Working Document No. 71. The Subcommittee on 'Application Clauses' decided against changing the terms of the articles on this topic which had been prepared by the Special Commission (*Procès-verbal* No 12).
[6] The 'Model Forms' Subcommittee, under the chairmanship of Professor Müller-Freienfels (Federal Republic of Germany) comprised Messrs Deschenaux (Switzerland), Hergen (United States), Barbosa (Portugal), Minami (Japan) and Miss Pripp (Sweden). The Subcommittee on 'Application Clauses', chaired by Mr van Boeschoten (Netherlands), was made up of Messrs Hétu (Canada), Hjorth (Denmark), Creswell (Australia), Salem (Egypt) and Miss Selby (United States).
[7] See in particular the *Observations of Governments*, Prel. Doc. No 7.
[8] Prel. Doc. No 6.
[9] Explanatory Report on the Convention on the Law Applicable to Matrimonial Property Regimes, *Acts and Documents of the Thirteenth Session*, Book II, p. 329.

donc pas été approuvé par la Conférence et il est possible que, malgré les efforts faits par le Rapporteur pour rester objectif, certains passages répondent à une appréciation partiellement subjective.

Première partie – Caractères généraux de la Convention

9 La Convention reflète, dans son ensemble, un compromis entre deux conceptions, partiellement différentes, du but à atteindre. On perçoit, en effet, dans les travaux préparatoires, la tension existant entre le désir de protéger les situations de fait altérées par le déplacement ou le non-retour illicites d'un enfant et le souci de garantir surtout le respect des rapports juridiques pouvant se trouver à la base de telles situations. A cet égard, l'équilibre consacré par la Convention est assez fragile. D'une part, il est clair que la Convention ne vise pas le fond du droit de garde (article 19); mais d'autre part il est également évident que le fait de qualifier d'illicite le déplacement ou le non-retour d'un enfant est conditionné par l'existence d'un droit de garde qui donne un contenu juridique à la situation modifiée par les actions que l'on se propose d'éviter.

I OBJET DE LA CONVENTION

10 Le titre de ce chapitre fait allusion tant au problème auquel répond la Convention, qu'aux objectifs qu'elle a adoptés pour lutter contre le développement des enlèvements. Après avoir abordé ces deux points, nous traiterons d'autres questions connexes qui nuancent sensiblement la portée des objectifs visés; il s'agit en particulier de l'importance accordée à l'intérêt de l'enfant et des exceptions possibles au retour immédiat des enfants déplacés ou retenus illicitement.

A *Délimitation du sujet*

11 En ce qui concerne la délimitation du sujet,[10] nous nous limiterons à rappeler très brièvement que les situations envisagées découlent de l'utilisation de voies de fait pour créer des liens artificiels de compétence judiciaire internationale, en vue d'obtenir la garde d'un enfant. La diversité des circonstances qui peuvent concourir dans un cas d'espèce fait échouer toute tentative d'établir une définition plus précise d'un point de vue juridique. Cependant, deux éléments se font jour de façon inéluctable dans toutes les situations examinées et confirment la caractérisation approximative que l'on vient d'ébaucher.

12 En premier lieu, dans toutes les hypothèses nous nous trouvons confrontés au déplacement d'un enfant hors de son milieu habituel, où il se trouvait confié à une personne physique ou morale qui exerçait sur lui un droit légitime de garde. Bien entendu, il faut assimiler à une telle situation le refus de réintégrer l'enfant dans son milieu, après un séjour à l'étranger consenti par la personne qui exerçait la garde. Dans les deux cas, la conséquence est en effet la même: l'enfant a été soustrait à l'environnement familial et social dans lequel sa vie se déroulait. D'ailleurs, dans ce contexte, peu importe la nature du titre juridique qui était à la base de

[10] Voir notamment *Questionnaire et Rapport sur l'enlèvement international d'un enfant par un de ses parents*, établi par M. Adair Dyer, Doc. prél. No 1, août 1977, *supra*, p. 18-25 (cité par la suite, «Rapport Dyer»), et Rapport sur l'avant-projet de Convention adopté par la Commission spéciale, Doc. prél. No 6, mai 1980, *supra*, p. 172-173.

been approved by the Conference, and it is possible that, despite the Rapporter's efforts to remain objective, certain passages reflect a viewpoint which is in part subjective.

First Part – General characteristics of the Convention

9 The Convention reflects on the whole a compromise between two concepts, different in part, concerning the end to be achieved. In fact one can see in the preliminary proceedings a potential conflict between the desire to protect factual situations altered by the wrongful removal or retention of a child, and that of guaranteeing, in particular, respect for the legal relationships which may underlie such situations. The Convention has struck a rather delicate balance in this regard. On the one hand, it is clear that the Convention is not essentially concerned with the merits of custody rights (article 19), but on the other hand it is equally clear that the characterization of the removal or retention of a child as wrongful is made conditional upon the existence of a right of custody which gives legal content to a situation which was modified by those very actions which it is intended to prevent.

I OBJECT OF THE CONVENTION

10 The title of this chapter alludes as much to the problem addressed by the Convention as to the objectives by which it seeks to counter the increase in abductions. After tackling both of these points, we shall deal with other connected questions which appreciably affect the scope of the Convention's objectives, and in particular the importance which has been placed on the interest of the child and on the possible exceptions to the rule requiring the prompt return of children who have been wrongfully removed or retained.

A *Definition of the Convention's subject-matter*

11 With regard to the definition of the Convention's subject-matter,[10] we need only remind ourselves very briefly that the situations envisaged are those which derive from the use of force to establish artificial jurisdictional links on an international level, with a view to obtaining custody of a child. The variety of different circumstances which can combine in a particular case makes it impossible to arrive at a more precise definition in legal terms. However, two elements are invariably present in all cases which have been examined and confirm the approximate nature of the foregoing characterization.

Firstly, we are confronted in each case with the removal from its habitual environment of a child whose custody had been entrusted to and lawfully exercised by a natural or legal person. Naturally, a refusal to restore a child to its own environment after a stay abroad to which the person exercising the right of custody had consented must be put in the same category. In both cases, the outcome is in fact the same: the child is taken out of the family and social environment in which its life has developed. What is more, in this context the type of legal title which underlies the exercise of custody rights over the child matters little, since

[10] See in particular the *Questionnaire and Report on international child abduction by one parent*, prepared by Mr Adair Dyer, Prel. Doc. No 1, August 1977, *supra*, pp. 18-25 (hereafter referred to as the 'Dyer Report'), and the Report on the preliminary draft Convention, adopted by the Special Commission, Prel. Doc. No 6, May 1980, *supra*, pp. 172-173.

l'exercice du droit de garde sur la personne de l'enfant: de ce point de vue, l'existence ou l'absence d'une décision relative à la garde ne change en rien les données sociologiques du problème.

13 En second lieu, la personne qui déplace l'enfant (ou qui est responsable du déplacement, quand l'action matérielle est exécutée par un tiers) a l'espoir d'obtenir des autorités du pays où l'enfant a été emmené le droit de garde sur celui-ci. Il s'agit donc de quelqu'un qui appartient au cercle familial de l'enfant, au sens large du terme; en fait, dans la plupart des cas, la personne en question est le père ou la mère.

14 Il est fréquent que la personne qui retient l'enfant essaie d'obtenir qu'une décision judiciaire ou administrative de l'Etat de refuge légalise la situation de fait qu'elle vient de créer; mais si elle n'est pas sûre du sens de la décision, il est aussi possible qu'elle opte pour l'inactivité, laissant ainsi l'initiative à la personne dépossédée. Or, même si cette dernière agit rapidement, c'est-à-dire même si elle évite la consolidation dans le temps de la situation provoquée par le déplacement de l'enfant, l'enleveur se trouvera dans une position avantageuse, car c'est lui qui aura choisi le for qui va juger de l'affaire, un for que, par principe, il considère comme le plus favorable à ses prétentions.

15 En conclusion, nous pouvons affirmer que le problème dont s'occupe la Convention – avec tout ce qu'implique de dramatique le fait qu'il concerne directement la protection de l'enfance dans les relations internationales – prend toute son acuité juridique par la possibilité qu'ont les particuliers d'établir des liens plus ou moins artificiels de compétence judiciaire. En effet, par ce biais, le particulier peut altérer la loi applicable et obtenir une décision judiciaire qui lui soit favorable. Certes, une telle décision, surtout quand elle coexiste avec d'autres décisions de contenu contradictoire rendues par d'autres fors, aura une validité géographiquement restreinte, mais en tout état de cause elle apportera un titre juridique suffisant pour «légaliser» une situation de fait qu'aucun des systèmes juridiques en présence ne souhaitait.

B *Les objectifs de la Convention*

16 Les objectifs de la Convention, qui apparaissent dans l'article premier, pourraient être résumés comme suit: étant donné qu'un facteur caractéristique des situations considérées réside dans le fait que l'enleveur prétend que son action soit légalisée par les autorités compétentes de l'Etat de refuge, un moyen efficace de le dissuader est que ses actions se voient privées de toute conséquence pratique et juridique. Pour y parvenir, la Convention consacre en tout premier lieu, parmi ses objectifs, le rétablissement du *statu quo*, moyennant le «retour immédiat des enfants déplacés ou retenus illicitement dans tout Etat contractant». Les difficultés insurmontables rencontrées pour fixer conventionnellement des critères de compétence directe en la matière[11] ont en effet conduit au choix de cette voie qui, bien que détournée, va, dans la plupart des cas, permettre que la décision finale sur la garde soit prise par les autorités de la résidence habituelle de l'enfant, avant son déplacement.

17 D'ailleurs, bien que l'objectif exprimé au point *b*, «faire respecter effectivement dans les autres Etats contractants les

[11] Une telle option a été rejetée au cours de la première réunion de la Commission spéciale. *Cf. Conclusions des discussions de la Commission spéciale de mars 1979 sur le kidnapping légal*, établies par le Bureau Permanent, Doc. prél. No 5, juin 1979, *supra*, p. 163-164.

whether or not a decision on custody exists in no way alters the sociological realities of the problem.

Secondly, the person who removes the child (or who is responsible for its removal, where the act of removal is undertaken by a third party) hopes to obtain a right of custody from the authorities of the country to which the child has been taken. The problem therefore concerns a person who, broadly speaking, belongs to the family circle of the child; indeed, in the majority of cases, the person concerned is the father or mother.

14 It frequently happens that the person retaining the child tries to obtain a judicial or administrative decision in the State of refuge, which would legalize the factual situation which he has just brought about. However, if he is uncertain about the way in which the decision will go, he is just as likely to opt for inaction, leaving it up to the dispossessed party to take the initiative. Now, even if the latter acts quickly, that is to say manages to avoid the consolidation through lapse of time of the situation brought about by the removal of the child, the abductor will hold the advantage, since it is he who has chosen the forum in which the case is to be decided, a forum which, in principle, he regards as more favourable to his own claims.

15 To conclude, it can firmly be stated that the problem with which the Convention deals – together with all the drama implicit in the fact that it is concerned with the protection of children in international relations – derives all of its legal importance from the possibility of individuals establishing legal and jurisdictional links which are more or less artificial. In fact, resorting to this expedient, an individual can change the applicable law and obtain a judicial decision favourable to him. Admittedly, such a decision, especially one coexisting with others to the opposite effect issued by the other forum, will enjoy only a limited geographical validity, but in any event it bears a legal title sufficient to 'legalize' a factual situation which none of the legal systems involved wished to see brought about.

B *The objectives of the Convention*

16 The Convention's objects, which appear in article 1, can be summarized as follows: since one factor characteristic of the situations under consideration consists in the fact that the abductor claims that his action has been rendered lawful by the competent authorities of the State of refuge, one effective way of deterring him would be to deprive his actions of any practical or juridical consequences. The Convention, in order to bring this about, places at the head of its objectives the restoration of the *status quo*, by means of 'the prompt return of children wrongfully removed to or retained in any Contracting State'. The insurmountable difficulties encountered in establishing, within the framework of the Convention, directly applicable jurisdictional rules[11] indeed resulted in this route being followed which, although an indirect one, will tend in most cases to allow a final decision on custody to be taken by the authorities of the child's habitual residence prior to its removal.

17 Besides, although the object stated in sub-paragraph *b*, 'to ensure that rights of custody and of access under the law

[11] Such an option was rejected in the course of the first meeting of the Special Commission. *Cf. Conclusions drawn from the discussions of the Special Commission of March 1979 on legal kidnapping*, prepared by the Permanent Bureau, Prel. Doc. No 5, June 1979, *supra*, pp. 163-164.

droits de garde et de visite existant dans un Etat contractant», présente un caractère autonome, sa connexion téléologique avec l'objectif «retour de l'enfant» n'en est pas moins évidente. En réalité, on pourrait estimer qu'il ne s'agit que d'un seul objectif considéré à deux moments différents: tandis que le retour immédiat de l'enfant répond au désir de rétablir une situation que l'enleveur a modifiée unilatéralement par une voie de fait, le respect effectif des droits de garde et de visite se place sur un plan préventif, dans la mesure où ce respect doit faire disparaître l'une des causes les plus fréquentes de déplacements d'enfants.
Or, puisque la Convention ne précise pas les moyens que chaque Etat doit employer pour faire respecter le droit de garde existant dans un autre Etat contractant, il faut conclure qu'exception faite de la protection indirecte, qui implique l'obligation de retourner l'enfant à celui qui en avait la garde, le respect du droit de garde échappe presque entièrement au domaine conventionnel. Par contre, le droit de visite fait l'objet d'une régulation incomplète certes, mais indicative de l'intérêt accordé aux contacts réguliers entre parents et enfants, même quand la garde a été confiée à un seul des parents ou à un tiers.

18 Si on admet le bien-fondé des considérations précédentes, il faut en conclure que toute tentative de hiérarchisation des objectifs de la Convention ne peut avoir qu'une signification symbolique. En effet, il semble presque impossible d'établir une hiérarchisation entre deux objectifs qui prennent leurs racines dans une même préoccupation. Car, en définitive, il revient à peu près au même de faciliter le retour d'un enfant déplacé ou de prendre les mesures nécessaires pour éviter un tel déplacement.
Or, comme nous le verrons par la suite, l'aspect que la Convention a essayé de régler en profondeur est celui du retour des enfants déplacés ou retenus illicitement. La raison nous semble évidente: c'est après la retenue illicite d'un enfant que se produisent les situations les plus douloureuses, celles qui, tout en exigeant des solutions particulièrement urgentes, ne peuvent pas être résolues de façon unilatérale par chaque système juridique concerné. Prises dans leur ensemble, toutes ces circonstances justifient à notre avis le développement que la réglementation du retour de l'enfant reçoit dans la Convention et en même temps accordent, sur le plan des principes, une certaine priorité à l'objectif visé. Ainsi donc, bien qu'en théorie les deux objectifs mentionnés doivent être placés sur un même plan, dans la pratique c'est le désir de garantir le rétablissement de la situation altérée par l'action de l'enleveur qui a prévalu dans la Convention.

19 Dans un dernier effort de clarification des objectifs de la Convention, il convient de souligner qu'ainsi qu'il résulte en particulier des dispositions de son article premier, elle ne cherche pas à régler le problème de l'attribution du droit de garde. Sur ce point, le principe non explicite sur lequel repose la Convention est que la discussion sur le fond de l'affaire, c'est-à-dire sur le droit de garde contesté, si elle se produit, devra être engagée devant les autorités compétentes de l'Etat où l'enfant avait sa résidence habituelle avant son déplacement; et cela aussi bien si le déplacement a eu lieu avant qu'une décision sur la garde ait été rendue – situation dans laquelle le droit de garde violé s'exerçait *ex lege* – que si un tel déplacement s'est produit en violation d'une décision préexistante.

C *Importance accordée à l'intérêt de l'enfant*

20 Avant tout, il est nécessaire de justifier les raisons qui nous amènent à insérer l'examen de ce point dans le contexte des considérations sur l'objet de la Convention. Elles apparaissent clairement si l'on considère, d'une part que

of one Contracting State are effectively respected in the other Contracting States' appears to stand by itself, its teleological connection with the 'return of the child' object is no less evident. In reality, it can be regarded as one single object considered at two different times; whilst the prompt return of the child answers to the desire to re-establish a situation unilaterally and forcibly altered by the abductor, effective respect for rights of custody and of access belongs on the preventive level, in so far as it must lead to the disappearance of one of the most frequent causes of child abductions.
Now, since the Convention does not specify the means to be employed by each State in bringing about respect for rights of custody which exist in another Contracting State, one must conclude that, with the exception of the indirect means of protecting custody rights which is implied by the obligation to return the child to the holder of the right of custody, respect for custody rights falls almost entirely outwith the scope of the Convention. On the other hand, rights of access form the subject of a rule which, although undoubtedly incomplete, nevertheless is indicative of the interest shown in ensuring regular contact between parents and children, even when custody has been entrusted to one of the parents or to a third party.

18 If the preceding considerations are well-founded, it must be concluded that any attempt to establish a hierarchy of objects of the Convention could have only a symbolic significance. In fact, it would seem almost impossible to create a hierarchy as between two objects which spring from the same concern. For at the end of the day, promoting the return of the child or taking the measures necessary to avoid such removal amount to almost the same thing.

Now, as will be seen below, the one matter which the Convention has tried to regulate in any depth is that of the return of children wrongfully removed or retained. The reason for this seems clear: the most distressing situations arise only after the unlawful retention of a child and they are situations which, while requiring particularly urgent solutions, cannot be resolved unilaterally by any one of the legal systems concerned. Taken as a whole, all these circumstances justify, in our opinion, the Convention's development of rules for regulating the return of the child, whilst at the same time they give in principle a certain priority to that object. Thus, although theoretically the two above-mentioned objects have to be placed on the same level, in practice the desire to guarantee the re-establishment of the *status quo* disturbed by the actions of the abductor has prevailed in the Convention.

19 In a final attempt to clarify the objects of the Convention, it would be advisable to underline the fact that, as is shown particularly in the provisions of article 1, the Convention does not seek to regulate the problem of the award of custody rights. On this matter, the Convention rests implicitly upon the principle that any debate on the merits of the question, *i.e.* of custody rights, should take place before the competent authorities in the State where the child had its habitual residence prior to its removal; this applies as much to a removal which occurred prior to any decision on custody being taken – in which case the violated custody rights were exercised *ex lege* – as to a removal in breach of a pre-existing custody decision.

C *Importance attached to the interest of the child*

20 Above all, one has to justify the reasons for including an examination of this matter within the context of a consideration of the Convention's objects. These reasons will appear clearly if one considers, on the one hand, that the

l'intérêt de l'enfant est souvent invoqué à ce sujet, et d'autre part que l'on pourrait argumenter que l'objectif conventionnel touchant au retour de l'enfant devrait toujours être subordonné à la prise en considération de son intérêt.

21 A cet égard, il a été à juste titre mis en relief que «la norme juridique reposant sur «l'intérêt supérieur de l'enfant» est, à première vue, d'une telle imprécision qu'elle ressemble davantage à un paradigme social qu'à une norme juridique concrète. Comment étoffer cette notion pour décider quel est l'intérêt *final* de l'enfant sans faire des suppositions qui ne prennent leur source que dans le contexte moral d'une culture déterminée? En introduisant le mot «final» dans l'équation, on fait aussitôt naître de sérieux problèmes, puisque l'énoncé général de la norme ne permet pas de savoir clairement si «l'intérêt» de l'enfant qu'il faut protéger est celui qui suit immédiatement la décision, ou celui de son adolescence, de son existence de jeune adulte, de son âge mûr ou de sa vieillesse».[12]

22 D'autre part, on ne doit pas oublier que c'est en invoquant «l'intérêt supérieur de l'enfant» que souvent, dans le passé, les juridictions internes ont accordé finalement la garde en litige à la personne qui l'avait déplacé ou retenu illicitement. Il a pu se trouver que cette décision soit la plus juste; nous ne pouvons cependant pas ignorer le fait que le recours, par des autorités internes, à une telle notion implique le risque de traduire des manifestations du particularisme culturel, social, etc., d'une communauté nationale donnée et donc, au fond, de porter des jugements de valeur subjectifs sur l'autre communauté nationale d'où l'enfant vient d'être arraché.

23 Pour les motifs invoqués, parmi d'autres, la partie dispositive de la Convention ne contient aucune allusion explicite à l'intérêt de l'enfant en tant que critère correcteur de l'objectif conventionnel qui vise à assurer le retour immédiat des enfants déplacés ou retenus illicitement. Cependant, il ne faudrait pas déduire de ce silence que la Convention ignore le paradigme social qui proclame la nécessité de prendre en considération l'intérêt des enfants pour régler tous les problèmes les concernant. Bien au contraire, dès le préambule, les Etats signataires déclarent être «profondément convaincus que l'intérêt de l'enfant est d'une importance primordiale pour toute question relative à sa garde»; c'est précisément dans cette conviction qu'ils ont élaboré la Convention, «désirant protéger l'enfant, sur le plan international, contre les effets nuisibles d'un déplacement ou d'un non-retour illicites».

24 Ces deux paragraphes du préambule reflètent assez clairement quelle a été la philosophie de la Convention à cet égard, philosophie que l'on pourrait définir comme suit: la lutte contre la multiplication des enlèvements internationaux d'enfants doit toujours être inspirée par le désir de protéger les enfants, en se faisant l'interprète de leur véritable intérêt. Or, parmi les manifestations les plus objectives de ce qui constitue l'intérêt de l'enfant figure le droit de ne pas être déplacé ou retenu au nom de droits plus ou moins discutables sur sa personne. En ce sens, il est souhaitable de rappeler la Recommandation 874 (1979) de l'Assemblée parlementaire du Conseil de l'Europe dont le premier principe général dit que «les enfants ne doivent plus être considérés comme la propriété de leurs parents, mais être reconnus comme des individus avec leurs droits et leurs besoins propres».[13]

[12] Rapport Dyer, *supra*, p. 22-23.
[13] Assemblée parlementaire du Conseil de l'Europe. 31ème Session ordinaire, *Recommandation relative à une Charte européenne des droits de l'enfant*. Texte adopté le 4 octobre 1979.

interests of the child are often invoked in this regard, and on the other hand, that it might be argued that the Convention's object in securing the return of the child ought always to be subordinated to a consideration of the child's interests.

21 In this regard, one fact has rightly been highlighted, *viz.* that 'the legal standard 'the best interests of the child' is at first view of such vagueness that it seems to resemble more closely a sociological paradigm than a concrete juridical standard. How can one put flesh on its bare bones without delving into the assumptions concerning the *ultimate* interests of a child which are derived from the moral framework of a particular culture? The word 'ultimate' gives rise to immediate problems when it is inserted into the equation since the general statement of the standard does not make it clear whether the 'interests' of the child to be served are those of the immediate aftermath of the decision, of the adolescence of the child, of young adulthood, maturity, senescence or old age'.[12]

22 On the other hand, it must not be forgotten that it is by invoking 'the best interests of the child' that internal jurisdictions have in the past often finally awarded the custody in question to the person who wrongfully removed or retained the child. It can happen that such a decision is the most just, but we cannot ignor the fact that recourse by internal authorities to such a notion involves the risk of their expressing particular cultural, social etc. attitudes which themselves derive from a given national community and thus basically imposing their own subjective value judgments upon the national community from which the child has recently been snatched.

23 For these reasons, among others, the dispositive part of the Convention contains no explicit reference to the interests of the child to the extent of their qualifying the Convention's stated object, which is to secure the prompt return of children who have been wrongfully removed or retained. However, its silence on this point ought not to lead one to the conclusion that the Convention ignores the social paradigm which declares the necessity of considering the interests of children in regulating all the problems which concern them. On the contrary, right from the start the signatory States declare themselves to be 'firmly convinced that the interests of children are of paramount importance in matters relating to their custody'; it is precisely because of this conviction that they drew up the Convention, 'desiring to protect children internationally from the harmful effects of their wrongful removal or retention'.

24 These two paragraphs in the preamble reflect quite clearly the philosophy of the Convention in this regard. It can be defined as follows: the struggle against the great increase in international child abductions must always be inspired by the desire to protect children and should be based upon an interpretation of their true interests. Now, the right not to be removed or retained in the name of more or less arguable rights concerning its person is one of the most objective examples of what constitutes the interests of the child. In this regard it would be as well to refer to Recommendation 874(1979) of the Parliamentary Assembly of the Council of Europe, the first general principle of which states that 'children must no longer be regarded as parents' property, but must be recognised as individuals with their own rights and needs'.[13]

[12] Dyer Report, *supra*, pp. 22-23.
[13] Parliamentary Assembly of the Council of Europe. 31st Ordinary Session, *Recommendation on a European Charter on the Rights of the Child*. Text adopted on 4 October 1979.

En effet, comme l'a souligné M. Dyer, dans la littérature consacrée à l'étude de ce problème, «l'opinion qu'on y trouve le plus souvent exprimée est que la véritable victime d'un «enlèvement d'enfant» est l'enfant lui-même. C'est lui qui pâtit de perdre brusquement son équilibre, c'est lui qui subit le traumatisme d'être séparé du parent qu'il avait toujours vu à ses côtés, c'est lui qui ressent les incertitudes et les frustrations qui découlent de la nécessité de s'adapter à une langue étrangère, à des conditions culturelles qui ne lui sont pas familières, à de nouveaux professeurs et à une famille inconnue».[14]

25 Il est donc légitime de soutenir que les deux objectifs de la Convention – l'un préventif, l'autre visant la réintégration immédiate de l'enfant dans son milieu de vie habituel – répondent dans leur ensemble à une conception déterminée de «l'intérêt supérieur de l'enfant». Cependant, même dans l'optique choisie, il fallait admettre que le déplacement d'un enfant peut parfois être justifié par des raisons objectives touchant soit à sa personne, soit à l'environnement qui lui était le plus proche. De sorte que la Convention reconnaît certaines exceptions à l'obligation générale assumée par les Etats d'assurer le retour immédiat des enfants déplacés ou retenus illicitement. Pour la plupart, ces exceptions ne sont que des manifestations concrètes du principe trop imprécis qui proclame que l'intérêt de l'enfant est le critère vecteur en la matière.

26 D'ailleurs, la réglementation du droit de visite répond aussi au souci de fournir aux enfants des rapports familiaux aussi complets que possible, afin de favoriser un développement équilibré de leur personnalité. Pourtant, ici encore les avis ne sont pas unanimes, ce qui met une fois de plus en relief le caractère ambigu du principe de l'intérêt de l'enfant. En effet, à l'encontre du critère admis par la Convention, certaines tendances soutiennent qu'il est préférable pour l'enfant de ne pas avoir de contacts avec ses deux parents quand le couple est séparé *de jure* ou *de facto*. A cet égard, la Conférence a été consciente du fait qu'une telle solution peut parfois s'avérer la plus souhaitable. Tout en sauvegardant la marge d'appréciation des circonstances concrètes inhérente à la fonction judiciaire, la Conférence a néanmoins préféré l'autre option et la Convention fait prévaloir sans équivoque l'idée que le droit de visite est la contrepartie naturelle du droit de garde; contrepartie qui, par conséquent, doit en principe être reconnue à celui des parents qui n'a pas la garde de l'enfant.

D *Exceptions à l'obligation d'assurer le retour immédiat des enfants*

27 Etant donné que le retour de l'enfant est en quelque sorte l'idée de base de la Convention, les exceptions à l'obligation générale de l'assurer constituent un aspect important pour en comprendre avec exactitude la portée. Il ne s'agit évidemment pas d'examiner ici en détail les dispositions qui établissent ces exceptions, mais d'en esquisser le rôle, en insistant particulièrement sur les raisons qui ont déterminé leur inclusion dans la Convention. De ce point de vue, nous pouvons distinguer des exceptions basées sur trois justifications différentes.

28 D'une part, l'article 13*a* reconnaît que les autorités judiciaires ou administratives de l'Etat requis ne sont pas

[14] Rapport Dyer, *supra*, p. 21.

In fact, as Mr Dyer has emphasized, in the literature devoted to a study of this problem, 'the presumption generally stated is that the true victim of the 'childnapping' is the child himself, who suffers from the sudden upsetting of his stability, the traumatic loss of contact with the parent who has been in charge of his upbringing, the uncertainty and frustration which come with the necessity to adapt to a strange language, unfamiliar cultural conditions and unknown teachers and relatives'.[14]

25 It is thus legitimate to assert that the two objects of the Convention – the one preventive, the other designed to secure the immediate reintegration of the child into its habitual environment – both correspond to a specific idea of what constitutes the 'best interests of the child'. However, even when viewing from this perspective, it has to be admitted that the removal of the child can sometimes be justified by objective reasons which have to do either with its person, or with the environment with which it is most closely connected. Therefore the Convention recognizes the need for certain exceptions to the general obligations assumed by States to secure the prompt return of children who have been unlawfully removed or retained. For the most part, these exceptions are only concrete illustrations of the overly vague principle whereby the interests of the child are stated to be the guiding criterion in this area.

26 What is more, the rule concerning access rights also reflects the concern to provide children with family relationships which are as comprehensive as possible, so as to encourage the development of a stable personality. However, opinions differ on this, a fact which once again throws into relief the ambiguous nature of this principle of the interests of the child. In fact, there exists a school of thought opposed to the test which has been accepted by the Convention, which maintains that it is better for the child not to have contact with both parents where the couple are separated in law or in fact. As to this, the Conference was aware of the fact that such a solution could sometimes prove to be the most appropriate. Whilst safeguarding the element of judicial discretion in individual cases, the Conference nevertheless chose the other alternative, and the Convention upholds unequivocally the idea that access rights are the natural counterpart of custody rights, a counterpart which must in principle be acknowledged as belonging to the parent who does not have custody of the child.

D *Exceptions to the duty to secure the prompt return of children*

27 Since the return of the child is to some extent the basic principle of the Convention, the exceptions to the general duty to secure it form an important element in understanding the exact extent of this duty. It is not of course necessary to examine in detail the provisions which constitute these exceptions, but merely to sketch their role in outline, while at the same time stressing in particular the reasons for their inclusion in the Convention. From this vantage point can be seen those exceptions which derive their justification from three different principles.

28 On the one hand, article 13*a* accepts that the judicial or administrative authorities of the requested State are not

[14] Dyer Report, *supra*, p. 21.

tenues d'ordonner le retour de l'enfant lorsque le demandeur n'exerçait pas de façon effective, avant le déplacement prétendûment illicite, la garde qu'il invoque maintenant, ou lorsqu'il a donné son accord postérieur à l'action qu'il attaque désormais. Il s'agit par conséquent des situations dans lesquelles, ou bien les conditions préalables au déplacement ne comportaient pas l'un des éléments essentiels des relations que la Convention entend protéger (celui de l'exercice effectif de la garde), ou bien le comportement postérieur du parent dépossédé montre une acceptation de la nouvelle situation ainsi créée, ce qui la rend plus difficilement contestable.

29 D'autre part, les alinéas 1*b* et 2 du même article 13 retiennent des exceptions s'inspirant clairement de la prise en considération de l'intérêt de l'enfant. Or, comme nous l'avons signalé auparavant, la Convention a donné un contenu précis à cette notion. Ainsi, l'intérêt de l'enfant de ne pas être déplacé de sa résidence habituelle, sans garanties suffisantes de stabilité de la nouvelle situation, cède le pas devant l'intérêt primaire de toute personne de ne pas être exposée à un danger physique ou psychique, ou placée dans une situation intolérable.

30 De surcroît, la Convention admet aussi que l'avis de l'enfant sur le point essentiel de son retour ou de son non-retour puisse être décisif, si d'après les autorités compétentes il a atteint un âge et une maturité suffisante. Par ce biais, la Convention donne aux enfants la possibilité de se faire l'interprète de leur propre intérêt. Evidemment, cette disposition peut devenir dangereuse si son application se traduit par des interrogatoires directs de jeunes qui peuvent, certes, avoir une conscience claire de la situation, mais qui peuvent aussi subir des dommages psychiques sérieux s'ils pensent qu'on les a obligés à choisir entre leurs deux parents. Pourtant, une disposition de ce genre était indispensable étant donné que le domaine d'application de la Convention *ratione personae* s'étend aux enfants jusqu'à leur seizième anniversaire; il faut avouer que serait difficilement acceptable le retour d'un enfant, par exemple de quinze ans, contre sa volonté. D'ailleurs, sur ce point précis, les efforts faits pour se mettre d'accord sur un âge minimum à partie duquel l'opinion de l'enfant pourrait être prise en considération ont échoué, tous les chiffres ayant un caractère artificiel, voire arbitraire; il est apparu préférable de laisser l'application de cette clause à la sagesse des autorités compétentes.

31 En troisième lieu, il n'existe pas d'obligation de faire revenir l'enfant quand, aux termes de l'article 20, ceci «ne serait pas permis par les principes fondamentaux de l'Etat requis sur la sauvegarde des droits de l'homme et des libertés fondamentales». Nous nous trouvons ici devant une disposition peu habituelle dans les conventions concernant le droit international privé et dont la portée exacte est difficile à établir. En renvoyant au commentaire de l'article 20 pour tenter d'y parvenir, il nous paraît surtout intéressant ici d'en considérer l'origine. Or cette règle est le produit d'un compromis entre délégations favorables et délégations contraires à l'inclusion dans la Convention d'une clause d'ordre public.
Une telle possibilité a été largement débatue au sein de la Première commission, sous des formules différentes. Finalement, après quatre scrutins négatifs et par une seule voix de différence, la Commission a admis la possibilité de rejeter la demande en retour de l'enfant, avec mention d'une réserve faisant état de l'exception d'ordre public sous une formule restreinte en relation avec le droit de la famille et de l'enfance de l'Etat requis. La réserve prévue était formulée littéralement comme suit: «*Contracting States may reserve the right not to return the child when such return would be manifestly incompatible with the fundamental principles of the*

bound to order the return of the child if the person requesting its return was not actually exercising, prior to the allegedly unlawful removal, the rights of custody which he now seeks to invoke, or if he had subsequently consented to the act which he now seeks to attack. Consequently, the situations envisaged are those in which either the conditions prevailing prior to the removal of the child do not contain one of the elements essential to those relationships which the Convention seeks to protect (that of the actual exercise of custody rights), or else the subsequent behaviour of the dispossessed parent shows his acceptance of the new situation thus brought about, which makes it more difficult for him to challenge.

29 On the other hand, paragraphs 1*b* and 2 of the said article 13 contain exceptions which clearly derive from a consideration of the interests of the child. Now, as we pointed out above, the Convention invests this notion with definite content. Thus, the interest of the child in not being removed from its habitual residence without sufficient guarantees of its stability in the new environment, gives way before the primary interest of any person in not being exposed to physical or psychological danger or being placed in an intolerable situation.

30 In addition, the Convention also provides that the child's views concerning the essential question of its return or retention may be conclusive, provided it has, according to the competent authorities, attained an age and degree of maturity sufficient for its views to be taken into account. In this way, the Convention gives children the possibility of interpreting their own interests. Of course, this provision could prove dangerous if it were applied by means of the direct questioning of young people who may admittedly have a clear grasp of the situation but who may also suffer serious psychological harm if they think they are being forced to choose between two parents. However, such a provision is absolutely necessary given the fact that the Convention applies, *ratione personae*, to all children under the age of sixteen; the fact must be acknowledged that it would be very difficult to accept that a child of, for example, fifteen years of age, should be returned against its will. Moreover, as regards this particular point, all efforts to agree on a minimum age at which the views of the child could be taken into account failed, since all the ages suggested seemed artificial, even arbitrary. It seemed best to leave the application of this clause to the discretion of the competent authorities.

31 Thirdly, there is no obligation to return a child when, in terms of article 20, its return 'would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms'. Here, we are concerned with a provision which is rather unusual in conventions involving private international law, and the exact scope of which is difficult to define. Although we shall refer to the commentary on article 20 for the purpose of defining such scope, it is particularly interesting to consider its origins here. This rule was the result of a compromise between those delegations which favoured, and those which were opposed to, the inclusion in the Convention of a 'public policy' clause.
The inclusion of such a clause was debated at length by the First Commission, under different formulations. Finally, after four votes against inclusion, the Commission accepted, by a majority of only one, that an application for the return of a child could be refused, by reference to a reservation which took into account the public policy exception by way of a restrictive formula concerning the laws governing the family and children in the requested State. The reservation provided for was formulated exactly as follows: 'Contracting States may reserve the right not to return the child when such return would be manifestly incompatible with the

law relating to the family and children in the State addressed».[15] En adoptant ce texte, on ouvrait une brèche grave dans le *consensus* qui avait présidé fondamentalement jusqu'alors aux travaux de la Conférence; c'est pourquoi, conscientes de ce qu'il fallait trouver une solution largement acceptable, toutes les délégations se sont engagées dans cette voie qui constituait le chemin le plus sûr pour garantir la réussite de la Convention.

32 Le point débattu était particulièrement important, car il reflétait en partie deux conceptions partiellement différentes de l'objectif de la Convention en matière de retour de l'enfant. En effet, jusqu'ici le texte élaboré par la Première commission (en accord avec l'avant-projet préparé par la Commission spéciale) avait limité les exceptions possibles au retour de l'enfant à la considération des situations de fait et de la conduite des parties ou à une appréciation spécifique de l'intérêt de l'enfant. Par contre, la réserve qu'on venait d'accepter impliquait qu'on admettait la possibilité de refuser le retour d'un enfant sur la base d'arguments purement juridiques, tirés du droit interne de l'Etat requis. Droit interne qui aurait pu jouer dans le contexte de la disposition transcrite, soit pour «évaluer» le titre invoqué par le parent dépossédé, soit pour apprécier le bien-fondé juridique de l'action de l'enleveur. Or, de telles conséquences altéraient considérablement un édifice conventionnel construit sur l'idée qu'il fallait éviter le détournement, par voies de fait, de la compétence normale des autorités de la résidence habituelle de l'enfant.

33 Dans cette situation, l'adoption par une majorité[16] rassurante de la formule qui figure à l'article 20 de la Convention représente un louable effort de compromis entre les différentes positions, le rôle accordé à la loi interne de l'Etat de refuge ayant considérablement diminué. D'une part, la référence aux principes fondamentaux concernant la sauvegarde des droits de l'homme et des libertés fondamentales porte sur un secteur du droit où il existe de nombreux compromis internationaux. D'autre part, la règle de l'article 20 va également plus loin que les formules traditionnelles de la clause d'ordre public en ce qui concerne le degré d'incompatibilité existant entre le droit invoqué et l'action envisagée; en effet, pour pouvoir refuser le retour de l'enfant en invoquant le motif qui figure dans cette disposition, l'autorité en question doit constater non seulement l'existence d'une contradiction, mais aussi le fait que les principes protecteurs des droits de l'homme interdisent le retour demandé.

34 Pour clore les considérations sur les problèmes traités à cet alinéa, il semble nécessaire de souligner que les exceptions de trois types au retour de l'enfant doivent être appliquées en tant que telles. Cela implique avant tout qu'elles doivent être interprétées restrictivement si l'on veut éviter que la Convention devienne lettre morte. En effet, la Convention repose dans sa totalité sur le rejet unanime du phénomène des déplacements illicites d'enfants et sur la conviction que la meilleure méthode pour les combattre, au niveau international, est de ne pas leur reconnaître des conséquences juridiques. La mise en pratique de cette méthode exige que les Etats signataires de la Convention soient convaincus de ce qu'ils appartiennent, malgré leurs différences, à une même communauté juridique au sein de laquelle les autorités de chaque Etat reconnaissent que les autorités de l'un d'entre eux – celles de la résidence

[15] Voir P.-v. No 9 et Doc. trav. connexes.
[16] Le texte a été adopté par 14 suffrages positifs, 6 négatifs et 4 abstentions, voir P.-v. No 13.

fundamental principles of the law relating to the family and children in the State addressed'.[15] The adoption of this text caused a serious breach in the consensus which basically had prevailed up to this point in the Conference proceedings. That is why all the delegations, aware of the fact that a solution commanding wide acceptance had to be found, embarked upon this road which provided the surest guarantee of the success of the Convention.

32 The matter under debate was particularly important since to some extent it reflected two partly different concepts concerning the Convention's objects as regards the return of the child. Actually, up to now the text drawn up by the First Commission (like the Preliminary Draft drawn up by the Special Commission) had limited the possible exceptions to the rule concerning the return of the child to a consideration of factual situations and of the conduct of the parties or to a specific evaluation of the interests of the child. On the other hand, the reservation just accepted implicitly permitted the possibility of the return of a child being refused on the basis of purely legal arguments drawn from the internal law of the requested State, an internal law which could come into play in the context of the quoted provision either to 'evaluate' the right claimed by the dispossessed parent or to assess whether the action of the abductor was well-founded in law. Now, such consequences would alter considerably the structure of the Convention which is based on the idea that the forcible denial of jurisdiction ordinarily possessed by the authorities of the child's habitual residence should be avoided.

33 In this situation, the adoption by a comforting majority[16] of the formula which appears in article 20 of the Convention represents a laudable attempt to compromise between opposing points of view, the role given to the internal law of the State of refuge having been considerably diminished. On the one hand, the reference to the fundamental principles concerning the protection of human rights and fundamental freedoms relates to an area of law in which there are numerous international agreements. On the other hand, the rule in article 20 goes further than the traditional formulation of 'public policy' clauses as regards the extent of incompatibility between the right claimed and the action envisaged. In fact, the authority concerned, in order to be able to refuse to order the return of the child by invoking the grounds which appear in this provision, must show not only that such a contradiction exists, but also that the protective principles of human rights prohibit the return requested.

34 To conclude our consideration of the problems with which this paragraph deals, it would seem necessary to underline the fact that the three types of exception to the rule concerning the return of the child must be applied only so far as they go and no further. This implies above all that they are to be interpreted in a restrictive fashion if the Convention is not to become a dead letter. In fact, the Convention as a whole rests upon the unanimous rejection of this phenomenon of illegal child removals and upon the conviction that the best way to combat them at an international level is to refuse to grant them legal recognition. The practical application of this principle requires that the signatory States be convinced that they belong, despite their differences, to the same legal community within which the authorities of each State acknowledge that the authorities of one of them – those of the child's habitual residence – are in

[15] See *P.-v.* No 9 and associated Working Documents.
[16] The text was adopted with 14 votes in favour, 6 against and 4 abstentions, see *P.-v.* No 13.

habituelle de l'enfant – sont en principe les mieux placées pour statuer en toute justice sur les droits de garde et de visite. De sorte qu'une invocation systématique des exceptions mentionnées, substituant ainsi au for de la résidence de l'enfant le for choisi par l'enleveur, fera s'écrouler tout l'édifice conventionnel, en le vidant de l'esprit de confiance mutuelle qui l'a inspiré.

II NATURE DE LA CONVENTION

A *Une convention de coopération entre autorités*

35 En délimitant les buts poursuivis par les Etats contractants, les objectifs d'une convention en déterminent en dernier ressort la nature. Ainsi, la Convention sur les aspects civils de l'enlèvement international d'enfants est avant tout une convention qui cherche à éviter les déplacements internationaux d'enfants en instituant une coopération étroite entre les autorités judiciaires et administratives des Etats contractants. Une telle collaboration porte sur les deux objectifs que nous venons d'examiner, d'une part l'obtention du retour immédiat de l'enfant dans le milieu d'où il a été éloigné, d'autre part le respect effectif des droits de garde et de visite existant dans un des Etats contractants.

36 Cette caractérisation de la Convention peut aussi être effectuée à travers une approche négative. Ainsi, nous pouvons constater avant tout qu'il ne s'agit pas d'une convention sur la loi applicable à la garde des enfants. En effet, les références faites au droit de l'Etat de la résidence habituelle de l'enfant ont une portée restreinte, puisque le droit en question n'est pris en considération que pour établir le caractère illicite du déplacement (par exemple, à l'article 3). En second lieu, la Convention n'est pas non plus un traité sur la reconnaissance et l'exécution des décisions en matière de garde. On a sciemment évité cette option, qui a pourtant suscité de longs débats au sein de la première réunion de la Commission spéciale. Etant donné les conséquences sur le fond de la reconnaissance d'une décision étrangère, cette institution est normalement entourée de garanties et d'exceptions qui peuvent prolonger la procédure. Or, en cas de déplacement d'un enfant, le facteur temps prend une importance décisive. En effet, les troubles psychologiques que l'enfant peut subir du fait d'un tel déplacement pourraient se reproduire si la décision sur son retour n'était adoptée qu'après un certain délai.

37 Une fois acquis que nous nous trouvons devant une convention axée sur l'idée de coopération entre autorités, il faut préciser qu'elle n'essaie de régler que les situations entrant dans son domaine d'application et touchant deux ou plusieurs Etats parties. En effet, l'idée d'une convention «universaliste» (c'est-à-dire dont le domaine s'applique à toute espèce internationale) est difficile à soutenir en dehors des conventions en matière de loi applicable. En ce sens, nous devons rappeler que les systèmes prévus, qu'il s'agisse du retour des enfants ou d'assurer l'exercice effectif du droit de visite, s'appuient largement sur une coopération entre les Autorités centrales reposant sur des droits et des devoirs réciproques. De même, quand des particuliers s'adressent directement aux autorités judiciaires ou administratives d'un Etat contractant en invoquant la Convention, l'application des bénéfices conventionnels répond aussi à une idée de réciprocité qui exclut en principe son extension aux ressortissants des Etats tiers.

Par ailleurs, bien que la Convention n'atteigne la plénitude de ses objectifs qu'entre les Etats contractants, les autorités de chacun de ces Etats ont parfaitement le droit de s'inspirer

principle best placed to decide upon questions of custody and access. As a result, a systematic invocation of the said exceptions, substituting the forum chosen by the abductor for that of the child's residence, would lead to the collapse of the whole structure of the Convention by depriving it of the spirit of mutual confidence which is its inspiration.

II NATURE OF THE CONVENTION

A *A convention of co-operation among authorities*

35 By defining the ends pursued by the Contracting States, a convention's objects in the final analysis determine its nature. Thus, the Convention on the Civil Aspects of International Child Abduction is above all a convention which seeks to prevent the international removal of children by creating a system of close co-operation among the judicial and administrative authorities of the Contracting States. Such collaboration has a bearing on the two objects just examined, *viz.* on the one hand, obtaining the prompt return of the child to the environment from which it was removed, and on the other hand the effective respect for rights of custody and access which exist in one of the Contracting States.

36 This description of the Convention can also be drawn in a negative way. Thus, it can be said at the outset that the Convention is not concerned with the law applicable to the custody of children. In fact, the references to the law of the State of the child's habitual residence are of limited significance, since the law in question is taken into consideration only so as to establish the wrongful nature of the removal (see, for example, article 3). Secondly, the Convention is certainly not a treaty on the recognition and enforcement of decisions on custody. This option, which gave rise to lengthy debates during the first meeting of the Special Commission, was deliberately rejected. Due to the substantive consequences which flow from the recognition of a foreign judgment, such a treaty is ordinarily hedged around by guarantees and exceptions which can prolong the proceedings. Now, where the removal of a child is concerned, the time factor is of decisive importance. In fact, the psychological problems which a child may suffer as a result of its removal could reappear if a decision on its return were to be taken only after some delay.

37 Once it is accepted that we are dealing with a convention which is centred upon the idea of co-operation amongst authorities, it must also be made clear that it is designed to regulate only those situations that come within its scope and which involve two or more Contracting States. Indeed, the idea of a 'universalist' convention (*i.e.* a convention which applies in every international case) is difficult to sustain outwith the realm of conventions on applicable law. In this regard, we must remember that the systems which have been designed either to return children or to secure the actual exercise of access rights, depend largely on co-operation among the Central Authorities, a co-operation which itself rests upon the notion of reciprocal rights and duties. In the same way, when individuals, by invoking the provisions of the Convention, apply directly to the judicial or administrative authorities of a Contracting State, the applicability of the Convention's benefits will itself depend on the concept of reciprocity which in principle excludes its being extended to nationals of third countries.
What is more, although the Convention attains its objectives in full only as among the Contracting States, the authorities in each of those States have the absolute right to be guided

des dispositions conventionnelles pour traiter d'autres situations similaires.

B *Caractère autonome de la Convention*

38 Axée comme elle l'est sur la notion de coopération entre autorités, en vue d'atteindre des objectifs précis, la Convention est autonome par rapport aux conventions existantes en matière de protection des mineurs ou relatives au droit de garde. Ainsi, l'une des premières décisions prises par la Commission spéciale a été d'orienter ses travaux dans le sens d'une convention indépendante, plutôt que d'élaborer un protocole à la *Convention de La Haye du 5 octobre 1961 concernant la compétence des autorités et la loi applicable en matière de protection des mineurs.* Dans cette même optique, elle ne pouvait pas non plus s'en tenir aux modèles proposés par les conventions sur la reconnaissance et l'exécution des décisions en matière de garde, y compris celui de la Convention du Conseil de l'Europe.[17]

39 Cette autonomie ne signifie pas que les dispositions prétendent régler tous les problèmes posés par les enlèvements internationaux d'enfants. Bien au contraire, dans la mesure où les objectifs de la Convention, quoique ambitieux, ont une portée très concrète, le problème de fond du droit de garde se situe hors du domaine d'application de la Convention. Elle est donc appelée à coexister inévitablement avec les règles sur la loi applicable et sur la reconnaissance et l'exécution des décisions étrangères de chaque Etat contractant, indépendamment du fait que leur source soit interne ou conventionnelle.
D'autre part, même dans son domaine propre, la Convention ne prétend pas être appliquée de façon exclusive: elle désire, avant tout, la réalisation des objectifs conventionnels et reconnaît donc explicitement la possibilité d'invoquer, simultanément à la Convention, toute autre règle juridique qui permette d'obtenir le retour d'un enfant déplacé ou retenu illicitement, ou l'organisation d'un droit de visite (article 34).

C *Rapports avec d'autres conventions*

40 La Convention se présente comme un instrument devant apporter une solution d'urgence, en vue d'éviter la consolidation juridique des situations, initialement illicites, provoquées par le déplacement ou le non-retour d'un enfant. Dans la mesure où elle n'essaie pas de trancher sur le fond des droits des parties, sa compatibilité avec d'autres conventions s'impose. Néanmoins, une telle compatibilité ne pouvait être obtenue qu'en assurant l'application prioritaire des dispositions susceptibles de fournir une solution d'urgence et, dans une certaine mesure, provisoire. C'est en effet après le retour de l'enfant à sa résidence habituelle que devront être soulevées, devant les tribunaux compétents, les questions relatives au droit de garde. A ce sujet, l'article 34 déclare que «dans les matières auxquelles elle s'applique, la Convention prévaut sur la *Convention du 5 octobre 1961 concernant la compétence des autorités et la loi applicable en matière de protection des mineurs*, entre les Etats parties aux deux Conventions». D'ailleurs, étant donné qu'on a essayé d'éviter que l'on puisse ajourner l'application des dispositions conventionnelles en invoquant des dispositions qui touchent le fond du droit de garde, le principe incorporé à l'article 34 devrait s'étendre à toute

[17] Il s'agit de la *Convention européenne sur la reconnaissance et l'exécution des décisions en matière de garde des enfants et sur le rétablissement de la garde des enfants*, adoptée par le Comité des Ministres du Conseil de l'Europe le 30 novembre 1979 et ouverte à la signature des Etats membres, au Luxembourg, le 20 mai 1980.

by the provisions of the Convention when dealing with other, similar situations.

B *The autonomous nature of the Convention*

38 The Convention, centred as it is upon the notion of co-operation among authorities with a view to attaining its stated objects, is autonomous as regards existing conventions concerning the protection of minors or custody rights. Thus, one of the first decisions taken by the Special Commission was to direct its proceedings towards the drawing up of an independent Convention, rather than the preparation of a protocol to the *Hague Convention of 5 October 1961 concerning the powers of authorities and the law applicable to the protection of minors.* Seen from this perspective, the Convention could not possibly be confined within the framework provided by the conventions on the recognition and enforcement of custody decisions, including that of the Council of Europe Convention.[17]

39 This autonomous character does not mean that the provisions purport to regulate all the problems arising out of international child abductions. On the contrary, to the extent that the Convention's aims, although ambitious, are given concrete expression, the basic problem of custody rights is not to be found within the scope of the Convention. The Convention must necessarily coexist with the rules of each Contracting State on applicable law and on the recognition and enforcement of foreign decrees, quite apart from the fact that such rules are derived from internal law or from treaty provisions.
On the other hand, even within its own sphere of application, the Convention does not purport to be applied in an exclusive way. It seeks, above all, to carry into effect the aims of the Convention and so explicitly recognizes the possibility of a party invoking, along with the provisions of the Convention, any other legal rule which may allow him to obtain the return of a child wrongfully removed or retained, or to organize access rights (article 34).

C *Relations with other conventions*

40 The Convention is designed as a means for bringing about speedy solutions so as to prevent the consolidation in law of initially unlawful factual situations, brought about by the removal or retention of a child. In as much as it does not seek to decide upon the merits of the rights of parties, its compatibility with other conventions must be considered. Nonetheless, such compatibility can be achieved only by ensuring that priority is given to those provisions which are likely to bring about a speedy and, to some extent, temporary solution. In fact it is only after the return of the child to its habitual residence that questions of custody rights will arise before the competent tribunals. On this point, article 34 states that 'This Convention shall take priority in matters within its scope over the *Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors*, as between Parties to both Conventions.' Moreover, since one is trying to avoid delays in the application of the Convention's provisions caused by claims concerning the merits of custody rights, the principle in article 34 ought to be extended to any provision which has a bearing upon custody rights, whatever the reason. On the other hand, as has just been emphasized in the preceding

[17] The *European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children*, adopted by the Committee of Ministers of the Council of Europe on 30 November 1979 and opened for signing by the Member States at Luxemburg on 20 May 1980.

disposition portant sur le droit de garde, quelle qu'en soit la source. Par contre, comme nous venons de le souligner au paragraphe précédent, les parties peuvent faire appel à toute règle qui facilite la réalisation des objectifs conventionnels.

D *Ouverture de la Convention aux Etats non-membres de la Conférence de La Haye*

41 Sur ce point aussi, la Convention s'est manifestée en tant que Convention de coopération, en déterminant son caractère semi-ouvert. En principe, tout Etat pourra adhérer à la Convention, mais son adhésion «n'aura d'effet que dans les rapports entre l'Etat adhérant et les Etats contractants qui auront déclaré accepter cette adhésion» (article 38). En agissant de la sorte, les Etats contractants ont cherché à maintenir l'équilibre nécessaire entre le désir d'universalisme et la conviction qu'un système de coopération n'est efficace que lorsqu'il existe entre les Parties un degré de confiance mutuelle suffisant.

Plus encore, le choix du système de l'acceptation explicite de l'adhésion par chaque Etat membre, afin que celle-ci devienne effective à leur égard,[18] de préférence au système, plus ouvert, qui entend que l'adhésion produit ses effets sauf dans les rapports avec l'Etat membre qui s'y oppose dans un délai fixé,[19] montre l'importance accordée par les Etats à la sélection de ses cocontractants dans la matière qui fait l'objet de la Convention.

III INSTRUMENTS D'APPLICATION DE LA CONVENTION

A *Les Autorités centrales*

42 Une convention de coopération comme celle qui nous occupe peut en principe s'orienter dans deux directions différentes: imposer la coopération directe entre les autorités internes compétentes dans le domaine d'application de la Convention, ou baser son action sur la création d'Autorités centrales dans chaque Etat contractant, en vue de coordonner et de canaliser la coopération souhaitée. L'avant-projet mis au point par la Commission spéciale consacrait assez nettement le choix fait en faveur de la deuxième option et la Convention elle-même continue à être bâtie, dans une large mesure, sur l'intervention et les compétences des Autorités centrales.

43 Néanmoins, l'admission sans équivoque de la possibilité reconnue aux particuliers de s'adresser directement aux autorités judiciaires ou administratives compétentes dans l'application de la Convention (article 29), accroît l'importance du devoir qui est fait à celles-ci de coopérer, à tel point qu'on pourra qualifier de «système mixte» le système suivi par la Convention du fait qu'en marge des obligations des Autorités centrales, il en introduit d'autres qui sont propres aux autorités judiciaires ou administratives.

44 D'ailleurs, ce serait une erreur de prétendre construire une convention pour lutter contre les enlèvements internationaux d'enfants sans tenir compte du rôle important joué par les autorités judiciaires ou administratives internes dans toutes les questions concernant la protection des mineurs.

[18] A l'instar de l'article 39 de la *Convention sur l'obtention des preuves à l'étranger en matière civile ou commerciale, du 18 mars 1970*, voir P.-v. No 13.
[19] Système consacré, parmi d'autres, dans la *Convention tendant à faciliter l'accès international à la justice*, adopté également au cours de la Quatorzième session de la Conférence.

paragraph, the parties may have recourse to any rule which promotes the realization of the Convention's aims.

D *Opening of the Convention to States not Members of the Hague Conference*

41 On this point also, by virtue of the decision that it be of a 'semi-open' type, the Convention is shown to be one of co-operation. In principle, any State can accede to the Convention, but its accession 'will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession' (article 38). The Contracting States, by this means, sought to maintain the requisite balance between a desire for universality and the belief that a system based on co-operation could work only if there existed amongst the Contracting Parties a sufficient degree of mutual confidence.
What is more, the choice of a system based on the express acceptance of accession by each Member State, by which such acceptance becomes effective as amongst themselves,[18] in preference to a more open system by which accession has effect except as regards Member States which raise objections thereto within a certain period of time,[19] demonstrates the importance which the States attached to the selection of their co-signatories in those questions which form the subject-matter of the Convention.

III INSTRUMENTS FOR APPLYING THE CONVENTION

A *The Central Authorities*

42 A convention based on co-operation such as the one which concerns us here can in theory point in two different directions; it can impose direct co-operation among competent internal authorities, in the sphere of the Convention's application, or it can act through the creation of Central Authorities in each Contracting State, so as to co-ordinate and 'channel' the desired co-operation. The Preliminary Draft drawn up by the Special Commission expressed quite clearly the choice made in favour of the second option, and the Convention itself was also built in large measure upon the intervention and powers of Central Authorities.

43 Nevertheless, the unequivocal acceptance of the possibility for individuals to apply directly to the judicial or administrative authorities which have power to apply the provisions of the Convention (article 29), increases the importance of the duty of co-operation laid upon them, so much so that the system adopted by the Convention could be characterized as a 'mixed system', due to the fact that, aside from the duties imposed upon the Central Authorities, it creates other obligations which are peculiar to judicial or administrative authorities.

44 What is more, it would be a mistake to claim to have constructed a convention to counter international child abduction without taking account of the important role played by the internal judicial or administrative authorities in all matters concerning the protection of minors. In this context,

[18] As in article 39 of the *Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*, see *P.-v.* No 13.
[19] The system adopted, among others, by the *Convention on International Access to Justice*, also adopted during the Fourteenth Session of the Conference.

Dans ce contexte, la référence aux autorités administratives doit être comprise comme le simple reflet du fait que, dans certains Etats membres de la Conférence, cette tâche est confiée à des autorités d'une telle nature, tandis que dans la plupart des systèmes juridiques la compétence en la matière appartient aux autorités judiciaires. Somme toute, c'est aux autorités chargées à l'intérieur de chaque Etat de statuer sur la garde et la protection des enfants que la Convention confie le soin de trancher les problèmes posés, qu'il s'agisse du retour d'un enfant déplacé ou retenu illicitement, ou de l'organisation de l'exercice du droit de visite. Ainsi, la Convention fait sienne l'exigence de sécurité juridique qui inspire dans ce domaine tous les droits internes. En effet, quoique les décisions sur le retour des enfants ne préjugent pas du fond du droit de garde (voir article 19), elles vont largement influencer la vie des enfants; l'adoption de telles décisions, la prise d'une semblable responsabilité doivent obligatoirement revenir aux autorités qui sont normalement compétentes selon le droit interne.

45 Cependant, dans ses grandes lignes et dans une large majorité des cas, l'application de la Convention dépendra du fonctionnement des instruments qu'elle-même instituera à cette fin, c'est-à-dire des Autorités centrales. En ce qui concerne leur réglementation par la Convention, la première remarque à faire est que la Conférence a eu conscience des différences profondes existant dans l'organisation interne des Etats membres; c'est la raison pour laquelle la Convention ne précise point quelles doivent être la structure et la capacité d'action des Autorités centrales, deux aspects qui seront nécessairement régis par la loi interne de chaque Etat contractant. L'acceptation de cette prémisse se traduit dans la Convention par la reconnaissance du fait que les tâches assignées en particulier aux Autorités centrales pourront être accomplies soit directement par elles-mêmes, soit avec le concours d'un intermédiaire (article 7). Il est évident, par exemple, que la localisation d'un enfant peut requérir l'intervention de la police; de même, l'adoption de mesures provisoires ou l'introduction de procédures judiciaires sur des rapports privés peuvent tomber hors des compétences susceptibles d'être dévolues aux autorités administratives par certaines lois internes. Néanmoins, dans tous les cas, l'Autorité centrale reste le destinataire des obligations que la Convention lui impose, en tant que «monteur» de la coopération voulue pour lutter contre les déplacements illicites d'enfants. D'autre part, c'est encore pour tenir compte des particularités des différents systèmes juridiques que la Convention admet que l'Autorité centrale pourra exiger que la demande qui lui est adressée soit accompagnée d'une autorisation «par écrit lui donnant le pouvoir d'agir pour le compte du demandeur, ou de désigner un représentant habilité à agir en son nom» (article 28).

46 Par ailleurs, la Convention, suivant une tradition bien établie de la Conférence de La Haye,[20] dispose que tant les Etats fédéraux que les Etats plurilégislatifs ou ayant des organisations territoriales autonomes sont libres de désigner plus d'une Autorité centrale. Pourtant, les problèmes constatés dans l'application pratique des conventions qui prévoient l'existence de plusieurs Autorités centrales sur le territoire d'un seul Etat, ainsi que, tout particulièrement, les caractéristiques spéciales de la matière qui fait l'objet de la présente Convention, ont amené la Conférence, suivant le critère déjà établi par la Commission spéciale, à faire un pas

[20] Par exemple, *cf.* l'article 18, troisième alinéa de la *Convention relative à la signification et la notification à l'étranger des actes judiciaires et extrajudiciaires en matière civile ou commerciale, du 15 novembre 1965. Id.* les articles 24 et 25 de la *Convention sur l'obtention des preuves à l'étranger en matière civile ou commerciale, du 18 mars 1970.*

references to administrative authorities must be understood as a simple reflection of the fact that, in certain Member States, the task in question is entrusted to such authorities, while in the majority of legal systems jurisdiction belongs to the judicial authorities. *In fine*, it is for the appropriate authorities within each State to decide questions of custody and protection of minors; it is to them that the Convention has entrusted the responsibility of solving the problems which arise, whether they involve the return of a child wrongfully removed or retained or organizing the exercise of access rights. Thus, the Convention adopts the demand for legal certainty which inspires all internal laws in this regard. In fact, although decisions concerning the return of children in no way prejudge the merits of any custody issue (see article 19), they will in large measure influence children's lives; such decisions and such responsibilities necessarily belong ultimately to the authorities which ordinarily have jurisdiction according to internal law.

45 However, the application of the Convention, both in its broad outline and in the great majority of cases, will depend on the working of the instruments which were brought into being for this purpose, *i.e.* the Central Authorities. So far as their regulation by the Convention is concerned, the first point to be made is that the Conference was aware of the profound differences which existed as regards the internal organization of the Contracting States. That is why the Convention does not define the structure and capacity to act of the Central Authorities, both of which are necessarily governed by the internal law of each Contracting State. Acceptance of this premise is shown in the Convention by its recognition of the fact that the tasks specifically assigned to Central Authorities can be performed either by themselves, or with the assistance of intermediaries (article 7). For example, it is clear that discovering a child's whereabouts may require the intervention of the police; similarly, the adoption of provisional measures or the institution of legal proceedings concerning private relationships may fall outwith the scope of those powers which can be devolved upon administrative authorities in terms of some internal laws. Nonetheless, the Central Authority in every case remains the repository of those duties which the Convention imposes upon it, to the extent of its being the 'engine' for the desired co-operation which is designed to counter the wrongful removal of children. On the other hand, it is so as to take account of the peculiarities of different legal systems that the Convention allows a Central Authority to require that applications addressed to it be accompanied by a 'written authorization empowering it to act on behalf of the applicant, or to designate a representative so to act' (article 28).

46 In other respects, the Convention follows a long-established tradition of the Hague Conference,[20] by providing that States with more than one system of law or which have autonomous territorial organizations, as well as Federal States, are free to appoint more than one Central Authority. However, the problems encountered in the practical application of those Conventions which provide for several Central Authorities within the territory of a single State, as well as, in particular, the special characteristics of the subject-matter of this Convention, led the Conference to adopt the text previously established by the Special Commission and

[20] Compare, for example, article 18(3) of the *Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.* Also, articles 24 and 25 of the *Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters.*

en avant vers une sorte de «hiérarchisation» des Autorités centrales dans ces Etats. En effet, en nous limitant au deuxième aspect mentionné, si la personne qui a déplacé ou retenu un enfant se sert de l'extrême facilité des communications à l'intérieur d'un Etat, le demandeur ou l'Autorité centrale de l'Etat requérant pourraient être contraints de répéter plusieurs fois leur demande en vue d'obtenir le retour de l'enfant; de surcroît, il existe la possibilité que, même en ayant des raisons sérieuses de croire que l'enfant se trouve dans un Etat contractant, on ignore quelle est l'unité territoriale de sa résidence.

47 Pour fournir une solution à ces situations et à d'autres similaires, la Convention prévoit que les Etats qui établissent plus d'une Autorité centrale, désigneront simultanément «l'Autorité centrale à laquelle les demandes peuvent être adressées en vue de leur transmission à l'Autorité centrale compétente au sein de cet Etat» (article 6). La question est importante, du fait que la Convention limite, dans le temps, l'obligation imposée aux autorités judiciaires ou administratives de l'Etat requis, en ce qui concerne le retour immédiat de l'enfant;[21] une erreur dans le choix de l'Autorité centrale requise peut donc avoir des conséquences décisives pour les prétentions des parties. Or, pour éviter qu'un facteur non prévu par la Convention en modifie l'application normale, il faudra que cette sorte de «super Autorité centrale», envisagée à l'article 6, adopte une attitude active. En effet, puisqu'elle devra servir de pont entre l'Autorité centrale de son propre Etat qui est compétente dans chaque cas d'espèce d'une part, et les Autorités centrales des autres Etats contractants d'autre part, elle se verra contrainte de choisir entre procéder à la localisation de l'enfant pour pouvoir transmettre l'affaire à l'Autorité centrale adéquate, ou transmettre une copie de la demande à toutes les Autorités centrales de l'Etat, ce qui provoquera inévitablement une multiplication des services bureaucratiques. Mais il est hors de doute qu'une telle Autorité centrale jouera un rôle fondamental dans l'application de la Convention quant aux rapports qui affectent les Etats susmentionnés.

B *La formule modèle*

48 Suivant en cela la décision prise par la Commission spéciale lors de sa seconde réunion, la Quatorzième session de la Conférence a adopté, en même temps que la Convention, une Recommandation qui incorpore une formule modèle pour les demandes en vue du retour des enfants déplacés ou retenus illicitement. A son sujet, il convient de faire deux remarques. La première concerne la valeur juridique de la Recommandation en question: pour l'établir, il semble souhaitable de recourir au droit général des organisations internationales. Or, dans cette optique, une recommandation est en substance une invitation non contraignante adressée par une organisation internationale à un, plusieurs ou tous les Etats membres. Par conséquent, les Etats ne sont pas tenus *stricto sensu* d'utiliser la formule modèle contenue dans cette Recommandation; on a même soigneusement évité de la présenter comme une annexe à la Convention.
Les motifs en sont évidents. Avant tout, étant donné l'absence d'expérience internationale préalable dans le domaine couvert par la Convention, on peut penser qu'après quelques années l'application pratique des dispositions

[21] *Cf. infra*, commentaire de l'article 12 de la Convention.

take a step towards creating a sort of 'hierarchy' of Central Authorities in those States. In fact, by confining our discussion to the latter point, we can see that if the person responsible for the removal or retention of a child avails himself of the excellent means of communication within a particular State, the applicant or Central Authority of the requesting State could be forced to re-apply several times in order to obtain the return of the child. Moreover, it is still possible that, even if there are valid reasons for believing that the child is in a Contracting State, the territorial unit of the child's residence will be ignored.

47 The Convention supplies a solution to these and other situations by providing that States which establish more than one Central Authority should at the same time designate 'the Central Authority to which applications may be addressed for transmission to the appropriate Central Authority within that State' (article 6). The matter is important, because the Convention imposes a time-limit upon the duty of judicial or administrative authorities in the requested State for the prompt return of the child;[21] a mistaken choice as to the requested Central Authority could therefore have decisive consequences for the claims of the parties. Now, so as to prevent a factor which was not provided for in the Convention modifying the Convention's normal application, this type of 'super-Central Authority' envisaged in article 6 will have to adopt a positive approach. As a matter of fact, if it is to act as a bridge between on the one hand the Central Authority of its own State which has jurisdiction in each particular case, and on the other hand the Central Authorities of the other Contracting States, it will find itself obliged to choose between proceeding to locate a child in order to transmit the matter to the appropriate Central Authority, and transmitting a copy of the application to all the Central Authorities of the State concerned, which would inevitably cause a great increase in administrative duties. However it is undoubtedly the case that such a Central Authority will play a fundamental role in the application of the Convention in regard to relations affecting the aforementioned States.

B *The model form*

48 Following the decision taken by the Special Commission at its second meeting, the Fourteenth Session of the Conference adopted simultaneously with its adoption of the Convention, a Recommendation containing a model form for applications for the return of children wrongfully removed or retained. Two comments are appropriate here. The first concerns the legal force of this Recommendation. In drawing it up, it seemed advisable to have recourse to the general law governing international organizations. Now, viewed from this perspective, a recommendation is in substance a non-obligatory invitation addressed by one international organization to one, several or all Member States. Consequently, States are not strictly required to make use of the model form contained in the Recommendation; indeed, the Commission took care to avoid presenting the form as an annex to the Convention.

The reasons for this are clear. Most importantly, given the lack of prior international experience in this field, it can well be imagined that, after a number of years, the practical application of the Convention's provisions will result in

[21] *Cf. infra*, the commentary on article 12 of the Convention.

conventionnelles amène à conseiller l'introduction de certaines modifications dans la formule adoptée. Or, il semble préférable de ne pas soumettre une éventuelle révision du texte aux formalités qu'exigerait le droit international public en matière de révision des traités internationaux. On peut d'ailleurs soutenir qu'en marge d'une future action concertée de la Conférence sur ce point, l'adaptation de la formule recommandée aux Etats pourra aussi être l'oeuvre des contacts bilatéraux entrepris par les Autorités centrales, en exécution de l'obligation générale visée à l'article 7, alinéa 2, lettre *i*.
D'autre part, une conséquence directe de la décision de ne pas rendre obligatoire l'emploi de la formule modèle est que la Convention contient une énumération des données que doit nécessairement inclure toute demande adressée à une Autorité centrale (article 8).

49 La deuxième remarque porte sur le domaine d'application et sur la teneur de la formule recommandée. En effet, bien que la Convention règle aussi des aspects importants concernant le droit de visite, la formule proposée se limite à offrir une requête modèle en vue du retour de l'enfant. Ceci montre la polarisation de l'intérêt de la Conférence sur la solution des problèmes posés après le déplacement de l'enfant, tout en mettant en relief l'originalité de la voie choisie pour y parvenir. C'est justement parce que cette voie est nouvelle qu'on a cru souhaitable d'insérer une indication concernant son mode d'utilisation.

50 Quant à la teneur de la formule, elle développe très justement les éléments exigés par la Convention; pourtant, nous voudrions attirer l'attention sur deux points mineurs. D'abord, sur la mention «date et lieu du mariage» des parents de l'enfant concerné: dans la mesure où elle n'est pas suivie, entre parenthèses, de l'expression «s'il y a lieu», il semble qu'on donne un traitement exceptionnel et discriminatoire à la situation des enfants naturels. D'ailleurs, l'absence de cette même expression à côté de la référence à la date et au lieu de naissance de l'enfant s'accorde mal avec la précision dont fait preuve sur ce point l'article 8 de la Convention, quand il ajoute en se référant à la date de naissance, «s'il est possible de se la procurer».

51 D'autre part, on constate un manque de concordance entre le texte français et le texte anglais, du point de vue des «renseignements concernant la personne dont il est allégué qu'elle a enlevé ou retenu l'enfant». A cet égard, il semble préférable de suivre le texte anglais, plus complet, surtout en ce qui concerne la mention de la nationalité du prétendu enleveur, un élément qui sera parfois décisif dans la localisation de l'enfant.

IV STRUCTURE ET TERMINOLOGIE

A *La structure de la Convention*

52 Les articles 1, 2, 3 et 5 définissent le domaine d'application matériel de la Convention, en précisant ses objectifs et les conditions requises pour pouvoir considérer que le déplacement ou le non-retour d'un enfant sont illicites. L'article 4 s'attache au domaine d'application personnel de la Convention, tandis que l'article 35 détermine son application dans le temps. Les articles 6 et 7 sont consacrés à la création des Autorités centrales et à leurs obligations. Les articles 8, 27 et 28 se réfèrent à la saisine des Autorités centrales et aux documents qui peuvent accompagner ou compléter une demande qui leur aurait été présentée. Les articles 9 à 12 et 14 à 19 traitent des différentes voies instaurées pour obtenir le retour d'un enfant, ainsi que de la portée juridique d'une décision à cet effet. Les articles 13 et 20 s'occupent des exceptions à l'obligation générale de renvoyer l'enfant. L'article 21 établit les devoirs spécifiques

certain modifications to the present form being thought advisable. Now, it seems better not to subject future revisions of the text to the formalities required by public international law for the revision of international treaties. Besides, it could be said, in connection with any future concerted action by the Conference in this regard, that adaptation of the form which was recommended to States should also be a matter for bilateral negotiations between Central Authorities, in implementation of their general obligation contained in article 7(2)(*i*).

On the other hand, a direct consequence of the decision not to make the use of the model form obligatory is the catalogue of details which every application to a Central Authority must contain (article 8).

49 The second comment bears upon the sphere of application and the terms of the recommended form. Although the Convention also governs important matters concerning access rights, the model form proposed is merely a model application for the return of the child. This demonstrates the concentration of interest within the Conference on the resolution of problems arising out of the removal of a child, whilst at the same time throwing into relief the novelty of the means chosen to resolve them. It is precisely because the means are new that it was thought advisable to include some indication of the way in which they should be used.

50 The actual terms of the form narrate precisely those points required by the Convention itself. We should however like to draw attention to two minor points. Firstly, the phrase 'date and place of marriage' of the parents of the child in question: in as much as it is not followed, in parentheses, by the words 'if any', it would seem to treat natural children in an exceptional and discriminatory fashion. Moreover, the absence of the same phrase alongside the reference to the date and place of birth of the child compares badly with the precision shown by article 8 of the Convention which adds, referring to the date of birth, the words 'where available'.

51 Secondly, there is an inconsistency between the French and English texts regarding the 'information concerning the person alleged to have removed or retained the child'. It would be advisable to follow the English text here, since it is more comprehensive, especially as regards its reference to the nationality of the alleged abductor, a fact which will sometimes prove decisive in efforts to locate the child.

IV STRUCTURE AND TERMINOLOGY

A *The structure of the Convention*

52 Articles 1, 2, 3 and 5 define the Convention's scope with regard to its subject-matter, by specifying its aims and the criteria by which the removal or retention of a child can be regarded as wrongful. Article 4 concerns the persons to whom the Convention applies, while article 35 determines its temporal application. Articles 6 and 7 are devoted to the creation of the Central Authorities and their duties. Articles 8, 27 and 28 are concerned with applications to Central Authorities and the documents which may accompany or supplement an application to them. Articles 9 to 12, and 14 to 19, deal with the various means established for bringing about the return of a child, as well as the legal significance of a decree to that effect. Articles 13 and 20 concern the exceptions to the general rule for the return of the child. Article 21 lays down the specific duties which the States have taken upon themselves with regard to access rights.

assumés par les Etats à l'égard du droit de visite. Les articles 22 à 26 et 30 (ainsi que les articles 27 et 28 susmentionnés) s'occupent de certains aspects techniques concernant la procédure et les frais qui peuvent découler des demandes introduites par l'application de la Convention. Les articles 29 et 36 reflètent le point de vue non exclusif qui a présidé à l'élaboration de la Convention en précisant, d'une part l'action directe possible des particuliers devant les autorités judiciaires ou administratives des Etats contractants, hors du cadre des dispositions conventionnelles, et d'autre part la faculté reconnue aux Etats contractants de déroger conventionnellement aux restrictions auxquelles le retour de l'enfant peut être soumis d'après la présente Convention. Les articles 31 à 34 ont trait aux Etats plurilégislatifs et aux rapports avec d'autres conventions. Finalement, les articles 37 à 45 contiennent les clauses finales.

B *Terminologie utilisée par la Convention*

53 Selon une tradition bien établie de la Conférence de La Haye, la Convention a évité de définir les termes utilisés, sauf ceux contenus à l'article 5 sur les notions de droit de garde et de droit de visite, indispensables pour établir le domaine d'application matériel de la Convention. Ceci sera examiné dans son contexte. Nous voulons simplement considérer ici un aspect qui concerne la terminologie et qui mérite, à notre avis, un bref commentaire. Il s'agit du manque de concordance entre le titre de la Convention et la terminologie utilisée dans son texte. En effet, tandis que le premier emploie l'expression «enlèvement international d'enfants», les dispositions conventionnelles ont recours à des périphrases ou, en tous cas, à des tournures moins évocatrices, telles que «déplacement» ou «non-retour». L'explication est directement en rapport avec la délimitation du domaine de la Convention. Sur ce point, comme nous l'avons souligné ci-dessus (voir Nos 12 à 16), une étude du sujet dont s'occupe la Convention met en relief qu'en ce qui concerne aussi bien les rapports normalement existants entre «enleveur» et «enfant» que les intentions du premier, nous sommes fort loin des délits visés sous les dénominations d'«enlèvement», «*kidnapping*» ou «*secuestro*». Comme on est fort éloignés des problèmes propres au droit pénal, on a donc évité d'utiliser dans le texte de la Convention des appellations pouvant avoir une signification équivoque. Par contre, on a cru souhaitable de retenir le terme d'«enlèvement» dans le titre de la Convention, étant donné son emploi habituel par les «mass-media» et son retentissement dans l'opinion publique. Néanmoins, pour éviter toute équivoque, ce même titre précise, comme le faisait déjà le titre de l'avant-projet, que la Convention n'a pour objet que de régler les «aspects civils» du phénomène visé. Si tout au long de ce Rapport nous employons de temps en temps des expressions telles qu'«enlèvement» ou «enleveur», comme on les trouve d'ailleurs dans la formule modèle, c'est parce qu'elles permettent parfois une rédaction plus aisée; mais il faudra en tout état de cause les entendre avec les nuances que comporte leur application au problème spécifique dont la Convention s'occupe.

Deuxième partie – Commentaire des articles de la Convention

CHAPITRE PREMIER — CHAMP D'APPLICATION DE LA CONVENTION

54 Le chapitre premier définit le domaine d'application de la Convention quant à la matière et aux personnes concernées (domaine d'application *ratione materiae* et *ratione*

Articles 22 to 26 and 30 (like the aforementioned articles 27 and 28) deal with certain technical matters regarding proceedings and the costs which can result from applications submitted pursuant to the provisions of the Convention. Articles 29 and 36 reflect the 'non-exclusive' view which prevailed during the preparation of the Convention in stating, on the one hand, that applications may be submitted directly by individuals to the judicial or administrative authorities of the Contracting States, outwith the framework of the provisions of the Convention, and on the other hand that Contracting States have the acknowledged right to derogate by agreement from the restrictions which the present Convention allows to be imposed upon the return of the child. Articles 31 to 34 refer to States with more than one system of law and to the Convention's relations with other conventions. Lastly, articles 37 to 45 contain the Final Clauses.

B *Terminology used in the Convention*

53 Following a long-established tradition of the Hague Conference, the Convention avoided defining its terms, with the exception of those in article 5 concerning custody and access rights, where it was absolutely necessary to establish the scope of the Convention's subject-matter. These will be examined in their context. At this point we wish merely to consider one aspect of the terminology used which in our opinion merits a brief comment. It has to do with lack of correspondence between the title of the Convention and the terms used in the text. Whilst the former uses the phrase 'international child abduction', the provisions of the Convention avail themselves of circumlocutions or at any event of less evocative turns of phrase, such as 'removal' or 'retention'. The reason for this is quite in keeping with the Convention's limited scope. As was stressed above (see Nos 12 to 16), studies of the topic with which the Convention deals show clearly that, with regard both to the relationship which normally exists between 'abductor' and 'child' and to the intentions of the former, we are far removed from the offences associated with the terms 'kidnapping', '*enlèvement*' or '*secuestro*'. Since one is far removed from problems peculiar to the criminal law, the use in the text of the Convention of possibly ambiguous terms was avoided.

On the other hand, it was felt desirable to keep the term 'abduction' in the title of the Convention, owing to its habitual use by the 'mass media' and its resonance in the public mind. Nonetheless, so as to avoid any ambiguity, the same title, as in the Preliminary Draft, states clearly that the Convention only aims to regulate the 'civil aspects' of this particular phenomenon. If, in the course of this Report, expressions such as 'abduction' or 'abductor' are used from time to time, and one will find them also in the model form, that is because they sometimes permit of easier drafting; but at all events, they will have to be understood to contain nuances which their application to the specific problem with which the Convention deals may call for.

Second Part – Commentary on the specific articles of the Convention

CHAPTER ONE — SCOPE OF THE CONVENTION

54 The first chapter defines the scope of the Convention as regards its subject-matter and the persons concerned (its scope *ratione materiae* and *ratione personae*). However, so as

personae). Cependant, pour avoir une perspective globale du domaine conventionnel, il faut considérer aussi l'article 34 sur les relations avec d'autres conventions, l'article 35 concernant son domaine d'application dans le temps et les articles 31 à 33 qui ont trait à l'application de la Convention dans les Etats plurilégislatifs.

Article premier — Les objectifs de la Convention

a Observations générales

55 Cet article expose en deux paragraphes les objectifs conventionnels que nous avons traités assez largement dans la première partie de ce Rapport. Il est donc évident que l'absence de parallélisme entre le titre et le contenu de la Convention va plus loin que la question purement terminologique.[22] De toute façon, il faut reconnaître que les termes employés dans le titre, malgré leur manque de rigueur juridique, ont un pouvoir évocateur et une force qui attirent l'attention, ce qui est l'essentiel.

56 En ce qui concerne la nature des espèces réglées, une remarque de portée générale s'impose. Quoique la Convention n'inclue aucune disposition proclamant le caractère international des situations envisagées, une telle conclusion découle aussi bien du titre que des divers articles. Or, dans le cas présent, le caractère international provient d'une situation de fait, à savoir de la dispersion des membres d'une famille entre différents pays. Une situation purement interne lors de sa naissance peut donc tomber dans le domaine d'application de la Convention par le fait, par exemple, qu'un des membres de la famille se soit déplacé à l'étranger avec l'enfant, ou du désir d'exercer un droit de visite dans un autre pays où réside la personne qui prétend avoir ce droit. Par contre, la différence de nationalité des personnes concernées n'implique pas nécessairement que nous soyons devant un cas d'espèce international auquel la Convention doive s'appliquer, bien qu'il s'agisse d'un indice clair d'une internationalisation possible, au sens où nous l'avons décrit.

b Lettre a

57 L'objectif d'assurer le retour immédiat des enfants déplacés ou retenus illicitement a été déjà longuement présenté. D'ailleurs, la Quatorzième session n'a changé en rien la teneur littérale de la formule élaborée par la Commission spéciale. Nous ne ferons donc ici que deux brèves considérations d'éclaircissement relatives à son libellé. La première concerne la caractérisation des comportements que l'on voudrait éviter par la réalisation de cet objectif. En résumé comme nous le savons déjà, il s'agit de toute conduite qui altère les rapports familiaux existant avant ou après toute décision judiciaire, en utilisant un enfant, transformé par ce fait en instrument et principale victime de la situation. Dans ce contexte, la référence aux enfants «retenus illicitement» entend couvrir les cas où l'enfant qui se trouvait dans un lieu autre que celui de sa résidence habituelle — avec le consentement de la personne qui exerçait normalement sa garde — n'est pas renvoyé par la personne avec laquelle il séjournait. C'est la situation type qui se produit quand le déplacement de l'enfant est la conséquence d'un exercice abusif du droit de visite.

[22] Voir sur ce point Rapport de la Commission spéciale, No 52.

to have an overall picture of the Convention's scope, one must consider also article 34 which deals with the Convention's relationship with other conventions, article 35 which concerns the Convention's temporal application, and articles 31 to 33 which relate to the application of the Convention in States with more than one legal system.

Article 1 — The aims of the Convention

a General observations

55 This article sets out in two paragraphs the objects of the Convention which were discussed in broad terms in the first part of this Report. It is therefore clear that the lack of correspondence between the title and the specific provisions of the Convention is more than merely a matter of terminology.[22] In any event, it must be realized that the terms used in the title, while lacking legal exactitude, possess an evocative power and force which attract attention, and this is essential.

56 As for the nature of the matters regulated by the Convention, one general comment is required. Although the Convention does not contain any provision which expressly states the international nature of the situations envisaged, such a conclusion derives as much from its title as from its various articles. Now, in the present case, the international nature of the Convention arises out of a factual situation, that is to say the dispersal of members of a family among different countries. A situation which was purely internal to start with can therefore come within the scope of the Convention through, for example, one of the members of the family going abroad with the child, or through a desire to exercise access rights in a country other than that in which the person who claims those rights lives. On the other hand, the fact that the persons concerned hold different nationality does not necessarily mean that the international type of case to which the Convention applies automatically will arise, although it would clearly indicate the possibility of its becoming 'international' in the sense described.

b Sub-paragraph a

57 The aim of ensuring the prompt return of children wrongfully removed or retained has already been dealt with at length. Besides, the Fourteenth Session in no way altered the literal meaning of the wording devised by the Special Commission. Thus only two brief points by way of explanation will be put forward here. The first concerns the characterization of the behaviour which the realization of this objective seeks to prevent. To sum up, as we know, the conduct concerned is that which changes the family relationships which existed before or after any judicial decision, by using a child and thus turning it into an instrument and principal victim of the situation. In this context, the reference to children 'wrongfully retained' is meant to cover those cases where the child, with the consent of the person who normally has custody, is in a place other than its place of habitual residence and is not returned by the person with whom it was staying. This is the typical situation which comes about when the removal of the child results from the wrongful exercise of access rights.

[22] See the Report of the Special Commission, No 52.

58 En second lieu, le texte commenté précise que les enfants dont on essaie d'assurer le retour sont ceux qui ont été déplacés ou retenus «dans tout Etat contractant». Une telle précision a une double signification. D'une part, en ce qui concerne la disposition contenue à l'article 4, elle délimite le domaine d'application *ratione personae* de la Convention aux enfants qui, ayant leur résidence habituelle dans un des Etats contractants, sont déplacés ou retenus sur le territoire d'un autre Etat contractant.

59 Mais ces quelques mots ont aussi une signification toute différente. En effet, par ce biais, l'objectif de la Convention examinée, considéré en soi ou par rapport à la disposition de l'article 2, devient général, c'est-à-dire applicable à tous les enfants qui, dans les conditions décrites, se trouvent dans un Etat contractant. Pourtant, il y aura toujours une différence dans la situation juridique entre les enfants qui avaient leur résidence habituelle, avant le déplacement, dans un autre Etat contractant et les autres enfants. Ainsi, la situation des premiers devra être résolue par application directe des dispositions conventionnelles. Par contre, l'obligation des Etats envers les autres sera plus nuancée, dans la mesure où elle découlerait (abstraction faite de la législation interne) du devoir consacré par l'article 2, qui pourrait être décrit comme celui de prendre les mesures appropriées pour éviter que leurs territoires ne se convertissent en lieux de refuge d'éventuels «enleveurs».

c Lettre b

60 L'objectif conventionnel visé à ce sous-alinéa a été clarifié dans la rédaction qu'il a reçue lors de la Quatorzième session.[23] En ce qui concerne son domaine, il est maintenant manifeste que les situations considérées sont les mêmes que celles auxquelles s'applique la Convention, c'est-à-dire les situations internationales qui mettent en relation deux ou plusieurs Etats contractants. La précision n'est pas superflue, surtout si l'on tient compte du fait que le texte de l'avant-projet permettait d'autres interprétations, notamment la référence à des situations internes.

61 Quant à savoir quelle est la portée qu'on a voulu donner à l'objectif qui y est consacré, il s'impose de faire une distinction entre droit de garde et droit de visite. En ce qui concerne le droit de garde, on peut dire que la Convention n'a pas essayé de le développer de manière autonome. C'est donc dans l'obligation générale exprimée dans l'article 2, ainsi que dans la régulation du retour de l'enfant – basée, comme nous le verrons dans le cadre du commentaire à l'article 3, sur le respect d'un droit de garde effectivement exercé et attribué par le droit de l'Etat de la résidence habituelle – qu'on doit trouver la suite de la disposition qui nous occupe à cet égard. Par contre, le droit de visite a eu un sort plus favorable et les bases sur lesquelles doit se construire son respect effectif apparaissent fixées, au moins dans leurs grandes lignes, dans le contexte de l'article 21.

Article 2 – Obligation générale des Etats contractants

62 En étroite relation avec les objectifs vastes et souples de l'article 1*b*, cet article consacre une obligation générale de comportement des Etats contractants; il s'agit donc d'une obligation qui, à l'encontre des obligations de résultat, normalement inclues dans une convention, n'exige pas de

[23] *Cf.* Doc. trav. No 2 (*Proposal of the United Kingdom delegation*) et P.-v. No 2.

58 Secondly, the text states clearly that the children whose return it is sought to secure are those who have been removed to, or retained in, 'any Contracting State'. This wording is doubly significant. On the one hand, the provision in article 4 limits the scope of the Convention *ratione personae* to those children who, while being habitually resident in one of the Contracting States, are removed to or retained in, the territory of another Contracting State.

59 But these same words also have a quite diferent meaning. In fact, through this formulation this particular object of the Convention, whether considered in its own right or in relation to article 2, becomes indirectly a general one, applicable to all children who, in the circumstances set forth, are in any Contracting State. However, there will always be a difference between the legal position of those children who, prior to their removal, were habitually resident in another Contracting State, and that of other children. The position of the former will have to be resolved by the direct application of the provisions of the Convention. On the other hand, the duty of States towards the other children is less clear (leaving aside provisions of internal law) in so far as it derives from the obligation stated in article 2, which could be described as a duty to take appropriate measures to prevent their territory being turned into a place of refuge for potential 'abductors'.

c Sub-paragraph b

60 The aim of the Convention contained in this sub-paragraph was clarified in the course of drafting at the Fourteenth Session.[23] So far as its scope is concerned, it is now clear that the situations under consideration are the same as those to which the Convention applies, that is to say international situations which involve two or more Contracting States. It should not be thought that precision in this matter is unnecessary, especially when one considers that the text of the Preliminary Draft allowed of other interpretations, and in particular a reference to internal situations.

61 As for knowing the desired meaning of the aim stated therein, it is necessary to draw a distinction between custody rights and access rights. With regard to custody rights, it can be said that the Convention has not attempted to deal with them separately. It is thus within the general obligation stated in article 2, and the regulation governing the return of the child – which is based, as we shall see in the commentary on article 3, upon respect for custody rights actually exercised and attributed under the law of the child's habitual residence – that one must look in order to find the consequences of the provision which concerns us here. On the other hand, access rights are treated more favourably, and the foundations upon which respect for their effective exercise seem fixed, at least in broad outline, within the context of article 21.

Article 2 – General obligation of Contracting States

62 Closely related to the objects stated in broad and flexible fashion in article 1*b* is the fact that this article sets forth a general duty incumbent upon Contracting States. It is thus a duty which, unlike obligations to achieve a result which are normally to be found in conventions, does not require

[23] *Cf.* Working Document No 2 (Proposal of the United Kingdom delegation) and *P.-v.* No 2.

réalisations concrètes, mais plus simplement l'adoption d'une attitude déterminée en vue d'aboutir à de telles réalisations. Dans le cas présent, l'attitude, le comportement demandé aux Etats se traduit par le fait de prendre «toutes les mesures appropriées pour assurer, dans les limites de leur territoire, la réalisation des objectifs de la Convention». La Convention essaie ainsi, tout en sauvegardant le caractère *self-executing* de ses autres articles, d'encourager les Etats contractants à s'inspirer de ces normes pour résoudre les situations similaires à celles dont elle s'occupe, mais ne rentrant pas dans son domaine d'application *ratione personae* ou *ratione temporis*. D'une part, cela doit conduire à une considération attentive des normes conventionnelles quand l'Etat envisagera une modification de sa législation interne en matière de droits de garde ou de visite; d'autre part, l'extension des objectifs de la Convention à des cas non couverts par ses dispositions devrait influencer l'action des tribunaux et se traduire par une diminution du jeu de l'exception d'ordre public au moment de se prononcer sur des relations internationales tombant hors du domaine d'application de la Convention.

63 De plus, dans sa dernière phrase, l'article précise une des mesures envisagées, en soulignant l'importance accordée par la Conférence à l'utilisation de procédures rapides dans les affaires concernant les droits de garde ou de visite. Pourtant, cette disposition n'impose pas aux Etats l'obligation d'adopter dans leur loi interne de nouvelles procédures; la concordance établie entre le texte français et le texte anglais cherche justement à éviter une telle interprétation, que le texte français original rendait possible. Elle se limite donc à demander aux Etats contractants d'utiliser, dans toute question concernant la matière objet de la Convention, les procédures les plus urgentes figurant dans leur propre droit.

Article 3 — Le caractère illicite d'un déplacement ou d'un non-retour

a Observations générales

64 L'ensemble de l'article 3 constitue une disposition clé de la Convention, puisque de son application dépend le déclenchement des mécanismes conventionnels en vue du retour de l'enfant; en effet, la Convention n'impose l'obligation de retourner l'enfant que lorsqu'il y a eu un déplacement ou un non-retour considérés par elle comme illicites. Or, en précisant les conditions que doit réunir une situation pour que son altération unilatérale puisse être qualifiée d'illicite, cet article met indirectement en relief les rapports que la Convention entend protéger; ces rapports sont basés sur un double élément: *primo*, l'existence d'un droit de garde attribué par l'Etat de la résidence habituelle de l'enfant; *secundo*, l'exercice effectif de cette garde, avant le déplacement. Examinons de plus près la teneur des conditions mentionnées.

b L'élément juridique

65 En ce qui concerne l'élément des situations visées qu'on pourrait appeler juridique, ce que la Convention se propose de défendre ce sont les relations qui se trouvent déjà protégées, au moins par l'apparence d'un titre valable sur le droit de garde, dans l'Etat de la résidence habituelle de l'enfant; c'est-à-dire par le droit de l'Etat où ces relations se déroulaient avant le déplacement. L'affirmation antérieure exige certaines précisions sur deux points. Le premier aspect que nous devons considérer a trait au droit dont la violation détermine l'existence d'un déplacement ou d'un non-retour illicites, au sens de la Convention. Il s'agit, comme nous venons de le dire, du droit de garde; en effet, bien qu'au

that actual results be achieved but merely the adoption of an attitude designed to lead to such results. In the present case, the attitude and behaviour required of States is expressed in the requirement to 'take all appropriate measures to secure within their territories the implementation of the objects of the Convention'. The Convention also seeks, while safeguarding the 'self-executing' character of its other articles, to encourage Contracting States to draw inspiration from these rules in resolving problems similar to those with which the Convention deals, but which do not fall within its scope *ratione personae* or *ratione temporis*. On the one hand, this should lead to careful examination of the Convention's rules whenever a State contemplates changing its own internal laws on rights of custody or access; on the other hand, extending the Convention's objects to cases which are not covered by its own provisions should influence courts and be shown in a decreasing use of the public policy exception when questions concerning international relations which are outwith the scope of the Convention fall to be decided.

63 Moreover, the last sentence of the article specified one of the particular means envisaged, while stressing also the importance placed by the Convention on the use of speedy procedures in matters of custody or access rights. However, this provision does not impose an obligation upon States to bring new procedures into their internal law, and the correspondence now existing between the French and English texts rightly seeks to avoid such an interpretation, which the original French text made possible. It is therefore limited to requesting Contracting States, in any question concerning the subject-matter of the Convention, to use the most expeditious procedures available in their own law.

Article 3 — The unlawful nature of a removal or retention

a General observations

64 Article 3 as a whole constitutes one of the key provisions of the Convention, since the setting in motion of the Convention's machinery for the return of the child depends upon its application. In fact, the duty to return a child arises only if its removal or retention is considered wrongful in terms of the Convention. Now, in laying down the conditions which have to be met for any unilateral change in the *status quo* to be regarded as wrongful, this article indirectly brings into clear focus those relationships which the Convention seeks to protect. Those relationships are based upon the existence of two facts, firstly, the existence of rights of custody attributed by the State of the child's habitual residence and, secondly, the actual exercise of such custody prior to the child's removal. Let us examine more closely the import of these conditions.

b The juridical element

65 As for what could be termed the juridical element present in these situations, the Convention is intended to defend those relationships which are already protected, at any rate by virtue of an apparent right to custody in the State of the child's habitual residence, *i.e.* by virtue of the law of the State where the child's relationships developed prior to its removal. The foregoing remark requires further explanation in two respects. The first point to be considered concerns the law, a breach of which determines whether a removal or retention is wrongful, in the Convention sense. As we have just said, this is a matter of custody rights. Although the problems which can arise from a breach of

cours de la Quatorzième session les problèmes pouvant dériver de la violation d'un droit de visite, surtout quand le titulaire de la garde déplace l'enfant à l'étranger, aient été soulevés, l'opinion majoritaire a été qu'on ne peut pas assimiler une telle situation aux déplacements illicites qu'on essaie de prévenir.[24]
Cet exemple, et d'autres similaires où la violation du droit de visite altère profondément l'équilibre de la situation établie par une décision, sont certes la preuve de ce que les décisions sur la garde des enfants devraient toujours être susceptibles de révision. Mais ce problème échappe à l'effort de coordination entrepris par la Conférence de La Haye; on aurait abouti à des résultats contestables si, à travers une égale protection accordée aux droits de garde et de visite, l'application de la Convention avait conduit, au fond, à la substitution des titulaires de l'un par ceux de l'autre.

66 La deuxième question à examiner se réfère au droit choisi pour évaluer la validité initiale du titre invoqué. Nous ne nous arrêterons pas ici sur le concept de la résidence habituelle; il s'agit en effet d'une notion familière à la Conférence de La Haye, où elle est comprise comme une notion de pur fait, qui diffère notamment de celle de domicile. D'ailleurs, le choix du droit de la résidence habituelle en tant que critère déterminant de la légalité de la situation violée par l'enlèvement est logique. En fait, aux arguments qui ont agi en faveur de lui accorder un rôle prééminent en matière de protection des mineurs, comme dans la Convention de La Haye de 1961, vient s'ajouter la propre nature même de la Convention, c'est-à-dire sa portée limitée. En ce sens, il faut faire deux considérations: d'une part, la Convention n'essaie pas de régler définitivement la garde des enfants, ce qui affaiblit considérablement les arguments favorables à la loi nationale; d'autre part, les normes conventionnelles reposent, dans une large mesure, sur l'idée sous-jacente qu'il existe une sorte de compétence naturelle des tribunaux de la résidence habituelle de l'enfant dans un litige relatif à sa garde.
Dans une perspective différente, nous devons aussi attirer l'attention sur le fait que la Convention parle du «droit» de l'Etat de la résidence habituelle, s'écartant ainsi de la tradition bien établie par les Conventions de La Haye sur la loi applicable, élaborées à partir de 1955, qui soumettent la réglementation du sujet dont elles s'occupent à une loi interne déterminée. Certes, dans ces cas, le terme de «loi» doit être compris dans son sens le plus large, celui qui recouvre aussi bien les règles écrites et coutumières – quel qu'en soit le rang – que les précisions apportées par leur interprétation jurisprudentielle. Cependant, l'adjectif «interne» implique l'exclusion de toute référence aux règles de conflit de la loi désignée. Donc, si la Convention a abandonné la formule traditionnelle pour parler du «droit de la résidence habituelle», la différence ne saurait être purement terminologique. En effet, comme le montrent les travaux préparatoires,[25] dès le début, l'intention a été d'élargir davantage l'éventail des dispositions qui doivent être prises en considération dans ce contexte. En fait, il y a même eu, au cours de la Quatorzième session, une proposition tendant à expliciter dans cet article que la référence au droit de la résidence habituelle s'étend à ces normes de droit international privé; si la proposition a été rejetée, c'est parce que la Conférence était convaincue qu'une telle inclusion était superflue et s'avérait implicite du moment que le texte

[24] *Cf.* Doc. trav. No 5 (Proposition de la délégation canadienne) et P.-v. No 3.

[25] *Cf.* le Rapport de la Commission spéciale, No 62, *supra*, p. 90.

access rights, especially where the child is taken abroad by its custodian, were raised during the Fourteenth Session, the majority view was that such situations could not be put in the same category as the wrongful removals which it is sought to prevent.[24]

This example, and others like it where breach of access rights profoundly upsets the equilibrium established by a judicial or administrative decision, certainly demonstrate that decisions concerning the custody of children should always be open to review. This problem however defied all efforts of the Hague Conference to co-ordinate views thereon. A questionable result would have been attained had the application of the Convention, by granting the same degree of protection to custody and access rights, led ultimately to the substitution of the holders of one type of right by those who held the other.

66 The second question which should be examined concerns the law which is chosen to govern the initial validity of the claim. We shall not dwell at this point upon the notion of habitual residence, a well-established concept in the Hague Conference, which regards it as a question of pure fact, differing in that respect from domicile. Moreover, the choice of the law of habitual residence as the factor which is to determine the lawfulness of the situation flouted by the abduction is logical. In actual fact, to the arguments in favour of its being accorded a pre-eminent role in the protection of minors, as in the Hague Convention of 1961, must be added the very nature of the Convention itself, *viz.* its limited scope. In this regard, two points must be made: on the one hand, the Convention does not seek to govern definitively questions concerning the custody of children, a fact which weakens considerably those arguments favouring the application of national law; on the other hand, the rules of the Convention rest largely upon the underlying idea that there exists a type of jurisdiction which by its nature belongs to the courts of a child's habitual residence in cases involving its custody.
From a different viewpoint, our attention should also be drawn to the fact that the Convention speaks of the 'law' of the State of habitual residence, thus breaking with a long-established tradition of Hague Conventions on applicable law since 1955, which refer to a particular internal law to govern the matters with which they deal. Of course, in such cases, the word 'law' has to be understood in its widest sense, as embracing both written and customary rules of law – whatever their relative importance might be – and the interpretations placed upon them by case-law. However, the adjective 'internal' implies the exclusion of all reference to the conflict of law rules of the particular legal system. Therefore, since the Convention has abandoned its traditional formulation by speaking of 'the law of the habitual residence', this difference cannot be regarded as just a matter of terminology. In fact, as the preliminary proceedings of the Commission demonstrate,[25] it was intended right from the start to expand considerably the range of provisions which have to be considered in this context. Actually, a proposal was made during the Fourteenth Session that this article should make it clear that the reference to the law of the habitual residence extends also to the rules of private international law. The fact that this proposal was rejected was due to the Conference's view that its inclusion was unnecessary and became implicit anyway

[24] *Cf.* Working Document No 5 (Proposal of the Canadian delegation) and *P.-v.* No 3.

[25] *Cf.* the Special Commission Report, No 62, *supra*, p. 90.

n'exclut ni directement ni indirectement les règles en question.[26]

67 Les considérations antérieures nous montrent que l'invocation du droit de la résidence habituelle de l'enfant est aussi large que possible. De même, les sources dont peut découler le droit de garde qu'on essaie de protéger sont toutes celles qui peuvent fonder une réclamation dans le cadre du système juridique en question. A cet égard, l'alinéa 2 de l'article 3 considère certaines – les plus importantes sans doute – de ces sources, mais en soulignant la nature non exhaustive de l'énumération; cet alinéa dispose en effet que «le droit de garde visé en *a* peut notamment résulter . . .», en soulignant de la sorte l'existence possible d'autres titres non considérés dans le texte. Or, comme nous le verrons dans les paragraphes suivants, les sources retenues couvrent un vaste éventail juridique; la précision de leur caractère partiel doit donc être surtout comprise comme favorisant une interprétation souple des concepts employés, qui permette d'appréhender le maximum d'hypothèses possibles.

68 La première des sources à laquelle l'article 3 fait allusion est la loi, quand il dit que la garde peut «résulter d'une attribution de plein droit». Cela nous amène à insister sur l'un des traits caractéristiques de cette Convention, nommément son applicabilité à la protection des droits de garde exercés avant toute décision en la matière. Le point est important, car on ne peut pas ignorer que, dans une perspective statistique, les cas où l'enfant est déplacé avant qu'une décision concernant sa garde n'ait été prononcée sont assez fréquents. D'ailleurs, dans de telles situations, les possibilités existantes, en marge de la Convention, pour le parent dépossédé de récupérer l'enfant sont presque nulles, sauf s'il recourt à son tour à des voies de fait toujours pernicieuses pour l'enfant. A cet égard, en introduisant ces cas dans son domaine d'application, la Convention a progressé de manière significative dans la solution des problèmes réels qui échappaient auparavant, dans une large mesure, aux mécanismes traditionnels du droit international privé.
Quant à savoir quel est, selon la Convention, le système juridique qui peut attribuer le droit de garde qu'on désire protéger, il nous faut en revenir aux considérations développées au paragraphe précédent. Ainsi donc, la garde *ex lege* pourra se baser soit sur la loi interne de l'Etat de la résidence habituelle de l'enfant, soit sur la loi désignée par les règles de conflit de cet Etat. Le jeu de la première option est parfaitement clair; en ce qui concerne la seconde, elle impliquerait, par exemple, que le déplacement par son père français d'un enfant naturel ayant sa résidence habituelle en Espagne où il habitait avec sa mère, tous les deux étant aussi de nationalité française, devrait être considéré comme illicite au sens de la Convention, par application de la loi française désignée comme compétente par la règle de conflit espagnole en matière de garde et indépendamment du fait que l'application de la loi interne espagnole aurait vraisemblablement conduit à une autre solution.

69 La deuxième source du droit de garde, retenue à l'article 3, est l'existence d'une décision judiciaire ou administrative. Etant donné que la Convention n'ajoute aucune précision sur ce point, il faut considérer, d'une part que le mot «décision» est utilisé dans son sens le plus large, de manière à embrasser toute décision ou élément de décision (judiciaire ou administrative) concernant la garde d'un

[26] *Cf.* Doc. trav. No 2 (*Proposal of the United Kingdom delegation*) et P.-v. No 2.

once the text neither directly nor indirectly excluded the rules in question.[26]

67 The foregoing considerations show that the law of the child's habitual residence is invoked in the widest possible sense. Likewise, the sources from which the custody rights which it is sought to protect derive, are all those upon which a claim can be based within the context of the legal system concerned. In this regard, paragraph 2 of article 3 takes into consideration some – no doubt the most important – of those sources, while emphasizing that the list is not exhaustive. This paragraph provides that 'the rights of custody mentioned in sub-paragraph *a* above may arise in particular', thus underlining the fact that other sorts of rights may exist which are not contained within the text itself. Now, as we shall see in the following paragraphs, these sources cover a vast juridical area, and the fact that they are not exhaustively set out must be understood as favouring a flexible interpretation of the terms used, which allows the greatest possible number of cases to be brought into consideration.

68 The first source referred to in article 3 is law, where it is stated that custody 'may arise . . . by operation of law'. That leads us to stress one of the characteristics of this Convention, namely its application to the protection of custody rights which were exercised prior to any decision thereon. This is important, since one cannot forget that, in terms of statistics, the number of cases in which a child is removed prior to a decision on its custody are quite frequent. Moreover, the possibility of the dispossessed parent being able to recover the child in such circumstances, except within the Convention's framework, is practically non-existent, unless he in his turn resorts to force, a course of action which is always harmful to the child. In this respect, by including such cases within its scope, the Convention has taken a significant step towards resolving the real problems which in the past largely escaped the control of the traditional mechanisms of private international law.

As for knowing the legal system which, according to the Convention, is to attribute the custody rights, which it is desired to protect, it is necessary to go back to the considerations developed in the previous paragraph. Thus, custody *ex lege* can be based either on the internal law of the State of the child's habitual residence, or on the law designated by the conflict rules of that State. The scope of the first option is quite clear; the second implies, for example, that the removal by its French father of a child born out of wedlock which had its habitual residence in Spain where it lived with its mother, both mother and child being of French nationality, should be considered wrongful in the Convention sense, by means of the application of French law designated as applicable by the Spanish conflict rule on questions of custody, quite independently of the fact that application of internal Spanish law would probably have led to a different result.

69 The second source of custody rights contained in article 3 is a judicial or administrative decision. Since the Convention does not expand upon this, it must be deemed, on the one hand, that the word 'decision' is used in its widest sense, and embraces any decision or part of a decision (judicial or administrative) on a child's custody and, on the other hand, that these decisions may have been issued by the courts of

[26] *Cf.* Working Document No 2 (Proposal of the United Kingdom delegation), and *P.-v.* No 2.

enfant; d'autre part que les décisions visées peuvent avoir été rendues aussi bien par les tribunaux de l'Etat de la résidence habituelle de l'enfant que par ceux d'un Etat tiers.[27] Or, dans cette dernière hypothèse, c'est-à-dire lorsque le droit de garde s'exerçait dans l'Etat de la résidence habituelle de l'enfant sur la base d'une décision étrangère, la Convention n'exige pas qu'elle ait été formellement reconnue. En conséquence, il doit suffire aux effets considérés que la décision soit telle au regard du droit de l'Etat de la résidence habituelle, c'est-à-dire, en principe, qu'elle présente les caractéristiques *minima* pour pouvoir déclencher une procédure en vue de son homologation ou de sa reconnaissance;[28] interprétation large qui se trouve d'ailleurs confirmée par la teneur de l'article 14 de la Convention.

70 Finalement, le droit de garde peut découler, d'après l'article 3, «d'un accord en vigueur selon le droit de cet Etat». En principe, les accords envisagés peuvent être de simples transactions privées entre les parties, au sujet de la garde des enfants. La condition d'être «en vigueur» selon le droit de l'Etat de la résidence habituelle, a été introduite au cours de la Quatorzième session en substitution de l'exigence d'avoir «force de loi», qui figurait dans l'avant-projet. La modification répond à un désir de clarification, mais aussi d'assouplissement, autant que possible, des conditions posées à l'acceptation d'un accord en tant que source de la garde protégée par la Convention. Sur le point précis de savoir ce qu'est un accord «en vigueur» selon un droit déterminé, il nous semble que l'on doive inclure sous cette appellation tout accord qui ne soit pas interdit par un tel droit et qui puisse servir de base à une prétention juridique devant les autorités compétentes. Or, pour en revenir au sens large que la notion «droit de l'Etat de la résidence habituelle de l'enfant» a reçu dans cet article 3, le droit en question peut être aussi bien la loi interne de cet Etat que la loi désignée par ses règles de conflit; le choix entre les deux branches de l'option appartient aux autorités de l'Etat concerné, quoique l'esprit de la Convention semble incliner pour celle qui, dans chaque cas d'espèce, légitime la garde effectivement exercée. D'autre part, la Convention ne précise point les conditions de fond ou de forme que ces accords doivent remplir; elles changeront donc selon la teneur du droit impliqué.

71 Tout en ajournant l'étude de la personne qui peut être titulaire d'un droit de garde au commentaire de l'article 4 sur le domaine d'application *ratione personae* de la Convention, il convient d'insister ici sur le fait qu'on s'est proposé de protéger toutes les modalités d'exercice de la garde d'enfants. En effet, aux termes de l'article 3, le droit de garde peut avoir été attribué, seul ou conjointement, à la personne qui demande qu'on en respecte l'exercice. Il ne pouvait en être autrement à une époque où les législations internes introduisent progressivement la modalité de la garde conjointe, considérée comme la mieux adaptée au principe général de la non-discrimination à raison du sexe. D'ailleurs, la garde conjointe n'est pas toujours une garde *ex lege*, dans la mesure où les tribunaux se montrent de plus en plus favorables, si les circonstances le permettent, à partager entre les deux parents les responsabilités inhérentes au droit de garde. Or, dans l'optique adoptée par la Convention, le déplacement d'un enfant par l'un des titulaires de la garde

[27] Cette interprétation s'appuie sur les travaux qui ont conduit à l'adoption d'un texte, similaire à l'actuel, au sein de la Commission spéciale. Voir Rapport de la Commission spéciale, No 64, *supra*, p. 191-192.
[28] Sur l'intérêt de ce que la Convention inclue un tel cas, voir le Doc. trav. No 58, «Document de clarification présenté par la délégation italienne».

the State of the child's habitual residence as well as by the courts of a third country.[27] Now, in the latter case, that is to say when custody rights were exercised in the State of the child's habitual residence on the basis of a foreign decree, the Convention does not require that the decree had been formally recognized. Consequently, in order to have the effect described, it is sufficient that the decision be regarded as such by the State of habitual residence, *i.e.* that it contain in principle certain minimum characteristics which are necessary for setting in motion the means by which it may be confirmed or recognized.[28] This wide interpretation is moreover confirmed by the whole tenor of article 14.

70 Lastly, custody rights may arise according to article 3, 'by reason of an agreement having legal effect under the law of that State'. In principle, the agreements in question may be simple private transactions between the parties concerning the custody of their children. The condition that they have 'legal effect' according to the law of the State of habitual residence was inserted during the Fourteenth Session in place of a requirement that it have the 'force of law', as stated in the Preliminary Draft. The change was made in response to a desire that the conditions imposed upon the acceptance of agreements governing matters of custody which the Convention seeks to protect should be made as clear and as flexible as possible. As regards the definition of an agreement which has 'legal effect' in terms of a particular law, it seems that there must be included within it any sort of agreement which is not prohibited by such a law and which may provide a basis for presenting a legal claim to the competent authorities. Now, to go back to the wide interpretation given by article 3 to the notion of 'the law of the State of the child's habitual residence', the law concerned can equally as well be the internal law of that State as the law which is indicated as applicable by its conflict rules. It is for the authorities of the State concerned to choose between the two alternatives, although the spirit of the Convention appears to point to the choice of the one which, in each particular case, would recognize that custody had actually been exercised. On the other hand, the Convention does not state, in substance or form, the conditions which these agreements must fulfil, since these will change according to the terms of the law concerned.

71 Leaving aside a consideration of those persons who can hold rights of custody, until the commentary on article 4 which concerns the scope of the Convention *ratione personae*, it should be stressed now that the intention is to protect *all* the ways in which custody of children can be exercised. Actually, in terms of article 3, custody rights may have been awarded to the person who demands that their exercise be respected, and to that person in his own right or jointly. It cannot be otherwise in an era when types of joint custody, regarded as best suited to the general principle of sexual non-discrimination, are gradually being introduced into internal law. Joint custody is, moreover, not always custody *ex lege*, in as much as courts are increasingly showing themselves to be in favour, where circumstances permit, of dividing the responsibilities inherent in custody rights between both parents. Now, from the Convention's standpoint, the removal of a child by one of the joint holders without the consent of the other, is equally wrongful, and

[27] This interpretation is based upon the deliberations of the Special Commission which led to its adopting a similar text to the current one. See Report of the Special Commission, No 64, *supra*, pp. 191-192.
[28] See Working Document No 58, '*Document de clarification présenté par la délégation italienne*', for the desirability of including such a case in the Convention.

conjointe, sans le consentement de l'autre titulaire, est également illicite; ce caractère illicite proviendrait, dans ce cas précis, non pas d'une action contraire à la loi, mais du fait qu'une telle action aurait ignoré les droits de l'autre parent, également protégé par la loi, et interrompu leur exercice normal. La véritable nature de la Convention apparaît plus clairement dans ces situations: elle ne cherche pas à établir à qui appartiendra dans l'avenir la garde de l'enfant, ni s'il s'avérera nécessaire de modifier une décision de garde conjointe rendue sur la base de données qui ont été altérées par la suite; elle essaie plus simplement d'éviter qu'une décision ultérieure à cet égard puisse être influencée par un changement des circonstances introduit unilatéralement par l'une des parties.

c L'élément de fait

72 Le deuxième élément qui caractérise les rapports protégés par la Convention est que le droit de garde, qu'on prétend violé par le déplacement, ait été exercé de façon effective par son titulaire. En effet, du moment qu'on a choisi une approche du sujet conventionnel s'écartant de la pure et simple reconnaissance internationale des droits de garde attribués aux parents, la Convention a mis l'accent sur la protection du droit des enfants au respect de leur équilibre vital; c'est-à-dire du droit des enfants à ne pas voir altérées les conditions affectives, sociales, etc., qui entourent leur vie, à moins qu'il n'existe des arguments juridiques garantissant la stabilité d'une nouvelle situation. Cette approche est reflétée dans la limite du domaine d'application de la Convention aux droits de garde effectivement exercés. De plus, une telle conception se trouve justifiée dans le cadre des relations internationales par un argument complémentaire, touchant au fait que, dans ce contexte, il est relativement fréquent qu'il existe des décisions contradictoires peu à même de servir de base à la protection de la stabilité de la vie d'un enfant.

73 En réalité, cette conception a été à peine contestée. Pourtant, plusieurs propositions[29] ont été présentées en vue de supprimer de l'article 3 toute référence à l'exercice effectif de la garde; la raison en était que, par ce biais, on imposait au demandeur le fardeau d'une preuve sur un point qui serait parfois difficile à établir. La situation semblait encore plus compliquée si on tenait compte du fait que l'article 13 consacré aux exceptions possibles à l'obligation de faire retourner l'enfant exige, de «l'enleveur» cette fois, la preuve que la personne dépossédée n'exerçait pas effectivement la garde qu'elle réclame maintenant. Or, c'est justement en rapprochant les deux dispositions que l'on fait apparaître nettement la véritable nature de la condition prévue à l'article 3. En effet, cette condition, en délimitant le domaine d'application de la Convention, n'exige du demandeur qu'une première évidence du fait qu'il exerçait réellement les soins sur la personne de l'enfant; cette circonstance doit être, en général, assez facile à établir. D'ailleurs, le caractère non formel de cette exigence est mis en relief à l'article 8 lorsque, parmi les données que doit contenir la demande introduite auprès des Autorités centrales, il indique simplement sous *c* «les motifs sur lesquels se base le demandeur pour réclamer le retour de l'enfant».
Par contre, l'article 13 de la Convention (12 de l'avant-projet) nous place devant un véritable fardeau de la preuve à la charge de «l'enleveur»; c'est en effet lui qui doit établir,

[29] *Cf.* Doc. trav. No 1 (*Proposal of the United States delegation*) et No 10 (*Proposal of the Finnish delegation*), ainsi que le P.-v. No 3.

this wrongfulness derives in this particular case, not from some action in breach of a particular law, but from the fact that such action has disregarded the rights of the other parent which are also protected by law, and has interfered with their normal exercise. The Convention's true nature is revealed most clearly in these situations: it is not concerned with establishing the person to whom custody of the child will belong at some point in the future, nor with the situations in which it may prove necessary to modify a decision awarding joint custody on the basis of facts which have subsequently changed. It seeks, more simply, to prevent a later decision on the matter being influenced by a change of circumstances brought about through unilateral action by one of the parties.

c The factual element

72 The second element characterizing those relationships protected by the Convention is that the custody rights which it is claimed have been breached by the child's removal were actually exercised by the holder. In fact, as soon as an approach to the subject-matter of the Convention was adopted which deviated from the pure and simple international recognition of custody rights attributed to parents, the Convention put its emphasis on protecting the right of children to have the stability which is so vital to them respected. In other words, the Convention protects the right of children not to have the emotional, social etc. aspects of their lives altered, unless legal arguments exist which would guarantee their stability in a new situation. This approach is reflected in the scope of the Convention, which is limited to custody rights actually exercised. What is more, such a notion is justified within the framework of international relations by a complementary argument which concerns the fact that contradictory decisions arise quite frequently in this particular context, decisions which are basically of little use in protecting the stability of a child's life.

73 Actually, this idea was not opposed to any extent. However, several proposals[29] were put forward for the deletion from article 3 of any reference to the actual exercise of custody rights. The reason for this was that its retention could place on the applicant the burden of proving a point which would sometimes be difficult to establish. The situation became even more complicated when account was taken of the fact that article 13, which concerns the possible exceptions to the obligation to order the return of the child, requires the 'abductor' this time to prove that the dispossessed party had not actually exercised the custody rights he now claims. Now, it is indeed by considering both provisions together that the true nature of the condition set forth in article 3 can be seen clearly. This condition, by defining the scope of the Convention, requires that the applicant provide only some preliminary evidence that he actually took physical care of the child, a fact which normally will be relatively easy to demonstrate. Besides, the informal nature of this requirement is highlighted in article 8 which simply includes, in sub-paragraph *c*, 'the grounds on which the applicant's claim for return of the child is based', amongst the facts which it requires to be contained in applications to the Central Authorities.
On the other hand, article 13 of the Convention (12 in the Preliminary Draft) shows us the real extent of the burden of proof placed upon the 'abductor'; it is for him to show, if he

[29] *Cf.* Working Documents Nos 1 (Proposal of the United States delegation) and 10 (Proposal of the Finnish delegation), and also *P.-v.* No 3.

pour éviter le retour de l'enfant, que le gardien n'exerçait pas effectivement le droit de garde. Donc, nous pouvons en arriver à la conclusion que l'ensemble de la Convention est construit sur la présomption non explicite que celui qui a le soin de la personne de l'enfant en exerce effectivement la garde; cette idée devra être détruite en vertu de l'inversion du fardeau de la preuve qui est le propre de toute présomption, (par «l'enleveur» s'il veut éviter que l'enfant ne soit renvoyé).

74 Cependant, la Convention inclut expressément dans le domaine qu'elle entend protéger la situation qui se pose quand la garde n'a pas pu devenir effective à cause précisément du déplacement de l'enfant; c'est en ce sens que se prononce le dernier membre de phrase de la lettre *b* de l'article 3. En théorie, l'idée sous-jacente s'accorde parfaitement avec l'esprit qui inspire la Convention; c'est donc d'un point de vue pratique qu'on peut se demander si un tel ajout était nécessaire.[30] Dans cette optique, les hypothèses que cette précision essaie de protéger visent deux situations type possibles, dont l'une rentrerait clairement dans le domaine d'application de la Convention, tandis que l'autre, à défaut de cette norme, exigerait vraisemblablement une interprétation trop forcée de ses dispositions. Il s'agit, d'une part, des cas soulevés lorsqu'une première décision sur la garde est mise en échec par le déplacement de l'enfant; or, dans la mesure où une telle décision suit, dans un délai raisonnable, la rupture de la vie familiale commune, on peut considérer que le titulaire de la garde l'avait exercée au préalable et qu'en conséquence la situation décrite remplit toutes les conditions que fixe le domaine d'application conventionnel. Pourtant, si nous nous plaçons devant une décision sur la garde, rendue par les tribunaux de la résidence habituelle de l'enfant, qui modifie une décision précédente et dont l'exécution est rendue impossible par l'action du ravisseur, il peut se trouver que le nouveau titulaire de la garde ne l'ait pas exercée dans un délai étendu; les difficultés qu'on rencontrerait dans de telles situations, et peut-être dans d'autres non visées dans ces lignes, pour invoquer la Convention sont évidentes. En conclusion, et quoiqu'il faille s'attendre à ce que le jeu de cette disposition ne soit pas fréquent, nous devons conclure que son inclusion dans la Convention peut s'avérer utile.

Article 4 — Domaine d'application ratione personae

75 Cet article ne concerne que le domaine d'application *ratione personae* de la Convention par rapport aux enfants protégés. Pourtant dans un souci de systématisation, nous traiterons aussi dans son contexte les autres aspects du problème, c'est-à-dire les titulaires possibles des droits de garde et de visite et les personnes qui pourraient être considérées comme «enleveurs», aux termes de la Convention.

a Les enfants protégés

76 La Convention s'applique aux enfants âgés de moins de seize ans qui avaient «leur résidence habituelle dans un Etat contractant immédiatement avant l'atteinte aux droits de garde ou de visite». En relation avec l'exigence concernant la résidence habituelle, il faut revenir aux considérations émises sur la nature de la Convention, qui aboutissent à la conclusion qu'une convention de coopération entre

[30] *Cf.* Doc. trav. No 2 (*Proposal of the United Kingdom delegation*) et les débats sur ce point aux P.-v. Nos 3 et 13.

wishes to prevent the return of the child, that the guardian had not actually exercised his rights of custody. Thus, we may conclude that the Convention, taken as a whole, is built upon the tacit presumption that the person who has care of the child actually exercises custody over it. This idea has to be overcome by discharging the burden of proof which has shifted, as is normal with any presumption (*i.e.* discharged by the 'abductor' if he wishes to prevent the return of the child).

74 However, there is expressly included amongst the matters which the Convention is intended to protect the situation which arises when actual custody cannot be exercised precisely because of the removal of the child; that is the situation envisaged in the last alternative set out in article 3*b*. Theoretically, the underlying idea is perfectly in keeping with the spirit of the Convention, and it is therefore from a practical point of view that it may be wondered whether such a provision needed to be added.[30] From this viewpoint, the hypothetical situations which this provision is designed to protect are of two types, one of which falls clearly within the scope of the Convention, while the other, failing this rule, would probably require too strained an interpretation of its provisions. On the one hand, there are cases where an initial decision on custody is rendered worthless by the removal of the child. In so far as such a description follows the disruption of normal family life after a reasonable lapse of time, the holder of the rights could be regarded as having exercised them from the outset, so that the situation described fulfils all the conditions laid down within the scope of the Convention. However, if a decision on custody by the courts of the child's habitual residence is considered, which modifies a prior decision and cannot be enforced because of the action of the abductor, it could be that the new holder of the right to custody has not exercised it within the extended time-limit. The difficulties which would be encountered in seeking to apply the Convention to such situations and perhaps to others not herein mentioned, are obvious. To conclude, although this provision must not be expected to come into play very often, it has to be said finally that its inclusion in the Convention might prove to be useful.

Article 4 — Convention's scope ratione personae

75 This article concerns only the Convention's scope *ratione personae* as regards the children who are to be protected. However, for the sake of completeness, we shall also deal with the other aspects of the problem in their proper context, that is to say those potential holders of custody and access rights and those who could be regarded as 'abductors', within the terms of the Convention.

a The children protected

76 The Convention applies to children of less than sixteen years of age, who were 'habitually resident in a Contracting State immediately before any breach of custody or access rights'. As regards the requirement that they be habitually resident, reference must again be made to those considerations previously expressed about the nature of the Convention, which lead to the conclusion that a convention

[30] *Cf.* Working Document No 2 (Proposal of the United Kingdom delegation) and the debate on this point in *P.-v.* Nos 3 and 13.

autorités ne peut atteindre toute son efficacité que si les rapports visés se produisent entre Etats contractants.

77 L'âge limite pour l'application de la Convention soulève deux questions importantes. La première, la question de l'âge *stricto sensu*, a été à peine débattue. La Convention retient l'âge de seize ans, consacrant ainsi une notion d'enfant plus restrictive que celle admise par d'autres Conventions de La Haye.[31] La raison découle des objectifs conventionnels eux-mêmes; en effet, une personne de plus de seize ans a en général une volonté propre qui pourra difficilement être ignorée, soit par l'un ou l'autre de ses parents, soit par une autorité judiciaire ou administrative.

Quant à la détermination du moment où cet âge interdit l'application de la Convention, celle-ci, parmi les diverses options possibles, retient la plus limitative; en conséquence, aucune action ou décision basée sur les dispositions conventionnelles ne peut être adoptée à l'égard d'un enfant après son seizième anniversaire.

78 Le deuxième problème a trait à la situation des enfants âgés de moins de seize ans qui ont le droit de fixer leur lieu de résidence. Compte tenu du fait que ce droit fait en général partie du droit de garde, une proposition a été faite dans le sens de la non-application de la Convention dans de tels cas.[32] Cependant, cette proposition a été rejetée sur la base de divers arguments, parmi lesquels on peut citer: 1) la difficulté de choisir le système juridique qui devrait consacrer l'existence d'une telle possibilité, étant donné qu'il existe au moins trois possibilités qui sont, respectivement, la loi nationale, la loi de la résidence habituelle avant le déplacement et la loi de l'Etat de refuge; 2) la limitation excessive que cette proposition apporterait au domaine d'application de la Convention, par rapport notamment au droit de visite; 3) le fait que la faculté de décider du lieu de résidence d'un enfant n'est qu'un élément possible du droit de garde qui n'en épuise pas le contenu.
D'autre part, la décision prise à cet égard ne peut pas être isolée de la disposition de l'article 13, alinéa 2, qui donne la possibilité aux autorités compétentes de tenir compte de l'opinion de l'enfant sur son retour, dès qu'il atteint un âge et une maturité suffisants; en effet, cette norme permettra aux autorités judiciaires ou administratives, quand il sera question du retour d'un mineur ayant capacité de décider sur son lieu de résidence, de considérer que l'opinion de l'enfant est toujours déterminante. On peut arriver ainsi à l'application automatique d'une disposition facultative de la Convention, mais une telle conséquence semble préférable à la réduction globale du domaine d'application de la Convention.

b Les titulaires des droits de garde et de visite

79 Les problèmes soulevés à cet égard par l'un et l'autre des droits visés sont nettement différents. D'abord, en ce qui concerne le droit de visite, il est évident que par la nature même des choses, ses titulaires seront toujours des personnes physiques, dont la détermination dépendra de la loi appliquée à l'organisation de ce droit. En principe, ces personnes appartiendront à la proche famille de l'enfant, et il s'agira normalement soit du père, soit de la mère.

[31] Par exemple: *Convention sur la loi applicable aux obligations alimentaires envers les enfants, du 24 octobre 1956* (article premier); *Convention concernant la reconnaissance et l'exécution des décisions en matière d'obligations alimentaires envers les enfants, du 15 avril 1958* (article premier); *Convention concernant la compétence des autorités et la loi applicable en matière de protection des mineurs, du 5 octobre 1961* (article 12); *Convention concernant la compétence des autorités, la loi applicable et la reconnaissance des décisions en matière d'adoption, du 15 novembre 1965* (article premier).
[32] *Cf.* Doc. trav. No 4 (Proposition de la délégation belge) et P.-v. No 4.

based on co-operation among authorities can only become fully operational after the relationships envisaged come into existence as among Contracting States.

77 The age limit for application of the Convention raises two important questions. Firstly, the matter of age in the strict sense gave rise to virtually no dispute. The Convention kept the age at sixteen, and therefore held to a concept of 'the child' which is more restrictive than that accepted by other Hague Conventions.[31] The reason for this derives from the objects of the Convention themselves; indeed, a person of more than sixteen years of age generally has a mind of his own which cannot easily be ignored either by one or both of his parents, or by a judicial or administrative authority.
As for deciding upon the point at which this age should exclude the Convention's application, the most restrictive of the various options available was retained by the Convention. Consequently, no action or decision based upon the Convention's provisions can be taken with regard to a child after its sixteenth birthday.

78 The second problem deals with the situation of children under sixteen years of age who have the right to choose their own place of residence. Considering that this right to choose one's residence generally forms part of the right to custody, a proposal was put forward to the effect that the Convention should not apply in such cases.[32] However, this proposal was rejected on various grounds, *inter alia* the following: (1) the difficulty of choosing the legal system which should determine whether such a possibility exists, since there are at least three different laws which could be applicable, namely, national law, the law of habitual residence prior to the child's removal, and the law of the State of refuge; (2) the excessive restriction which this proposal would place upon the scope of the Convention, particularly with regard to access rights; (3) the fact that the right to decide a child's place of residence is only one possible element of the right to custody which does not itself deprive it of all content.
On the other hand, the decision taken in this regard cannot be isolated from the provision in article 13, second paragraph, which allows the competent authorities to have regard to the opinion of the child as to its return, once it has reached an appropriate age and degree of maturity. Indeed, this rule leaves it open to judicial or administrative authorities, whenever they are faced with the possibility of returning a minor legally entitled to decide on his place of residence, to take the view that the opinion of the child should always be the decisive factor. The point could therefore be reached where an optional provision of the Convention becomes automatically applicable, but such a result seems preferable to an overall reduction in the Convention's scope.

b The holders of custody and access rights

79 The problems raised by both of these rights in this regard are quite different. Firstly, as regards access rights, it is obvious, by the very nature of things, that they will always be held by individuals, whose identity will depend on the law which applies to the organizing of these rights. These persons will as a rule be close relatives of the child, and normally will be either its father or mother.

[31] For example: *Convention of 24 October 1956 on the Law Applicable to Maintenance Obligations in Respect of Children* (article 1); *Convention of 15 April 1958 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations in Respect of Children* (article 1); *Convention of 5 October 1961 Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Minors* (article 12); *Convention of 15 November 1965 on Jurisdiction, Applicable Law and Recognition of Decisions Relating to Adoptions* (article 1).
[32] *Cf.* Working Document No 4 (*Proposition de la délégation belge*) and *P.-v.* No 4.

80 Par contre, des personnes morales peuvent aussi être titulaires d'un droit de garde, au sens de la Convention. A cet égard, l'article 3 considère la possibilité de l'attribution du droit de garde à «une institution ou tout autre organisme», en utilisant sciemment une expression vague et large. En effet, au cours de la Quatorzième session, l'inclusion dans le domaine conventionnel des hypothèses où la personne de l'enfant est confiée à une institution a été acceptée sans débats. Or, étant donné qu'il y a des organismes autres que les institutions qui ont à leur charge les soins de certains enfants, on a élargi l'expression utilisée pour y faire rentrer aussi bien les organismes ayant une personnalité juridique que ceux qui sont liés à l'organisation étatique et dépourvus d'une personnalité indépendante.

c Les éventuels «enleveurs»

81 La Convention ne contient aucune disposition expresse à ce propos. Néanmoins, de l'ensemble du texte, nous pouvons déduire deux remarques qui éclairent cet aspect relatif au domaine d'application *ratione personae* de la Convention. La première concerne les personnes physiques qui peuvent être responsables du déplacement ou du non-retour d'un enfant. Sur ce sujet, la Convention maintient le point de vue adopté par la Commission spéciale de ne pas attribuer de telles actions exclusivement à des parents.[33] L'idée de famille étant plus ou moins large selon les différentes conceptions culturelles, il est préférable de s'en tenir à une vue large qui permette, par exemple, de qualifier d'enlèvement d'enfant, au sens de la Convention, les déplacements faits par un grand-père ou un père adoptif.

82 La deuxième remarque a trait à la possibilité de ce qu'une «institution ou tout autre organisme» agisse comme «enleveur». A cet égard, il est difficilement imaginable qu'un organisme quelconque puisse déplacer, par la force ou par la ruse, un enfant d'un pays étranger vers son propre pays. D'autre part, si un enfant a été confié, par une décision judiciaire ou administrative (c'est-à-dire, au cas d'un placement forcé de l'enfant), à un tel organisme dans le pays de sa résidence habituelle, le parent qui prétend obtenir la jouissance effective d'un droit de garde sur celui-ci aura peu de chance de pouvoir invoquer la Convention. En effet, du fait que les organismes visés exercent en principe leurs compétences, abstraction faite de l'éventuelle reconnaissance de l'autorité parentale,[34] une telle prétention ne rentrerait pas dans le domaine conventionnel, puisque la garde au sens de la Convention appartiendrait à l'organisme en question.

Article 5 — De certaines expressions utilisées dans la Convention

83 Suivant une tradition bien établie de la Conférence de La Haye, la Convention ne définit pas les concepts juridiques dont elle se sert. Pourtant, dans cet article, elle précise le sens dans lequel sont utilisées les notions de droit de garde et de droit de visite, étant donné qu'une interprétation incorrecte de leur portée risquerait de compromettre les objectifs conventionnels.

84 En ce qui concerne le droit de garde, la Convention se limite à souligner qu'il comprend «le droit portant sur les soins de la personne de l'enfant», en marge des mécanismes

[33] Une approche plus restrictive se trouvait initialement dans le Rapport Dyer, cité *supra*, intitulé *Rapport sur l'enlèvement international d'un enfant par un de ses parents*.
[34] Voir sur ce point, Cour internationale de Justice, Arrêt du 28 novembre 1958, Affaire relative à l'application de la Convention de 1902 pour régler la tutelle des mineurs, *Recueil des arrêts* 1958, p. 55 et suiv.

80 On the other hand, legal persons can also, in terms of the Convention, hold rights of custody. Article 3 envisages the possibility of custody rights being attributed to 'an institution or any other body', and is expressed in deliberately vague and wide terms. In fact, during the Fourteenth Session, the inclusion within the scope of the Convention of situations in which the child is entrusted to an institution was not challenged. Now, since there are bodies other than institutions which have children in their care, the term used was extended so as to apply equally to those bodies with legal personality and to those which, as an arm of the State, lack separate personality.

c The potential 'abductors'

81 The Convention contains no express provision on this matter. Nevertheless, two comments may be drawn from the text as a whole, which shed light upon this question in relation to the Convention's scope *ratione personae*. The first concerns the physical persons who may be responsible for the removal or retention of a child. On this, the Convention upholds the point of view adopted by the Special Commission by not attributing such acts exclusively to one of the parents.[33] Since the idea of 'family' was more or less wide, depending on the different cultural conceptions which surround it, it was felt better to hold a wide view which would, for example, allow removals by a grandfather or adoptive father to be characterized as child abduction, in accordance with the Convention's use of that term.

82 The second comment relates to the possibility of an 'institution or any other body' acting as an 'abductor'. In this regard, it is difficult to imagine how any body whatever could remove, either by force or by deception, a child from a foreign country to its own land. On the other hand, if a child were entrusted, by virtue of a judicial or administrative decision (*i.e.* compulsory placement of the child) to such a body in the country of its habitual residence, the parent who sought to obtain the actual enjoyment of custody rights would stand little chance of being able to invoke the provisions of the Convention. In fact, by virtue of the fact that such bodies would as a rule exercise jurisdiction, except as regards the possible recognition of parental authority,[34] such a claim would not come within the scope of the Convention, since custody, in the sense understood by the Convention, would belong to the body in question.

Article 5 — Certain terms used in the Convention

83 The Convention, following a long-established tradition of the Hague Conference, does not define the legal concepts used by it. However, in this article, it does make clear the sense in which the notions of custody and access rights are used, since an incorrect interpretation of their meaning would risk compromising the Convention's objects.

84 As regards custody rights, the Convention merely emphasizes the fact that it includes in the term 'rights relating to the care of the person of the child', leaving aside the

[33] A more restrictive approach was to be found initially in the Dyer Report, referred to above, entitled *Report on international child abduction by one parent*.
[34] See the Judgment of the International Court of Justice, dated 28 November 1958, on the case concerning the application of the Convention of 1902 for regulating the guardianship of minors, *ICJ Reports* 1958, p. 55 *et seq.*

possibles de protection de ses biens. Il s'agit donc d'une notion plus restrictive que celle de «protection des mineurs»,[35] malgré les tentatives faites au cours de la Quatorzième session pour introduire l'idée de «protection», en vue surtout de couvrir les cas des enfants confiés à des institutions ou organismes. Mais, tous les efforts faits pour préciser la notion de droit de garde par rapport à ces situations ayant échoué, il faut s'en tenir au concept générique mentionné ci-dessus. La Convention essaie de le préciser en mettant en relief, comme indice des «soins» dont il s'agit, le droit de décider du lieu de résidence de l'enfant. Cependant, lorsque l'enfant, quoique mineur du point de vue juridique, a la faculté de fixer lui-même son lieu de résidence, le contenu du droit de garde sera déterminé en fonction des autres droits portant sur sa personne.
D'autre part, bien que dans cet article rien ne soit dit sur la possibilité que la garde soit exercée par son titulaire seul ou conjointement, il est évident que cette possibilité est envisagée. En effet, une règle classique du droit des traités exige que l'interprétation de ses termes soit effectuée dans son contexte et en tenant compte de l'objet et du but du traité;[36] or, la teneur de l'article 3 ne laisse pas de doute sur l'inclusion de la garde conjointe parmi les situations que la Convention entend protéger. Quant à savoir quand existe une garde conjointe, c'est une question qui doit être déterminée dans chaque cas d'espèce à la lumière du droit de la résidence habituelle de l'enfant.

85 Quant au droit de visite, la lettre *b* de cet article se limite à signaler qu'il comprend «le droit d'emmener l'enfant pour une période limitée dans un lieu autre que celui de sa résidence habituelle». L'intention de la Convention n'est évidemment pas d'exclure toutes les autres modalités du droit de visite; plus simplement, elle a voulu souligner que cette notion s'étend aussi au droit dit d'hébergement, manifestation du droit de visite que la personne qui a la garde de l'enfant redoute spécialement. De plus, étant donné que cette norme explicative ne qualifie point ce «lieu autre» où l'enfant peut être emmené, il faut conclure que le droit de visite, selon la Convention, inclut également le droit de visite transfrontière.

86 Une proposition a été faite en vue d'inclure dans cet article une définition des autorités judiciaires ou administratives visées tout au long des normes conventionnelles.[37] Les difficultés rencontrées tant pour la localisation d'un point de vue systématique que pour trouver une rédaction large qui englobe toutes les hypothèses possibles ont conseillé sa non-inclusion. Or il est clair qu'il s'agit, comme nous l'avons déjà souligné,[38] des autorités compétentes pour décider soit de la garde, soit de la protection des enfants, d'après la loi interne de chaque Etat contractant. D'ailleurs, c'est justement en raison des différences entre ces lois que l'on parle toujours des autorités «judiciaires ou administratives», en vue de recouvrir toutes les autorités ayant compétence en la matière, sans égard à la qualification juridique qu'elles reçoivent dans chaque Etat.

CHAPITRE II — AUTORITÉS CENTRALES

Article 6 — Création des Autorités centrales

87 Le rôle joué par les Autorités centrales, pièces clés dans

[35] Voir par exemple la *Convention concernant la compétence des autorités et la loi applicable en matière de protection des mineurs, du 5 octobre 1961.*
[36] En ce sens, l'article 31, alinéa premier, de la Convention de Vienne sur le droit des traités du 23 mai 1969.
[37] Voir Doc. trav. No 7 (*Proposal of the United States delegation*) et P.-v. Nos 4 et 14.
[38] Voir *supra* No 45.

possible ways of protecting the child's property. It is therefore a more limited concept than that of 'protection of minors',[35] despite attempts made during the Fourteenth Session to introduce the idea of 'protection' so as to include in particular those cases where children are entrusted to institutions or bodies. But since all efforts to define custody rights in regard to those particular situations failed, one has to rest content with the general description given above. The Convention seeks to be more precise by emphasizing, as an example of the 'care' referred to, the right to determine the child's place of residence. However, if the child, although still a minor at law, has the right itself to determine its own place of residence, the substance of the custody rights will have to be determined in the context of other rights concerning the person of the child.
On the other hand, although nothing is said in this article about the possibility of custody rights being exercised singly or jointly, such a possibility is clearly envisaged. In fact, a classic rule of treaty law requires that a treaty's terms be interpreted in their context and by taking into account the objective and end sought by the treaty,[36] and the whole tenor of article 3 leaves no room for doubt that the Convention seeks to protect joint custody as well. As for knowing when joint custody exists, that is a question which must be decided in each particular case, and in the light of the law of the child's habitual residence.

85 As regards access rights, sub-paragraph *b* of this article merely points out that they include 'the right to take a child for a limited period of time to a place other than the child's habitual residence'. Clearly, therefore, it is not intended that the Convention exclude all other ways of exercising access rights. Quite simply, it seeks to emphasize that access rights extend also to what is called 'residential access', that aspect of access rights about which the person who has custody of the child is particularly apprehensive. Moreover, since this explanatory provision in no way qualifies this 'other place' to which the child may be taken, one must conclude that access rights, in terms of the Convention, also include the right of access across national frontiers.

86 A proposal was made to include in this article a definition of the judicial or administrative authorities mentioned throughout the Convention's rules.[37] The difficulties encountered as much in reaching a systematic viewpoint on this as in devising a definition wide enough to encompass all possible contingencies made for its exclusion. Now, as was mentioned earlier,[38] it is clear that these are the authorities who have the power, according to the internal law of each Contracting State, to determine questions concerning a child's custody or protection. Besides, it is precisely because of differences amongst these laws that reference is always made to 'judicial or administrative' authorities, so as to embrace all authorities which have jurisdiction in the matter, without regard to their legal characterization in each State.

CHAPTER II — CENTRAL AUTHORITIES

Article 6 — Creation of Central Authorities

87 The role played by the Central Authorities, crucial

[35] See, for example, the *Convention of 5 October 1961 concerning the powers of authorities and the applicable law in respect of the protection of minors.*
[36] See article 31(1) of the Vienna Convention of 23 May 1969 on the law of treaties.
[37] See Working Document No 7 (Proposal of the United States delegation) and *P.-v.* Nos 4 and 14.
[38] See *supra*, No 45.

l'application de la Convention, a déjà été longuement présenté.[39]
En ce qui concerne les Etats susceptibles de désigner plus d'une Autorité centrale, c'est l'idée que le critère déterminant à cet effet devait être l'existence de plusieurs organisations territoriales en matière de protection des mineurs qui a prévalu. En conséquence, on a ajouté aux hypothèses des Etats fédéraux et plurilégislatifs le cas des Etats «ayant des organisations territoriales autonomes», expression qui doit être interprétée dans un sens large.

Article 7 — Obligations des Autorités centrales

88 Cet article résume le rôle des Autorités centrales dans la mise en oeuvre du système instauré par la Convention. L'article est structuré en deux alinéas, dont le premier, rédigé en termes généraux, établit une obligation globale de coopération, tandis que le second énumère, de la lettre *a* à la lettre *i*, quelques-unes des principales fonctions que les Autorités centrales doivent remplir. Tous deux sont le résultat du compromis entre, d'une part les délégations qui désiraient des Autorités centrales fortes avec des compétences d'action et d'initiative amples et d'autre part les délégations qui envisageaient lesdites Autorités comme de simples mécanismes administratifs pour faciliter l'action des parties. Or, puisque ces diverses attitudes reflétaient la plupart des profondes différences existant entre les systèmes représentés à la Conférence, la solution à retenir devait être souple, de manière à permettre à chaque Autorité centrale d'agir selon le droit dans lequel elle est appelée à s'insérer. Donc, bien que la Convention précise les principales obligations confiées à la charge des Autorités centrales, elle laisse à chaque Etat contractant la détermination des mesures appropriées pour les exécuter. D'ailleurs, c'est dans ce sens qu'il faut interpréter la phrase qui introduit le second alinéa, et qui spécifie que les Autorités centrales doivent remplir les fonctions énumérées «soit directement, soit avec le concours de tout intermédiaire»; c'est à chaque Autorité centrale de choisir entre l'une ou l'autre option en fonction de son propre droit interne et dans l'esprit du devoir général de coopération que lui impose le premier alinéa.

89 Comme nous venons de le dire, la norme insérée dans le *premier alinéa* énonce l'obligation générale de coopérer des Autorités centrales, en vue d'assurer l'accomplissement des objectifs de la Convention. Une telle coopération doit se développer à deux niveaux: les Autorités centrales doivent d'abord coopérer entre elles; mais, de surcroît, elles doivent promouvoir la collaboration entre les autorités compétentes pour les matières visées dans leurs Etats respectifs. La réalisation effective de cette promotion dépendra dans une large mesure de la capacité d'action que chaque droit interne accorde aux Autorités centrales.

90 Les fonctions détaillées au *deuxième alinéa* essaient de suivre, dans leurs grandes lignes, les différents stades de l'intervention des Autorités centrales dans un cas type de déplacements d'enfants. Néanmoins, il est évident que cette énumération n'est pas exhaustive; par exemple, puisque l'intervention des Autorités centrales exige qu'elles aient été saisies au préalable, soit directement par le demandeur, soit par l'Autorité centrale, d'un autre Etat contractant, dans la seconde hypothèse, l'Autorité centrale initialement saisie de

[39] Voir *supra* Nos 43 à 48.

factors as they are in the application of the Convention, has already been dealt with at length.[39]
As for those States which may appoint more than one Central Authority, the idea which prevailed was that the determining factor should be the existence of several territorial organizations for the protection of minors. Thus there was added to those cases of Federal States and States with more than one system of law that of States 'having autonomous territorial organizations', a term which is to be interpreted broadly.

Article 7 — Obligations of Central Authorities

88 This article summarizes the role played by Central Authorities in bringing into play the system established by the Convention. The article is structured in two paragraphs, the first of which, drafted in general terms, sets out an overall duty of co-operation, while the second lists, from sub-paragraphs *a* to *i*, some of the principal functions which the Central Authorities have to discharge. Both result from a compromise between, on the one hand, those delegations which wanted strong Central Authorities with wide-ranging powers of action and initiative, and on the other hand those which saw these Authorities as straightforward administrative mechanisms for promoting action by the parties. Now, since these diverse attitudes reflected most of the deep differences which existed amongst the systems represented at the Conference, the ultimate solution had to be flexible, and such as would allow each Central Authority to act according to the law within which it has to operate. Therefore, although the Convention clearly sets out the principal obligations laid upon the Central Authorities, it lets each Contracting State decide upon the appropriate means for discharging them. And it is in this sense that the sentence occurring at the beginning of the second paragraph must be understood, which states that the Central Authorities are to discharge their listed functions 'either directly, or through any intermediary'. It is for each Central Authority to choose one or the other options, while working within the context of its own internal law and within the spirit of the general duty of co-operation imposed upon it by the first paragraph.

89 As we have just said, the rule in the *first paragraph* sets out the general duty of Central Authorities to co-operate, so as to ensure the Convention's objects are achieved. Such co-operation has to develop on two levels: the Central Authorities must firstly co-operate with each other; however, in addition, they must promote co-operation among the authorities competent for the matters dealt with within their respective States. Whether this co-operation is promoted effectively will depend to a large extent on the freedom of action which each internal law confers upon the Central Authorities.

90 The functions listed in the *second paragraph* seek to trace, in broad outline, the different stages of intervention by Central Authorities in the typical case of child removal. Nonetheless, it is clear that this list is not exhaustive. For example, since the intervention of Central Authorities necessarily depends on their having been initially seized of the matter, either directly by the applicant or by the Central Authority of a Contracting State, then in the latter case the Central Authority initially seized will have to send the

[39] See *supra*, Nos 43 to 48.

l'affaire devra transmettre la demande à l'Autorité centrale de l'Etat où l'on suppose que l'enfant se trouve. Or, cette obligation n'est pas précisée à l'article 7, mais plus tard, dans le contexte de l'article 9. D'autre part, il est évident aussi que les Autorités centrales ne sont pas tenues de remplir, dans chaque cas d'espèce, toutes les obligations énumérées dans cet article; en effet, ce sont les circonstances du cas précis qui vont déterminer les démarches à faire par les Autorités centrales: par exemple, on ne peut pas soutenir qu'une Autorité centrale quelconque soit tenue de «localiser» l'enfant quand le demandeur sait avec exactitude où se trouve celui-ci.

91 En plus de la localisation de l'enfant, chaque fois que cela s'avère nécessaire (lettre *a*), l'Autorité centrale doit prendre ou faire prendre toute mesure provisoire qui semble utile pour prévenir de «nouveaux dangers pour l'enfant ou des préjudices pour les parties concernées» (lettre *b*). La rédaction de ce sous-alinéa met à nouveau en relief un fait souligné auparavant: la capacité d'agir des Autorités centrales peut varier d'un Etat à un autre. Quant au fond, les mesures provisoires qui ont été envisagées se centrent tout particulièrement sur l'idée d'éviter un nouveau déplacement de l'enfant.

92 La lettre *c* consacre le devoir des Autorités centrales d'essayer de trouver une solution extrajudiciaire à l'affaire. En effet, d'après l'expérience évoquée par certains délégués, le nombre de cas qu'il est possible de résoudre sans avoir besoin de recourir aux tribunaux est considérable. Mais, encore une fois, c'est l'Autorité centrale qui, dans ces étapes précédant une éventuelle procédure judiciaire ou administrative, dirige l'évolution du problème; donc c'est à elle de décider à quel moment les tentatives faites, soit pour assurer la «remise volontaire» de l'enfant, soit pour faciliter une «solution amiable», ont échouées.

93 La lettre *d* porte sur les échanges d'informations relatives à la situation sociale de l'enfant. L'obligation à cet effet est subordonnée au critère des Autorités centrales impliquées dans chaque cas d'espèce. En effet, l'introduction du membre de phrase «si cela s'avère utile» montre que l'on n'a pas voulu imposer une obligation rigide sur ce point: la possibilité qu'il n'existe pas d'informations à fournir, ainsi que la peur qu'elles puissent être employées dans le cadre d'une tactique dilatoire des parties, sont quelques-uns des arguments qui ont conseillé cette attitude. D'autre part, on a rejeté une proposition rendant possible que certaines informations soient transmises à condition qu'elles restent confidentielles.[40]

94 L'obligation faite aux Autorités centrales de fournir des informations sur le contenu du droit dans leur Etat pour l'application de la Convention apparaît à la lettre *e*. Ce devoir couvre notamment deux aspects: d'une part dans le cas où le déplacement s'est produit avant qu'il n'y ait eu une décision sur la garde de l'enfant, l'Autorité centrale de l'Etat de la résidence habituelle de l'enfant pourra produire une attestation sur le contenu du droit de cet Etat, en vue de l'application de la Convention; d'autre part, l'Autorité centrale devra renseigner les particuliers sur le fonctionnement de la Convention et des Autorités centrales, ainsi que sur les procédures possibles à suivre. Par contre, la possibilité d'aller plus loin, c'est-à-dire d'obliger les Autorités centrales à donner des conseils juridiques sur des cas concrets, n'est pas envisagée dans cette norme.

[40] Voir Doc. trav. No 9 (*Proposal of the United Kingdom delegation*) et P.-v. No 5.

application to the Central Authority of the State in which the child is thought to be. Now, this obligation is not spelled out in article 7, but later, in the context of article 9. On the other hand, it is also clear that the Central Authorities are not obliged to fulfil, in every specific case, all the duties listed in this article. In fact, the circumstances of each particular case will dictate the steps which are to be taken by the Central Authorities; for example, it cannot be maintained that every Central Authority must discover the whereabouts of a child when the applicant knows full well where it is.

91 In addition to finding the whereabouts of the child, where necessary (sub-paragraph *a*), the Central Authority must take or cause to be taken any provisional measures which could help prevent 'further harm to the child or prejudice to interested parties' (sub-paragraph *b*). The drafting of this sub-paragraph clearly brings out once again a fact which was emphasized above, namely, that the ability of Central Authorities to act will vary from one State to another. Basically, the provisional measures envisaged are designed in particular to avoid another removal of the child.

92 Sub-paragraph *c* sets out the duty of Central Authorities to try to find an extrajudicial solution. In actual fact, in the light of experience as spoken to by some delegates, a considerable number of cases can be settled without any need to have recourse to the courts. But, once again, it is the Central Authorities which, in those stages preceding the possible judicial or administrative proceedings, will direct the development of the problem; it is therefore for them to decide when the attempts to secure the 'voluntary return' of the child or to bring about an 'amicable resolution', have failed.

93 Sub-paragraph *d* relates to the exchange of information about the social background of the child. This duty is made subject to the criteria adopted by the Central Authorities involved in a particular case. Indeed, the insertion of the phrase 'where desirable' demonstrates that there is no wish to impose an inflexible obligation here: the possibility of there being no information to provide, as well as the fear that reference to this provision might be used by the parties as a delaying tactic, are some of the arguments which prompted this approach. On the other hand, a proposal which would have made the transmission of certain information conditional upon its remaining confidential, was rejected.[40]

94 The obligation laid upon Central Authorities to provide information on the content of the law in their own States for the application of the Convention appears in sub-paragraph *e*. This duty applies in particular to two situations. Firstly, where the removal occurs prior to any decision as to the custody of the child, the Central Authority of the State of the child's habitual residence is to produce, for the purposes of the Convention's application, a certificate on the relevant law of that State. Secondly, the Central Authority must inform the individuals about how the Convention works and about the Central Authorities, as well as about the procedures available. On the other hand, the possibility of going further, by obliging the Central Authorities to give legal advice in individual cases, is not envisaged by this rule.

[40] See Working Document No 9 (Proposal of the United Kingdom delegation) and *P.-v.* No 5.

95 Quand il est nécessaire, pour obtenir le retour de l'enfant, de faire intervenir les autorités judiciaires ou administratives de l'Etat où il se trouve, l'Autorité centrale doit introduire elle-même – si cela est possible selon son droit interne – ou favoriser l'ouverture d'une procédure; obligation qui s'étend aussi aux procédures qui s'avèrent nécessaires pour permettre l'organisation ou l'exercice effectif du droit de visite (lettre *f*).

96 Dans les cas où l'Autorité centrale ne peut pas saisir directement les autorités compétentes dans son propre Etat, elle doit accorder ou faciliter au demandeur l'obtention de l'assistance judiciaire, aux termes de l'article 25 (lettre *g*). Il convient de préciser très brièvement que l'expression «le cas échéant» dans ce sous-alinéa fait référence à la carence de ressources économiques du demandeur, sur la base des critères établis par la loi de l'Etat où cette assistance est sollicitée; elle ne fait donc pas allusion à des considérations abstraites sur la convenance ou non de l'octroyer.

97 Au terme du processus suivi par ce paragraphe, la lettre *h* inclut, parmi les obligations des Autorités centrales la mise en oeuvre des mesures administratives nécessaires et opportunes dans chaque cas d'espèce, pour assurer le retour sans danger de l'enfant.

98 En dernier lieu, la lettre *i* énonce une obligation des Autorités centrales qui ne concerne pas directement les particuliers mais la Convention elle-même: il s'agit du devoir de «se tenir mutuellement informées sur le fonctionnement de la Convention et, autant que possible, de lever les obstacles éventuellement rencontrés lors de son application». Cette obligation devra jouer à deux niveaux complémentaires: d'une part, sur le plan des relations bilatérales entre Etats parties à la Convention; d'autre part, au niveau multilatéral, en participant le cas échéant aux commissions réunies à cet effet par le Bureau Permanent de la Conférence de La Haye.

CHAPITRE III — RETOUR DE L'ENFANT

Article 8 — La saisine des Autorités centrales

99 D'après le *premier alinéa*, une demande en vue d'obtenir le retour d'un enfant peut être adressée à toute Autorité centrale qui, dès lors, sera tenue par toutes les obligations conventionnelles. Cela signifie que le demandeur est libre de saisir l'Autorité centrale qu'il estime la plus adéquate; néanmoins, pour des raisons d'efficacité, une mention expresse de l'Autorité centrale de la résidence habituelle de l'enfant est faite dans le texte – mention qui ne doit pourtant pas être interprétée comme signifiant que les demandes adressées aux autres Autorités centrales devraient être exceptionnelles.

100 Etant donné que l'utilisation de la formule modèle est simplement recommandée, il était indispensable d'inclure dans le texte de la Convention les éléments que doit contenir une demande introduite devant une Autorité centrale pour être recevable, ainsi que les documents facultatifs qui peuvent accompagner ou compléter une telle demande. Les éléments que doit contenir toute demande adressée à une Autorité centrale, dans ce contexte, sont énumérés au *deuxième alinéa* de l'article 8. Il s'agit notamment des données qui permettent l'identification de l'enfant et des parties concernées, ainsi que de celles qui peuvent aider à localiser l'enfant (lettres *a*, *b* et *d*). En ce qui concerne l'information sur la date de naissance de l'enfant, la Convention signale qu'elle sera apportée seulement «s'il est possible de se la procurer». Par cette précision, on a entendu favoriser l'action du demandeur qui ignore une telle circonstance; il

95 When it is necessary, in order to obtain the child's return, for the judicial or administrative authorities of the State in which it is located to intervene, the Central Authority must itself initiate proceedings (if that can be done under its internal law) or facilitate the institution of proceedings. This duty also extends to proceedings which prove to be necessary for organizing or securing the effective exercise of rights of access (sub-paragraph *f*).

96 Where the Central Authority is not able to apply directly to the competent authorities in its own State, it must provide or facilitate the provision of legal aid and advice for the applicant, in terms of article 25 (sub-paragraph *g*). It is appropriate to point out here very briefly that the phrase 'where the circumstances so require' in this sub-paragraph refers to the applicant's lack of economic resources, as determined by the criteria laid down by the law of the State in which such assistance is sought, and that it does not therefore refer to abstract considerations as to the convenience or otherwise of granting legal aid.

97 Following the method adopted by this paragraph, sub-paragraph *h* includes among the Central Authorities' obligations the bringing into play in each case of such administrative arrangements as may be necessary and appropriate to secure the safe return of the child.

98 Finally, sub-paragraph *i* sets forth an obligation on the part of Central Authorities which does not directly concern individuals but only the Convention itself. It is the duty 'to keep each other informed with respect to the operation of the Convention, and, as far as possible, to eliminate any obstacles to its application'. This obligation is to operate on two complementary levels, firstly at the level of bilateral relations between States which are Party to the Convention, and secondly on a multilateral level, through participating when required in commissions called for this purpose by the Permanent Bureau of the Hague Conference.

CHAPTER III — RETURN OF THE CHILD

Article 8 — Applications to Central Authorities

99 In terms of the *first paragraph*, an application for the return of a child can be addressed to any Central Authority which, from that point, will be bound by all the obligations laid down by the Convention. This demonstrates that the applicant is free to apply to the Central Authority which in his opinion is the most appropriate. However, for reasons of efficiency, the Central Authority of the child's habitual residence is expressly mentioned in the text, but this must not be understood as signifying that applications directed to other Central Authorities are to be regarded as exceptional.

100 Since use of the model form is merely recommended, it was necessary to include in the text of the Convention the elements which any application submitted to a Central Authority must contain in order to be admissible, as well as the optional documents which may accompany or supplement such an application. The elements which every application to a Central Authority must contain, in this context, are those listed in the *second paragraph* of article 8. In particular, they are facts which allow the child and interested parties to be identified, such as those which may be able to help in locating the child (sub-paragraphs *a*, *b*, and *d*). As regards information on the child's date of birth, the Convention makes it clear that this should be supplied only 'where available'. This provision is intended to favour action by an applicant who is ignorant of such a fact but who will, however, always have to supply precise information on the

devra pourtant toujours fournir des indices exacts sur l'âge de l'enfant, étant donné que le contenu de l'article 4 de la Convention peut déterminer le rejet de sa demande aux termes de l'article 27.
De plus, il faut que la demande contienne «les motifs sur lesquels se base le demandeur pour réclamer le retour de l'enfant» (lettre *c*). Ceci est une exigence logique, qui permettra d'ailleurs l'application de l'article 27 concernant la faculté qu'ont les Autorités centrales de rejeter les demandes manifestement non fondées. Les motifs invoqués doivent, en principe, se référer aux deux éléments, juridique et de fait, retenus à l'article 3. Or, puisque l'élément juridique peut notamment s'appuyer sur le contenu du droit de la résidence habituelle de l'enfant, sur une décision ou sur un accord, on aurait pu songer à exiger un soutien documentaire à ce stade initial. Pourtant, la Convention a choisi une voie différente et place cette preuve parmi les documents qui, d'une manière facultative, peuvent accompagner ou compléter la demande. La raison en est que l'obtention des documents en question sera parfois difficile; de plus, elle peut exiger un temps précieux pour une localisation rapide de l'enfant. D'ailleurs, chaque fois que l'Autorité centrale réussit à obtenir la remise volontaire de l'enfant ou une solution amiable de l'affaire, ils peuvent apparaître comme accessoires.

101 En ce sens, les deux premières lettres du *troisième alinéa* concernant la documentation facultative qui peut accompagner, ou compléter à un moment ultérieur, la demande, se réfèrent aux documents qui sont à la base de la réclamation en retour de l'enfant. A cet effet, il faut souligner d'abord que l'exigence que les copies de toute décision ou tout accord soient authentifiées ne s'oppose pas à la disposition de l'article 23, d'après laquelle «aucune légalisation ni formalité similaire ne sera requise dans le contexte de la Convention». Il s'agit simplement de vérifier des copies ou des documents privés à l'origine pour en garantir la concordance avec les originaux et en assurer, par ce biais, la libre circulation.
En second lieu, la preuve du contenu du droit de l'Etat de la résidence habituelle de l'enfant peut être établie soit par une attestation, soit par une déclaration avec affirmation, c'est-à-dire moyennant des documents incorporant des déclarations solennelles qui engagent la responsabilité de leurs auteurs. Quant à savoir qui peut produire lesdites déclarations, la Convention a choisi une formule large, qui doit faciliter la tâche du demandeur (lettre *f*). Ainsi, en plus des Autorités centrales et des autres autorités compétentes de l'Etat de la résidence habituelle de l'enfant, elles peuvent émaner de toute personne qualifiée – par exemple, d'un notaire, d'un avocat ou d'institutions scientifiques.
D'autre part, il convient de souligner que dans une phase ultérieure, c'est-à-dire quand les autorités judiciaires ou administratives de l'Etat de refuge sont appelées à intervenir, celles-ci peuvent demander, selon l'article 15, la production de certains des documents considérés comme facultatifs au moment de la saisine des Autorités centrales.
Finalement, la Convention admet la possibilité que la demande soit accompagnée ou complétée par «tout autre document utile» (lettre *g*). En principe, étant donné que la demande est introduite par le gardien dépossédé, c'est lui qui pourra apporter ces documents complémentaires. Ce qui n'empêche pas que, si la demande est transmise à une autre Autorité centrale, l'Autorité centrale initialement saisie puisse accompagner la demande notamment des informations relatives à la situation sociale de l'enfant – si elle en dispose et les considère utiles –, en vertu de la fonction que lui attribue l'article 7, alinéa 2*d*.

age of the child, since the provisions of article 4 may result in his application being rejected, in terms of article 27.

Moreover, the application must contain 'the grounds on which the applicant's claim for return of the child is based' (sub-paragraph *c*). This requirement is logical, in that it allows the application of article 27 concerning the right of Central Authorities to reject applications which are clearly not well-founded. The grounds must in principle refer to the two elements, legal and factual, contained in article 3. Now, since the legal element in particular may depend on the provisions of the law of the child's habitual residence, or upon a decision or agreement, it might have been expected that documentary support would be required at this initial stage. However, the Convention chose to follow a different route and placed this evidence amongst those documents which may, optionally, accompany or supplement the application. The reason for this is that obtaining the documents in question is sometimes difficult and, what is more, could take up precious time better spent in speedily discovering the whereabouts of the child. Moreover, whenever a Central Authority succeeds in bringing about the voluntary return of the child or an amicable resolution of the affair, such requirements may seem merely accessory.

101 Understood thus, the first two sub-paragraphs of the *third paragraph*, dealing with the optional provision of documents which may accompany or supplement applications, are seen to refer to documents which are fundamental to a claim for the return of the child. It must be emphasized firstly that the requirement that copies of any decision or agreement be authenticated in no way contradicts the provision in article 23 that 'no legalization or similar formality may be required in the context of this Convention'. It is simply a matter of verifying what were originally copies or private documents so as to guarantee that they correspond to the originals and thus to secure their free circulation.
Secondly, proof of the substantive law of the State of the child's habitual residence may be established by either certificates or affidavits, that is to say documents which include solemn statements for which those who make them assume responsibility. As regards those persons who may adduce such statements, the Convention chose to define them widely, a fact which must make the task of the applicant easier (sub-paragraph *f*). Thus, they may emanate from any qualified person – for example, an attorney, solicitor, or barrister or research institution – as well as from the Central Authorities and the other competent authorities of the State of the child's habitual residence.
On the other hand, it should be stressed that at a later stage, when the judicial or administrative authorities of the State of refuge have been called upon to intervene, they may, in terms of article 15, request the production of certain documents which were considered to be optional at the time of application to the Central Authorities.
Lastly, the Convention acknowledges that the application may be accompanied or supplemented by 'any other relevant document' (sub-paragraph *g*). In theory, since it is the dispossessed guardian of the child who brings the application, it is for him to provide these supplementary documents. This does not preclude the Central Authority to which the application was originally made, where the application is sent to another Central Authority, from accompanying the application by, *inter alia*, information concerning the social background of the child (if it has such information at its disposal and considers it to be useful), by virtue of the task laid upon it by article 7, paragraph 2*d*.

Article 9 — Transmission de la demande à l'Autorité centrale de l'Etat où se trouve l'enfant

102 Une conséquence directe de la liberté dont jouit le demandeur de s'adresser à l'Autorité centrale de son choix est l'obligation qui pèse sur celle-ci de transmettre la demande à l'Autorité centrale de l'Etat où elle a des raisons de penser que l'enfant se trouve; obligation qui va aussi se présenter quand l'Autorité centrale qui connaît d'une affaire par une autre Autorité centrale arrivera à la conclusion que l'enfant se trouve dans un pays différent. Il s'agit là d'une fonction qui vient compléter le cadre esquissé à l'article 7, puisqu'elle est en rapport direct avec l'obligation de coopérer entre Autorités centrales qu'établit le premier alinéa dudit article.
Or, si le sens de l'article 9 est clair, sa rédaction n'en est pas très heureuse. «L'Autorité centrale requérante» à laquelle cet article se réfère existe seulement lorsque la demande introduite conformément à l'article 8 a été transmise à une *autre* Autorité centrale aux termes de l'article 9 lui-même. En conséquence, l'obligation d'informer une «Autorité centrale requérante» n'existe que lorsque la demande a été transmise à une troisième Autorité centrale, l'enfant ne se trouvant pas dans l'Etat de la deuxième Autorité centrale saisie. Par contre, l'obligation de transmettre une demande en vertu de cet article incombe à *toute* Autorité centrale, indépendamment du fait qu'elle soit première saisie ou saisie par l'intermédiaire d'une autre Autorité centrale, en raison du fait que cette disposition doit être interprétée comme s'appliquant aux deux hypothèses qu'elle a l'intention de couvrir.

Article 10 — La remise volontaire de l'enfant

103 La fonction des Autorités centrales visée à l'article 7, alinéa 2*c* de «prendre toutes les mesures appropriées pour assurer la remise volontaire de l'enfant», trouve à cet article un traitement préférentiel qui met en relief l'intérêt accordé au recours à cette voie. Dans le texte de la Convention, on a supprimé le membre de phrase qui introduisait, dans l'avant-projet, cette disposition et qui situait dans le temps («avant l'ouverture de toute procédure judiciaire ou administrative») l'obligation qu'elle incorpore. La raison en était la difficulté éprouvée par certains systèmes juridiques pour accepter qu'une autorité publique, telle que l'Autorité centrale, puisse agir avant l'introduction d'une demande auprès des autorités compétentes; la teneur de la disposition conventionnelle n'empêche pas que les Autorités centrales des autres Etats agissent de la sorte. D'autre part, il ne sera jamais question d'une obligation rigide, dans un double sens: d'une part, les efforts pour la remise volontaire de l'enfant peuvent se poursuivre après la saisine des autorités judiciaires ou administratives s'ils ont commencé avant; d'autre part, dans la mesure où l'initiative en vue du retour de l'enfant ne se transfert pas à ces autorités, c'est l'Autorité centrale qui doit décider si les tentatives en vue de tel objectif ont échoué.

D'ailleurs, il est entendu que les démarches visées dans cet article ne doivent pas préjuger de l'action des Autorités centrales pour empêcher un nouveau déplacement de l'enfant, selon l'article 7, alinéa 2*b*.

Article 11 — L'utilisation des procédures d'urgence par les autorités judiciaires ou administratives

104 L'importance du facteur temps dans toute la matière apparaît de nouveau dans cet article. Si l'article 2 de la Convention impose aux Etats contractants l'obligation d'utiliser des procédures d'urgence le *premier alinéa* de cet article reproduit cette obligation à l'égard des autorités de

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

102 A direct consequence of the applicant's right to apply to the Central Authority of his choice is the duty imposed on the latter to transmit the application to the Central Authority of the State in which it has reason to believe the child is located; this duty arises also when the Central Authority which is informed of a case by another Central Authority reaches the conclusion that the child is in fact located in a different country. This is a task which supplements the framework of duties outlined in article 7, since it relates directly to the duty of co-operation amongst Central Authorities established by the first paragraph of that article.

Now, although the meaning of article 9 may be clear, it has not been very artfully drafted. The 'requesting Central Authority' to which this article refers exists only where the application submitted in accordance with article 8 has been transmitted to *another* Central Authority in terms of article 9 itself. Consequently, the duty to inform a 'requesting Central Authority' exists only when the application has been transmitted to a third Central Authority, the child not being located in the State of the second Central Authority to which the application was sent. But on the other hand, the duty to transmit an application in terms of this article devolves upon *any* Central Authority, independently of the fact that it was seized of the matter either directly or through the intervention of another Central Authority, since this provision must be understood as applying to both of the cases it is meant to cover.

Article 10 — Voluntary return of the child

103 The duty of Central Authorities, stated in article 7(2)(*c*), to 'take all appropriate measures to secure the voluntary return of the child', is given preferential treatment in this article, which highlights the interest of the Convention in seeing parties have recourse to this way of proceeding. The phrase 'before the institution of any legal or administrative proceedings' which preceded this provision in the Preliminary Draft, and restricted the duty included within it to a particular point in time, was deleted from the text of the Convention. The reason for this deletion is the difficulty experienced by some legal systems in accepting that a public authority, such as a Central Authority, could act before an application had been brought before the competent authorities; however, the whole tenor of the provision shows that the Central Authorities of other States are not precluded from acting in that way. On the other hand, it is in no way an inflexible obligation, for two reasons: firstly, efforts to secure the voluntary return of the child which were begun prior to the referral of the matter to the judicial or administrative authorities may be pursued thereafter, and secondly, in so far as the initiative for the return of the child has not been transferred to those authorities, it is for the Central Authority to decide whether the attempts to achieve this objective have failed.
Moreover, the measures envisaged in this article are not intended to prejudice the efforts of Central Authorities to prevent further removals of the child, pursuant to article 7(2)(*b*).

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

104 The importance throughout the Convention of the time factor appears again in this article. Whereas article 2 of the Convention imposes upon Contracting States the duty to use expeditious procedures, the *first paragraph* of this article restates the obligation, this time with regard to the authori-

l'Etat où l'enfant a été emmené et qui doivent statuer sur la remise de celui-ci. L'obligation considérée a un double aspect: d'une part, l'utilisation des procédures les plus rapides connues par leur système juridique; d'autre part le traitement prioritaire, dans toute la mesure du possible, des demandes visées.

105 Dans son désir de pousser les autorités internes à accorder une priorité maximum aux problèmes soulevés par les déplacements internationaux d'enfants, le *deuxième alinéa* établit un délai non contraignant de six semaines, après lequel le demandeur ou l'Autorité centrale de l'Etat requis peuvent solliciter une déclaration sur les motifs du retard. De plus quand l'Autorité centrale de l'Etat requis aura reçu la réponse, elle aura à nouveau une obligation de renseignement, soit envers l'Autorité centrale de l'Etat requérant, soit envers le demandeur, si c'est lui qui l'a directement saisie. En somme, l'importance de cette disposition ne peut pas être mesurée par rapport à l'exigibilité des obligations qu'elle consacre, mais par le fait même qu'elle attire l'attention des autorités compétentes sur le caractère décisif du facteur temps dans les situations concernées et qu'elle fixe le délai maximum que devrait prendre l'adoption d'une décision à cet égard.

Articles 12 et 18 — Obligation de retourner l'enfant

106 Ces deux articles peuvent être examinés ensemble car, malgré leur nature différente, ils présentent un certain caractère complémentaire.
L'article 12 constitue une pièce essentielle de la Convention, étant donné que c'est lui qui précise les situations dans lesquelles les autorités judiciaires ou administratives de l'Etat où se trouve l'enfant sont tenues d'ordonner son retour. C'est pourquoi il convient de souligner, une fois encore, que la remise non volontaire d'un enfant s'appuie, d'après la Convention, sur une décision adoptée par les autorités compétentes à cet égard dans l'Etat requis; en conséquence, l'obligation de retour dont traite cet article s'impose auxdites autorités. A cet effet, l'article distingue deux hypothèses: la première concerne le devoir des autorités lorsqu'elles ont été saisies dans le délai d'un an après le déplacement ou le non-retour illicites d'un enfant; la seconde a trait aux conditions qui entourent ce devoir quand l'introduction de la demande est postérieure au délai susmentionné.

107 Dans le premier alinéa, l'article apporte une solution unique au problème soulevé par la détermination de la période pendant laquelle les autorités en question doivent ordonner le retour immédiat de l'enfant. Le problème est important car, dans la mesure où le retour de l'enfant est envisagé dans son intérêt, il est certain que lorsque l'enfant est intégré dans un nouveau milieu, son retour ne devrait se produire qu'après un examen du fond du droit de garde — ce qui nous situe en dehors de l'objectif conventionnel. Or, les difficultés que rencontre toute tentative de traduire le critère de l'intégration de l'enfant sous forme d'une norme objective ont conduit à la fixation d'un délai, qui est peut-être arbitraire, mais qui constitue la «moins mauvaise» réponse aux soucis exprimés sur ce point.

108 Dans l'approche adoptée, il a fallu affronter une pluralité de questions: *primo*, le moment à partir duquel commence le délai; *secundo*, l'extension du délai; *tertio*, le moment d'expiration du délai. En ce qui concerne le premier point, c'est-à-dire la détermination du moment où commence à courir le délai, l'article se réfère au déplacement ou non-retour illicites; la concrétisation de la date décisive en cas de non-retour devant être entendue comme celle à laquelle l'enfant aurait dû être remis au gardien, ou à laquelle le titulaire de la garde a refusé son consentement à

ties of the State to which the child has been taken and which are to decide upon its return. There is a double aspect to this duty: firstly, the use of the most speedy procedures known to their legal system; secondly, that applications are, so far as possible, to be granted priority treatment.

105 The *second paragraph*, so as to prompt internal authorities to accord maximum priority to dealing with the problems arising out of the international removal of children, lays down a non-obligatory time-limit of six weeks, after which the applicant or Central Authority of the requested State may request a statement of reasons for the delay. Moreover, after the Central Authority of the requested State receives the reply, it is once more under a duty to inform, a duty owed either to the Central Authority of the requesting State or to the applicant who has applied to it directly. In short, the provision's importance cannot be measured in terms of the requirements of the obligations imposed by it, but by the very fact that it draws the attention of the competent authorities to the decisive nature of the time factor in such situations and that it determines the maximum period of time within which a decision on this matter should be taken.

Articles 12 and 18 — Duty to return the child

106 These two articles can be examined together since they complement each other to a certain extent, despite their different character.
Article 12 forms an essential part of the Convention, specifying as it does those situations in which the judicial or administrative authorities of the State where the child is located are obliged to order its return. That is why it is appropriate to emphasize once again the fact that the compulsory return of the child depends, in terms of the Convention, on a decision having been taken by the competent authorities of the requested State. Consequently, the obligation to return a child with which this article deals is laid upon these authorities. To this end, the article highlights two cases; firstly, the duty of authorities where proceedings have begun within one year of the wrongful removal or retention of a child and, secondly, the conditions which attach to this duty where an application is submitted after the aforementioned time-limit.

107 In the first paragraph, the article brings a unique solution to bear upon the problem of determining the period during which the authorities concerned must order the return of the child forthwith. The problem is an important one since, in so far as the return of the child is regarded as being in its interests, it is clear that after a child has become settled in its new environment, its return should take place only after an examination of the merits of the custody rights exercised over it — something which is outside the scope of the Convention. Now, the difficulties encountered in any attempt to state this test of 'integration of the child' as an objective rule resulted in a time-limit being fixed which, although perhaps arbitrary, nevertheless proved to be the 'least bad' answer to the concerns which were voiced in this regard.

108 Several questions had to be faced as a result of this approach: firstly, the date from which the time-limit was to begin to run; secondly, extension of the time-limit; thirdly, the date of expiry of the time-limit. As regards the first point, *i.e.* how to determine the date on which the time-limit should begin to run, the article refers to the wrongful removal or retention. The fixing of the decisive date in cases of wrongful retention should be understood as that on which the child ought to have been returned to its custodians or on which the holder of the right of custody refused to agree to

un prolongement du séjour de l'enfant dans un autre lieu que celui de sa résidence habituelle. En second lieu, la consécration d'un délai unique d'un an, abstraction faite des difficultés rencontrées dans la localisation de l'enfant, constitue une amélioration substantielle du système prévu dans l'article 11 de l'avant-projet élaboré par la Commission spéciale. En effet, par ce biais on a clarifié l'application de la Convention, en éliminant les difficultés inhérentes à la preuve des éventuels problèmes suscités par la localisation de l'enfant. Troisièmement, en ce qui concerne le *terminus ad quem*, l'article retient le moment de l'introduction de la demande, au lieu de la date de la décision, le retard possible dans l'action des autorités compétentes ne devant pas nuire aux intérêts des parties protégées par la Convention.

En résumé, chaque fois que les circonstances que nous venons d'examiner se trouvent réunies dans un cas d'espèce, les autorités judiciaires ou administratives doivent ordonner le retour immédiat de l'enfant, sauf si elles constatent l'existence d'une des exceptions prévues par la Convention elle-même.

109 Le deuxième alinéa répond à la nécessité, ressentie tout au long des travaux préparatoires,[41] d'assouplir les conséquences de l'adoption d'un délai rigide passé lequel la Convention ne pourrait pas être invoquée. La solution finalement retenue[42] étend nettement le domaine d'application de la Convention en consacrant, pour une période indéfinie, une véritable obligation de retourner l'enfant. De toute façon, on ne peut pas ignorer qu'une telle obligation disparaît si on arrive à établir que «l'enfant s'est intégré dans son nouveau milieu». La disposition ne précise point qui doit prouver cette circonstance; pourtant, il semble logique de penser qu'une telle tâche incombe à l'enleveur ou à la personne qui s'oppose au retour de l'enfant, tout en sauvegardant l'éventuel pouvoir d'appréciation des autorités internes à cet égard. En tout cas, la preuve ou la constatation du nouvel enracinement de l'enfant ouvre la porte à la possibilité d'une procédure plus longue que celle visée au premier alinéa. En définitive, tant pour ces raisons que du fait que le retour se produira toujours, par la nature même des choses, beaucoup plus tard qu'un an après l'enlèvement, la Convention ne parle pas dans ce contexte de retour «immédiat», mais simplement de retour.

110 Un problème commun aux deux situations examinées est la détermination du *lieu* où il faut retourner l'enfant. A cet égard, la Convention n'a pas retenu une proposition tendant à préciser que le retour se ferait toujours vers l'Etat de la résidence habituelle de l'enfant avant son déplacement. Certes, une des raisons sous-jacentes à l'idée de retourner l'enfant est le souci d'éviter que la compétence «naturelle» des tribunaux de l'Etat de sa résidence ne soit bafouée par une voie de fait; néanmoins, l'inclusion d'une telle précision dans le texte de la Convention en aurait rendu l'application inutilement rigide. En effet, nous ne devons pas ignorer que ce qu'on entend protéger en luttant contre les enlèvements internationaux d'enfants, c'est le droit de ceux-ci à ne pas être écartés d'un certain milieu qui, parfois, sera fondamentalement familial. Or, si le demandeur n'habite plus l'Etat de la résidence habituelle antérieure au déplacement, le retour de l'enfant dans cet Etat poserait des problèmes pratiques difficiles à résoudre. Le silence de la Convention sur ce point doit donc être interprété comme permettant aux autorités de l'Etat de refuge de renvoyer

[41] Voir Rapport de la Commission spéciale No 92.
[42] Voir Doc. trav. No 25 (Proposition de la délégation de la République fédérale d'Allemagne). et P.-v. Nos 7 et 10.

an extension of the child's stay in a place other than that of its habitual residence. Secondly, the establishment of a single time-limit of one year (putting on one side the difficulties encountered in establishing the child's whereabouts) is a substantial improvement on the system envisaged in article 11 of the Preliminary Draft drawn up by the Special Commission. In fact, the application of the Convention was thus clarified, since the inherent difficulty in having to prove the existence of those problems which can surround the locating of the child was eliminated. Thirdly, as regards the *terminus ad quem*, the article has retained the date on which proceedings were commenced, instead of the date of decree, so that potential delays in acting on the part of the competent authorities will not harm the interests of parties protected by the Convention.
To sum up, whenever the circumstances just examined are found to be present in a specific case, the judicial or administrative authorities must order the return of the child forthwith, unless they aver the existence of one of the exceptions provided for in the Convention itself.

109 The second paragraph answered to the need, felt strongly throughout the preliminary proceedings,[41] to lessen the consequences which would flow from the adoption of an inflexible time-limit beyond which the provisions of the Convention could not be invoked. The solution finally adopted[42] plainly extends the Convention's scope by maintaining indefinitely a real obligation to return the child. In any event, it cannot be denied that such an obligation disappears whenever it can be shown that 'the child is now settled in its new environment'. The provision does not state how this fact is to be proved, but it would seem logical to regard such a task as falling upon the abductor or upon the person who opposes the return of the child, whilst at the same time preserving the contingent discretionary power of internal authorities in this regard. In any case, the proof or verification of a child's establishment in a new environment opens up the possibility of longer proceedings than those envisaged in the first paragraph. Finally, and as much for these reasons as for the fact that the return will, in the very nature of things, always occur much later than one year after the abduction, the Convention does not speak in this context of return 'forthwith' but merely of return.

110 One problem common to both of these situations was determining the *place* to which the child had to be returned. The Convention did not accept a proposal to the effect that the return of the child should always be to the State of its habitual residence before its removal. Admittedly, one of the underlying reasons for requiring the return of the child was the desire to prevent the 'natural' jurisdiction of the courts of the State of the child's residence being evaded with impunity, by force. However, including such a provision in the Convention would have made its application so inflexible as to be useless. In fact, we must not forget that it is the right of children not to be removed from a particular environment which sometimes is a basically family one, which the fight against international child abductions seeks to protect. Now, when the applicant no longer lives in what was the State of the child's habitual residence prior to its removal, the return of the child to that State might cause practical problems which would be difficult to resolve. The Convention's silence on this matter must therefore be understood as allowing the authorities of the State of refuge

[41] See Report of the Special Commission, No 92.
[42] See Working Document No 25 (Proposal of the delegation of the Federal Republic of Germany) and *P.-v.* Nos 7 and 10.

l'enfant directement au demandeur, sans égard au lieu de la résidence actuelle de celui-ci.

111 Le troisième alinéa de l'article 12 introduit une idée tout à fait logique, inspirée par des soucis d'économie procédurale, en vertu de laquelle les autorités qui connaissent d'une affaire peuvent suspendre la procédure ou rejeter la demande, lorsqu'elles ont des raisons de croire que l'enfant a été emmené dans un autre Etat. Les moyens par lesquels elles peuvent arriver à une telle conviction ne sont pas envisagés dans l'article; ils dépendront par conséquent du droit interne de l'Etat concerné.

112 Finalement, *l'article 18* signale que rien dans ce chapitre ne limite le pouvoir de l'autorité judiciaire ou administrative saisie d'ordonner le retour de l'enfant à tout moment. Rédigée sur la base de l'article 15 de l'avant-projet, cette disposition, qui n'impose aucune obligation, souligne la nature non exhaustive, complémentaire, de la Convention. En effet, elle autorise les autorités compétentes à ordonner le retour de l'enfant en invoquant d'autres dispositions plus favorables à ce but. Ceci peut surtout se produire dans les situations envisagées au deuxième alinéa de l'article 12, c'est-à-dire quand, du fait que l'autorité a été saisie après que se soit écoulé plus d'un an depuis le déplacement, le retour peut être refusé si l'enfant s'est intégré dans son nouveau milieu social et familial.

Articles 13 et 20 — Exceptions possibles au retour de l'enfant

113 Dans la première partie de ce Rapport nous avons commenté longuement la justification, l'origine et la portée des exceptions consacrées dans les articles examinés.[43] Nous nous limiterons ici à faire quelques considérations sur sa teneur littérale. En termes généraux, il convient d'insister sur le fait que les exceptions visées dans les deux articles en question ne sont pas d'application automatique, en ce sens qu'elles ne déterminent pas inévitablement le non-retour de l'enfant; par contre, la nature même de ces exceptions est de donner aux juges la possibilité — non pas de leur imposer l'obligation — de refuser le retour dans certaines circonstances.

114 En ce qui concerne *l'article 13*, le paragraphe introductif du premier alinéa met en relief que le fardeau de la preuve des circonstances énoncées aux sous-alinéas *a* et *b* est à la charge de celui qui s'oppose au retour de l'enfant, c'est-à-dire à une personne, institution ou organisme qui peut parfois ne pas coïncider avec l'enleveur. La solution retenue se limite certes à préciser une maxime générale de droit, selon laquelle celui qui invoque un fait (ou un droit) doit le prouver; mais en adoptant cette optique, la Convention a entendu équilibrer la position de la personne dépossédée par rapport à l'enleveur qui, en principe, a pu choisir le for de sa convenance.

115 Les exceptions retenues à la lettre *a* sont établies en raison du fait que la conduite du prétendu gardien permet de douter de l'existence d'un déplacement ou d'un non-retour illicites, au sens de la Convention. D'une part, il s'agit des situations où celui qui avait le soin de la personne de l'enfant n'exerçait pas effectivement le droit de garde à l'époque du déplacement ou du non-retour. La Convention

[43] Voir *supra* Nos 28 à 35.

to return the child directly to the applicant, regardless of the latter's present place of residence.

111 The third paragraph of article 12 introduces a perfectly logical provision, inspired by considerations of procedural economy, by virtue of which the authorities which are acquainted with a case can stay the proceedings or dismiss the application, where they have reason to believe that the child has been taken to another State. The reasons by which they may come to such a conclusion are not stated in the article, and will therefore depend on the internal law of the State in question.

112 Finally, *article 18* indicates that nothing in this chapter limits the power of a judicial or administrative authority to order the return of the child at any time. This provision, which was drafted on the basis of article 15 of the Preliminary Draft, and which imposes no duty, underlines the non-exhaustive and complementary nature of the Convention. In fact, it authorizes the competent authorities to order the return of the child by invoking other provisions more favourable to the attainment of this end. This may happen particularly in the situations envisaged in the second paragraph of article 12, *i.e.* where, as a result of an application being made to the authority after more than one year has elapsed since the removal, the return of the child may be refused if it has become settled in its new social and family environment.

Articles 13 and 20 — Possible exceptions to the return of the child

113 In the first part of this Report we commented at length upon the reasons for, the origins and scope of, the exceptions contained in the articles concerned.[43] We shall restrict ourselves at this point to making some observations on their literal meaning. In general, it is appropriate to emphasize that the exceptions in these two articles do not apply automatically, in that they do not invariably result in the child's retention; nevertheless, the very nature of these exceptions gives judges a discretion — and does not impose upon them a duty — to refuse to return a child in certain circumstances.

114 With regard to *article 13*, the introductory part of the first paragraph highlights the fact that the burden of proving the facts stated in sub-paragraphs *a* and *b* is imposed on the person who opposes the return of the child, be he a physical person, an institution or an organization, that person not necessarily being the abductor. The solution adopted is indeed limited to stating the general legal maxim that he who avers a fact (or a right) must prove it, but in making this choice, the Convention intended to put the dispossessed person in as good a position as the abductor who in theory has chosen what is for him the most convenient forum.

115 The exceptions contained in *a* arise out of the fact that the conduct of the person claiming to be the guardian of the child raises doubts as to whether a wrongful removal or retention, in terms of the Convention, has taken place. On the one hand, there are situations in which the person who had the care of the child did not actually exercise custody rights at the time of the removal or retention. The Conven-

[43] See *supra*, Nos 28 to 35.

n'inclut pas une définition de ce qu'il faut entendre par «exercice effectif» de la garde, mais cette disposition se réfère de façon expresse au soin de la personne de l'enfant; donc, si l'on en compare le texte avec celui de la définition du droit de garde contenue à l'article 5, on peut conclure qu'il y a garde effective quand le gardien s'occupe des soins de la personne de l'enfant, même si, pour des raisons plausibles (maladie, séjour d'études, etc.), dans chaque cas concret, enfant et gardien n'habitent pas ensemble. Il s'ensuit que la détermination du caractère effectif ou non d'une garde doit être établi par le juge d'après les circonstances qui entourent chaque cas d'espèce.
D'ailleurs en mettant en relation ce paragraphe avec la définition du déplacement ou du non-retour illicites de l'article 3, il faut conclure que la preuve que la garde n'était pas effective ne constitue pas une exception à l'obligation de retourner l'enfant lorsque le gardien dépossédé n'exerçait pas de façon effective son droit à cause précisément de l'action de l'enleveur. En effet, la délimitation des situations protégées, contenue à l'article 3, préside toute la Convention et on ne peut interpréter aucun de ses articles en contradiction avec cette délimitation.
D'autre part, la conduite du gardien peut aussi altérer la qualification de l'action du ravisseur, au cas où il aurait consenti ou acquiescé postérieurement au déplacement qu'il combat maintenant. Cette précision a donné la possibilité de supprimer toute référence à l'exercice de «bonne foi» du droit de garde, en évitant simultanément que la Convention puisse être utilisée comme instrument d'un «marchandage» possible entre les parties.

116 Les exceptions consacrées à la lettre *b* concernent des situations dans lesquelles l'enlèvement international d'un enfant s'est vraiment produit, mais où le retour de l'enfant serait contraire à son intérêt, tel qu'il est apprécié dans ce sous-alinéa. Chacun des termes employés dans cette disposition reflète un délicat compromis atteint au cours des travaux de la Commission spéciale et qui s'est maintenu inchangé; en conséquence, on ne peut pas déduire, *a contrario*, des interprétations extensives du rejet, au cours de la Quatorzième session, des propositions tendant à inclure une allusion expresse à l'impossibilité d'invoquer cette exception lorsque le retour de l'enfant pourrait nuire à ses perspectives économiques ou éducatives.[44]

117 Il n'y a rien à ajouter aux commentaires déjà faits sur le deuxième alinéa de cet article (notamment, *supra* No 31).

Quant au troisième alinéa, il contient une disposition de nature très différente; il s'agit, en effet, d'une disposition procédurale qui vise, d'une part, à équilibrer la charge de la preuve imposée à la personne qui s'oppose au retour de l'enfant et d'autre part, à renforcer l'utilité des informations fournies par les autorités de l'Etat de la résidence habituelle de l'enfant. De telles informations, qui peuvent émaner soit de l'Autorité centrale, soit de toute autre autorité compétente, peuvent en particulier être précieuses pour permettre aux autorités requises de constater l'existence des circonstances à la base des exceptions visées aux deux premiers alinéas de cet article.

118 La possibilité reconnue à *l'article 20* de ne pas retourner un enfant quand ce retour «ne serait pas permis par les principes fondamentaux de l'Etat requis sur la sauvegarde des droits de l'homme et des libertés fondamentales», a été placée significativement dans le dernier

[44] Voir Doc. trav. No 12 (*Proposal of the United States delegation*) et No 42 (Proposition de la délégation hellénique), ainsi que le P.-v. No 8.

tion includes no definition of 'actual exercise' of custody, but this provision expressly refers to the care of the child. Thus, if the text of this provision is compared with that of article 5 which contains a definition of custody rights, it can be seen that custody is exercised effectively when the custodian is concerned with the care of the child's person, even if, for perfectly valid reasons (illness, education, etc.) in a particular case, the child and its guardian do not live together. It follows from this that the question of whether custody is actually exercised or not must be determined by the individual judge, according to the circumstances of each particular case.
Moreover, by relating this paragraph to the definition of wrongful removal or retention in article 3, one must conclude that proof that custody was not actually exercised does not form an exception to the duty to return the child if the dispossessed guardian was unable actually to exercise his rights precisely because of the action of the abductor. In fact, the categorization of protected situations, contained in article 3, governs the whole Convention, and cannot be contradicted by a contrary interpretation of any of the other articles.
On the other hand, the guardian's conduct can also alter the characterization of the abductor's action, in cases where he has agreed to, or thereafter acquiesced in, the removal which he now seeks to challenge. This fact allowed the deletion of any reference to the exercise of custody rights 'in good faith', and at the same time prevented the Convention from being used as a vehicle for possible 'bargaining' between the parties.

116 The exceptions contained in *b* deal with situations where international child abduction has indeed occurred, but where the return of the child would be contrary to its interests, as that phrase is understood in this sub-paragraph. Each of the terms used in this provision is the result of a fragile compromise reached during the deliberations of the Special Commission and has been kept unaltered. Thus it cannot be inferred, *a contrario*, from the rejection during the Fourteenth Session of proposals favouring the inclusion of an express provision stating that this exception could not be invoked if the return of the child might harm its economic or educational prospects,[44] that the exceptions are to receive a wide interpretation.

117 Nothing requires to be added to the preceding commentary on the second paragraph of this article (notably in No 31, *supra*.
The third paragraph contains a very different provision which is in fact procedural in nature and seeks on the one hand to compensate for the burden of proof placed on the person who opposes the return of the child, and on the other hand to increase the usefulness of information supplied by the authorities of the State of the child's habitual residence. Such information, emanating from either the Central Authority or any other competent authority, may be particularly valuable in allowing the requested authorities to determine the existence of those circumstances which underlie the exceptions contained in the first two paragraphs of this article.

118 It is significant that the possibility, acknowledged in *article 20*, that the child may not be returned when its return 'would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms' has been placed in the

[44] See Working Documents Nos 12 (Proposal of the United States delegation) and 42 (*Proposition de la délégation hellénique*), and also *P.-v.* No 8.

article du chapitre; on a voulu souligner de la sorte le caractère nettement exceptionnel que doit toujours revêtir son application. Quant à savoir quel est le contenu de cette disposition, nous nous limiterons à faire deux remarques: en premier lieu, même si sa teneur littérale rappelle fortement la terminologie des textes internationaux en matière de protection des droits de l'homme, cette norme ne vise pas les développements atteints sur le plan international; par contre, elle ne concerne que les principes admis dans le droit de l'Etat requis, soit par voie de droit international général ou conventionnel, soit par voie législative interne. En conséquence, pour pouvoir refuser un retour sur la base de cet article, il sera nécessaire que les principes fondamentaux en la matière acceptés par l'Etat requis ne le permettent pas; il ne suffit pas que le retour soit incompatible, ou même manifestement incompatible avec ces principes. En second lieu, l'invocation de tels principes ne devra en aucun cas être plus fréquente ni plus facilement admise qu'elle ne le serait pour régler des situations purement internes. Le contraire serait discriminatoire en soi, c'est-à-dire opposé à l'un des principes fondamentaux les plus généralement reconnus dans les droits internes. Or, l'étude de la jurisprudence des différents pays montre que l'application par le juge ordinaire de la législation concernant les droits de l'homme et les libertés fondamentales se fait avec une prudence qu'il faut s'attendre à voir maintenue à l'égard des situations internationales que vise la Convention.

Article 14 — Assouplissement de la preuve du droit étranger

119 Du moment que la Convention fait dépendre le caractère illicite d'un déplacement d'enfants du fait qu'il se soit produit en violation de l'exercice effectif d'un droit de garde attribué par le droit de la résidence habituelle de l'enfant, il est évident que les autorités de l'Etat requis devront prendre ce droit en considération pour décider du retour de l'enfant. En ce sens, la disposition incluse dans l'article 13 de l'avant-projet,[45] d'après laquelle ces autorités «tiendront compte» du droit de la résidence habituelle de l'enfant pouvait être considérée comme superflue. Cependant, une telle disposition, d'une part, soulignait bien qu'il ne s'agissait pas d'appliquer un droit, mais de l'utiliser comme instrument dans l'appréciation de la conduite des parties; d'autre part, dans la mesure où elle était applicable aux décisions qui pouvaient être à la base du droit de garde violé, elle faisait apparaître la Convention comme une sorte de *lex specialis*, d'après laquelle les décisions visées auraient eu dans l'Etat requis un effet indirect qui ne pouvait pas être conditionné par l'obtention d'un exequatur ou de toute autre modalité de reconnaissance des décisions étrangères.

Puisque le premier aspect découlait nécessairement d'autres dispositions conventionnelles, la teneur actuelle de l'article 14 s'occupe seulement du second. L'article se présente donc comme une disposition facultative concernant la preuve du droit de la résidence habituelle de l'enfant, en vertu de laquelle l'autorité saisie «peut tenir compte directement du droit et des décisions judiciaires ou administratives reconnues formellement ou non dans l'Etat de la résidence habituelle de l'enfant, sans avoir recours aux procédures

[45] Voir Rapport de la Commission spéciale, Nos 102-103.

last article of the chapter: it was thus intended to emphasize the always clearly exceptional nature of this provision's application. As for the substance of this provision, two comments only are required. Firstly, even if its literal meaning is strongly reminiscent of the terminology used in international texts concerning the protection of human rights, this particular rule is not directed at developments which have occurred on the international level, but is concerned only with the principles accepted by the law of the requested State, either through general international law and treaty law, or through internal legislation. Consequently, so as to be able to refuse to return a child on the basis of this article, it will be necessary to show that the fundamental principles of the requested State concerning the subject-matter of the Convention do not permit it; it will not be sufficient to show merely that its return would be incompatible, even manifestly incompatible, with these principles. Secondly, such principles must not be invoked any more frequently, nor must their invocation be more readily admissible than they would be in their application to purely internal matters. Otherwise, the provision would be discriminatory in itself, and opposed to one of the most widely recognized fundamental principles in internal laws. A study of the case law of different countries shows that the application by ordinary judges of the laws on human rights and fundamental freedoms is undertaken with a care which one must expect to see maintained in the international situations which the Convention has in view.

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

119 Since the wrongful nature of a child's removal is made to depend, in terms of the Convention, on its having occurred as the result of a breach of the actual exercise of custody rights conferred by the law of the child's habitual residence, it is clear that the authorities of the requested State will have to take this law into consideration when deciding whether the child should be returned. In this sense, the provision in article 13 of the preliminary draft Convention,[45] that the authorities 'shall have regard to' the law of the child's habitual residence, could be regarded as superfluous. However, such a provision would on the one hand underline the fact that there is no question of applying that law, but merely of using it as a means of evaluating the conduct of the parties, while on the other hand, in so far as it applied to decisions which could underlie the custody rights that had been breached, it would make the Convention appear to be a sort of *lex specialis*, according to which those decisions would receive effect indirectly in the requested State, an effect which would not be made conditional on the obtaining of an *exequatur* or any other method of recognition of foreign judgments.

Since the first aspect of article 14 necessarily derives from other provisions of the Convention, the actual purport of article 14 is concerned only with the second. The article therefore appears as an optional provision for proving the law of the child's residence and according to which the authority concerned 'may take notice directly of the law of, and of judicial or administrative decisions, formally recognized or not in the State of habitual residence of the child, without recourse to the specific procedures for the

[45] See Report of the Special Commission, Nos 102-103.

spécifiques sur la preuve de ce droit ou pour la reconnaissance des décisions étrangères qui seraient autrement applicables». Il n'est pas nécessaire d'insister sur l'importance pratique que cette norme peut avoir pour aboutir aux décisions rapides qui sont à la base du mécanisme conventionnel.

Article 15 — Possibilité de demander une décision ou une attestation des autorités de la résidence habituelle de l'enfant

120 Cet article répond aux difficultés que les autorités compétentes de l'Etat requis peuvent éprouver à statuer sur la demande en retour de l'enfant sans être certaines de l'application au cas d'espèce du droit de la résidence habituelle de celui-ci. Si tel est le cas, les autorités en question peuvent demander «la production par le demandeur d'une décision ou d'une attestation émanant des autorités de l'Etat de la résidence habituelle de l'enfant». A ce propos, nous ferons seulement deux remarques. La première concerne la nature non contraignante de la pétition, en ce sens que le retour de l'enfant ne peut pas être conditionné par son accomplissement; une telle conclusion s'impose en effet au vu tant de la teneur littérale de l'article (qui parle de «demander» et non pas d'«exiger») que de la possibilité, reconnue par la même disposition, du fait que l'obtention des documents sollicités ne soit pas possible dans l'Etat de la résidence de l'enfant. Or, sur ce dernier point, l'obligation que l'article impose aux Autorités centrales d'assister le demandeur pour obtenir la décision ou attestation doit faciliter sa tâche, étant donné que l'Autorité centrale peut produire une attestation concernant son droit en matière de garde, selon l'article 8*f*. En second lieu, le contenu de la décision ou attestation doit porter sur le caractère illicite, au sens de la Convention, du déplacement ou du non-retour; cela signifie, à notre avis, que l'une ou l'autre devra se prononcer sur les deux éléments retenus à l'article 3, et donc constater que le déplacement a interrompu une garde effective et légitime *prima facie*, d'après le droit de la résidence habituelle de l'enfant.

Article 16 — Prohibition de statuer sur le fond du droit de garde

121 En vue de faciliter la réalisation de l'objectif conventionnel relatif au retour de l'enfant, cet article essaie d'éviter qu'une décision sur le fond du droit de garde ne soit prise dans l'Etat de refuge. Dans ce but, il interdit aux autorités compétentes de cet Etat de statuer sur ce point, si elles sont informées que l'enfant concerné a été déplacé ou retenu illicitement, selon la Convention. Cette prohibition disparaîtra: lorsqu'il sera établi qu'il n'y a pas lieu de renvoyer l'enfant, d'après la Convention; ou lorsqu'une période raisonnable ne se sera pas écoulée sans qu'une demande en application de la Convention ait été introduite. Les deux circonstances qui peuvent mettre fin au devoir consacré dans cet article sont très différentes, tant par leur justification que par leurs conséquences. En effet, il est absolument logique de prévoir que l'obligation cesse dès qu'on constate que les conditions pour un retour de l'enfant ne sont pas réunies, soit parce que les parties sont arrivées à une solution amiable, soit parce qu'il y a lieu d'apprécier une des exceptions prévues aux articles 13 et 20; de surcroît, dans de tels cas, la décision sur le fond du droit de garde réglera l'affaire de façon définitive.

Par contre, étant donné que «l'information» sur laquelle on peut justifier une prohibition de statuer doit procéder, soit de l'introduction d'une demande en retour de l'enfant,

proof of that law or for the recognition of foreign decisions which would otherwise be applicable'. There is no need to stress the practical importance this rule may have in leading to the speedy decisions which are fundamental to the working of the Convention.

Article 15 — The possibility of requesting a decision or other determination from the authorities of the child's habitual residence

120 This article answers to the difficulties which the competent authorities of the requested State might experience in reaching a decision on an application for the return of a child through being uncertain of how the law of the child's habitual residence will apply in a particular case. Where this is so, the authorities concerned can request 'that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination'. Only two comments will be made here. The first concerns the voluntary nature of the request, in the sense that the return of the child cannot be made conditional upon such decision or other determination being provided. This conclusion arises in fact as much from the actual terms of the article (which speaks of 'requesting' and not 'requiring') as from the fact acknowledged in the same provision, that it may be impossible to obtain the requested documents in the State of the child's residence. Now, with regard to this last point, the duty which the article places upon Central Authorities to help the applicant obtain the decision or determination must make his task easier, since the Central Authority can provide a certificate concerning its relevant law in terms of article 8(3)(*f*). Secondly, the contents of the decision or certificate must have a bearing upon the wrongful nature, in the Convention sense, of the removal or retention. This means, in our opinion, that one or the other will have to contain a decision on the two elements in article 3, and thus establish that the removal was in breach of custody rights which, *prima facie*, were being exercised legitimately and in actual fact, in terms of the law of the child's habitual residence.

Article 16 — Prohibition against deciding upon the merits of custody rights

121 This article, so as to promote the realization of the Convention's objects regarding the return of the child, seeks to prevent a decision on the merits of the right to custody being taken in the State of refuge. To this end, the competent authorities in this State are forbidden to adjudicate on the matter when they have been informed that the child in question has been, in terms of the Convention, wrongfully removed or retained. This prohibition will disappear when it is shown that, according to the Convention, it is not appropriate to return the child, or where a reasonable period of time has elapsed without an application under the Convention having been lodged. The two sets of circumstances which can put an end to the duty contained in the article are very different, both in the reasons behind them and in their consequences. In fact, it is perfectly logical to provide that this obligation will cease as soon as it is established that the conditions for a child's return have not been met, either because the parties have come to an amicable arrangement or because it is appropriate to consider on the exceptions provided for in articles 13 and 20. Moreover, in such cases, the decision on the merits of the custody rights will finally dispose of the case.
On the other hand, since the 'notice' which may justify the prohibition against deciding upon the merits of the case must derive either from an application for the return of the

directement par le demandeur, soit d'une communication officielle de l'Autorité centrale du même Etat, il est difficile d'imaginer que les cas où l'information n'est pas suivie d'une demande ne seraient pas compris dans la première hypothèse. D'ailleurs, si de telles situations existent, l'ambiguïté de l'expression «période raisonnable» peut conduire à l'adoption d'une décision avant l'expiration de la période d'un an, retenue à l'article 12, alinéa premier; or, dans un tel cas, la décision adoptée coexisterait avec l'obligation de retourner l'enfant, d'après la Convention, posant ainsi un problème dont traite l'article 17.

Article 17 – Existence d'une décision relative à la garde dans l'Etat requis

122 La genèse de cet article montre clairement l'objectif qu'il poursuit: la Première commission a initialement adopté une disposition qui donnait priorité absolue à l'application de la Convention, en faisant prévaloir l'obligation de retourner l'enfant sur toute autre décision relative à la garde, rendue ou susceptible d'être reconnue dans l'Etat requis. En même temps, elle a accepté la possibilité d'une réserve qui aurait permis de refuser ce retour, quand il se serait avéré incompatible avec une décision existant dans l'Etat de refuge, antérieure à «l'enlèvement».[46] Le texte actuel est donc le produit d'un compromis en vue d'éliminer une réserve dans la Convention, sans en diminuer le degré d'acceptabilité par les Etats.[47] En ce sens, on a remanié la disposition originale en soulignant que ne fera pas obstacle au retour de l'enfant la *seule* existence d'une décision, et en donnant la possibilité au juge de prendre en considération les motifs de cette décision pour décider sur la demande de retour.

123 La solution incorporée dans l'article s'accorde parfaitement au but conventionnel de décourager les éventuels enleveurs qui ne pourront protéger leur action ni par une décision «morte», antérieure au déplacement, mais jamais exécutée, ni par une décision obtenue postérieurement et qui sera, dans la plupart des cas, entâchée de fraude. Par conséquent, l'autorité compétente de l'Etat requis devra considérer la demande de retour comme la preuve de ce qu'un élément nouveau est intervenu, qui l'oblige à remettre en question une décision non effective, ou adoptée sur la base de critères abusifs de compétence, ou encore ne respectant pas les droits de défense de toutes les parties concernées. D'ailleurs, étant donné que la décision sur le retour de l'enfant ne concerne pas le fond du droit de garde, les motifs de la décision qui pourront être pris en considération se limitent à ce qui concerne «l'application de la Convention». Quant à la situation provoquée par une décision rendue par les autorités de l'Etat de la résidence habituelle de l'enfant avant son «enlèvement», accordant la garde à l'«enleveur», elle serait normalement résolue par l'application de l'article 3 de la Convention, puisque l'existence du droit de garde réclamé doit être apprécié selon le droit dudit Etat.

Article 19 – Portée des décisions sur le retour de l'enfant

124 Cette disposition exprime l'idée qui se trouve à la base même de toute la Convention; en fait, nous nous en sommes

[46] Doc. trav. No 53, paragraphe 2 (*Proposal of the United Kingdom delegation*), No 32, article XG (*Proposal of the Netherlands delegation*) et No 19 (*Proposal of the Japanese delegation*), ainsi que P.-v. No 12.
[47] Voir Doc. trav. No 77 (Proposition du Président, appuyée par le Rapporteur et les délégations de la République fédérale d'Allemagne, de l'Australie, du Canada, de l'Espagne, de la Finlande, de la France, de l'Irlande, du Royaume-Uni et de la Suisse) et le P.-v. No 17.

child which is submitted directly by the applicant, or from an official communication from the Central Authority of the same State, it is difficult to see how cases in which the notice is not followed by an application would not be contained within the first hypothesis. Moreover, if such situations do exist, the ambiguity in the phrase 'reasonable time' could lead to decisions being taken before the period of one year, contained in article 12, first paragraph, has expired; in such a case, this decision would coexist alongside the duty to return the child, in accordance with the Convention, thus giving rise to a problem which is dealt with in article 17.

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

122 The origins of this article clearly demonstrate the end pursued. The First Commission initially adopted a provision which gave absolute priority to the application of the Convention, by making the duty to return the child prevail over any other decision on custody, which had been issued or was likely to be issued in the requested State. At the same time, it accepted the possibility of a reservation allowing the return of the child to be refused, when its return was shown to be incompatible with a decision existing in the State of refuge, prior to the 'abduction'.[46] The current text is therefore the result of a compromise which was reached in order to eliminate a reservation in the Convention, without at the same time reducing the extent of its acceptability to the States.[47] In this way, the original provision was recast by emphasizing that the sole fact that a decision existed would not of itself prevent the return of the child, and by allowing judges to take into consideration the reasons for this decision in coming to a decision themselves on the application for the child's return.

123 The solution contained in this article accords perfectly with the object of the Convention, which is to discourage potential abductors, who will not be able to defend their action by means either of a 'dead' decision taken prior to the removal but never put into effect, or of a decision obtained subsequently, which will, in the majority of cases, be vitiated by fraud. Consequently, the competent authority of the requested State will have to regard the application for the child's return as proof of the fact that a new factor has been introduced which obliges it to reconsider a decision which has not been put into effect, or which was taken on the basis of exorbitant grounds of jurisdiction, or else failed to have regard to the right of all the parties concerned to state their case. Moreover, since the decision on the return of the child is not concerned with the merits of custody rights, the reasons for the decision which may be taken into consideration are limited to those which concern 'the application of the Convention'. A situation brought about by a decision issued by the authorities of the State of a child's habitual residence prior to its 'abduction' and which granted custody to the 'abductor', would normally be resolved by applying article 3 of the Convention, since the existence of a claimed right to custody must be understood in accordance with the law of that State.

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

124 This provision expresses an idea which underlies the whole of the Convention; as a matter of fact, in this Report

[46] Working Documents Nos 53, paragraph 2 (Proposal of the United Kingdom delegation), 32, article XG (Proposal of the Netherlands delegation), and 19 (Proposal of the Japanese delegation), as well as *P.-v.* No 12.
[47] See Working Document No 77 (Proposal of the Chairman, supported by the Rapporteur and the delegations of Australia, Canada, Finland, France, the Federal Republic of Germany, Ireland, Spain, Switzerland and the United Kingdom) and *P.-v.* No 17.

déjà occupé à plusieurs reprises dans ce Rapport, en ce qui concerne tant sa justification que son commentaire. Cet article se limite à préciser la portée du retour de l'enfant que la Convention essaie de garantir; un retour qui, pour pouvoir être «immédiat» ou «rapide», ne doit pas préjuger du fond du droit de garde et qui cherche précisément à éviter qu'une décision ultérieure sur ce droit puisse être influencée par un changement des circonstances, introduit unilatéralement par une des parties.

we have already been concerned on several occasions as much with the reasons for it as with commenting upon it. This article is restricted to stating the scope of decisions taken regarding the return of the child which the Convention seeks to guarantee, a return which, so as to be 'forthwith' or 'speedy', must not prejudge the merits of custody rights; this provision seeks to prevent a later decision on these rights being influenced by a change of circumstances brought about by the unilateral action of one of the parties.

CHAPITRE IV — DROIT DE VISITE

Article 21

125 Avant tout, il s'impose de reconnaître que la Convention n'essaie pas d'établir une réglementation exhaustive du droit de visite, ce qui aurait sans doute débordé les objectifs conventionnels. En effet, même si l'attention prêtée au droit de visite répond à la conviction qu'il doit être le corollaire normal du droit de garde, au niveau des buts de la Convention il suffisait d'assurer la coopération des Autorités centrales en ce qui concerne, soit son organisation, soit la protection de son exercice effectif. Par ailleurs le temps particulièrement court que lui a consacré la Première commission est peut-être le meilleur indicatif du haut degré de consensus atteint à son égard.

126 Comme nous venons de l'indiquer, l'article repose dans son ensemble sur la coopération entre Autorités centrales. Une proposition visant à introduire, dans un nouvel alinéa, la seule compétence en matière de droit de visite tant des autorités que de la loi de l'Etat de la résidence habituelle de l'enfant a été rejetée à une large majorité.[48] L'organisation et la protection de l'exercice effectif du droit de visite sont donc toujours envisagées par la Convention comme une fonction essentielle des Autorités centrales. En ce sens, le premier alinéa consacre deux points importants: d'un côté la liberté des particuliers pour saisir l'Autorité centrale de leur choix; de l'autre côté, l'objet de la demande adressée à l'Autorité centrale peut être, soit l'organisation d'un droit de visite, c'est-à-dire son établissement, soit la protection de l'exercice d'un droit de visite déjà déterminé. Or, surtout quand la demande vise l'organisation du droit prétendu, ou lorsque son exercice se heurte à l'opposition du titulaire de la garde, le recours à des procédures légales s'imposera très fréquemment; à cet effet, le troisième alinéa de l'article envisage la possibilité pour les Autorités centrales d'entamer ou de favoriser de telles procédures, soit directement, soit par des intermédiaires.

127 Les problèmes abordés au deuxième alinéa sont de nature très différente. Il s'agit d'assurer l'exercice paisible du droit de visite sans qu'il mette en danger le droit de garde. Dans ce sens, cette disposition contient des éléments importants pour atteindre ce but. Au centre même de la solution esquissée, il faut situer, une fois encore, la coopération entre Autorités centrales, une coopération qui vise tant à faciliter l'exercice du droit de visite qu'à garantir l'accomplissement de toute condition à laquelle un tel exercice serait soumis.

[48] Voir Doc. trav. No 31 (*Proposal of the Danish delegation*) et P.-v. No 13.

CHAPTER IV — RIGHTS OF ACCESS

Article 21

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

126 As we have just pointed out, the article as a whole rests upon co-operation among Central Authorities. A proposal which sought to insert a provision in a new paragraph that both the authorities and the law of the State of the child's habitual residence should have exclusive jurisdiction in questions of access rights, was rejected by a large majority.[48] The organizing and securing of the actual exercise of access rights was thus always seen by the Convention as an essential function of the Central Authorities. Understood thus, the first paragraph contains two important points: in the first place, the freedom of individuals to apply to the Central Authority of their choice, and secondly the fact that the purpose of the application to the Central Authority can be either the organization of access rights, *i.e.* their establishment, or the protection of the exercise of previously determined access rights. Now, recourse to legal proceedings will arise very frequently, especially when the application seeks to organize rights which are merely claimed or when their exercise runs up against opposition from the holder of the rights of custody. With this in view, the article's third paragraph envisages the possibility of Central Authorities initiating or assisting in such proceedings, either directly, or through intermediaries.

127 The nature of the problems tackled in the second paragraph is very different. Here it is a question of securing the peaceful enjoyment of access rights without endangering custody rights. This provision therefore contains important elements for the attainment of this end. Once again, co-operation among Central Authorities is placed, of necessity, in the very centre of the picture, and it is a co-operation designed as much to promote the exercise of access rights as to guarantee the fulfilment of any conditions to which their exercise may be subject.

[48] See Working Document No 31 (Proposal of the Danish delegation) and *P.-v.* No 13.

Parmi les moyens concrets d'assurer l'exercice du droit de visite, l'article 21 en retient seulement un, lorsqu'il signale que l'Autorité centrale doit essayer que «soient levés, dans toute la mesure du possible, les obstacles de nature à s'y opposer»; obstacles qui, notamment, peuvent être légaux ou dérivés d'éventuelles responsabilités de type pénal. Le reste est laissé à la coopération entre Autorités centrales, considérée comme la meilleure méthode pour obtenir que les conditions imposées à l'exercice du droit de visite soient respectées. En effet, ce respect constitue, pour le titulaire de la garde, la seule garantie qu'un tel exercice ne serait pas nuisible à ses propres droits.

128 Sur la question de savoir comment les Autorités centrales vont organiser cette coopération en vue d'assurer le caractère «innocent» de l'exercice d'un droit de visite, la Convention ne donne pas d'exemples, car ils auraient pu être interprétés restrictivement. On peut donc mentionner, à titre purement indicatif, comme le faisait le Rapport de l'avant-projet,[49] qu'il convient d'éviter que l'enfant figure sur le passeport du titulaire du droit de visite et, en cas de visite «transfrontière», qu'il serait judicieux que celui-ci prenne l'engagement, devant l'Autorité centrale de l'Etat de la résidence habituelle de l'enfant, de le renvoyer à une date précise en indiquant le ou les endroits où il a l'intention d'habiter avec l'enfant. Une copie d'un tel compromis serait, par la suite, transmise tant à l'Autorité centrale de la résidence habituelle du titulaire du droit de visite, qu'à celle de l'Etat où il a déclaré qu'il séjournerait avec l'enfant. Cela permettrait de connaître à tout moment la localisation de l'enfant et de déclencher la procédure pour assurer son retour, dès l'expiration du délai fixé. Evidemment, aucune des mesures avancées ne peut, à elle seule, assurer l'exercice correct du droit de visite; de toute façon nous ne croyons pas que ce Rapport puisse aller plus loin: les mesures concrètes que pourront prendre les Autorités centrales impliquées dépendront des circonstances de chaque cas d'espèce et de la capacité d'agir reconnue à chaque Autorité centrale.

Of all the specific ways of securing the execise of access rights, article 21 contains only one, where it points out that the Central Authority must try 'to remove, as far as possible, all obstacles to the exercise of such rights', obstacles which may be legal ones or may originate in possible criminal liability. The rest is left up to the co-operation among Central Authorities, which is regarded as the best means of ensuring respect for the conditions imposed upon the exercise of access rights. In fact, such respect is the only means of guaranteeing to the custodian that their exercise will not harm his own rights.

128 The Convention gives no examples of how Central Authorities are to organize this co-operation so as to secure the 'innocent' exercise of access rights, since such examples could have been interpreted restrictively. Mention could however be made purely indicatively as in the Report of the preliminary draft Convention,[49] of the fact that it would be advisable that the child's name not appear on the passport of the holder of the right of access, whilst in 'transfrontier' access cases it would be sensible for the holder of the access rights to give an undertaking to the Central Authority of the child's habitual residence to return the child on a particular date and to indicate also the places where he intends to stay with the child. A copy of such an undertaking would then be sent to the Central Authority of the habitual residence of the holder of the access rights, as well as to the Central Authority of the State in which he has stated his intention of staying with the child. This would enable the authorities to know the whereabouts of the child at any time and to set in motion proceedings for bringing about its return, as soon as the stated time-limit has expired. Of course, none of the measures could by itself ensure that access rights are exercised properly, but in any event we believe that this Report can go no further: the specific measures which the Central Authorities concerned are able to take will depend on the circumstances of each case and on the capacity to act enjoyed by each Central Authority.

CHAPITRE V — DISPOSITIONS GÉNÉRALES

129 Ce chapitre contient une série de dispositions hétérogènes en raison de la matière dont elles s'occupent, mais qu'il fallait traiter en dehors des chapitres précédents. Il s'agit, d'une part de certaines dispositions procédurales communes aux procès visant tant le retour de l'enfant que l'organisation du droit de visite; d'autre part de la réglementation des problèmes posés par l'application de la Convention dans les Etats plurilégislatifs, ainsi que de ses relations avec d'autres conventions et de son domaine d'application *ratione temporis*.

Article 22 — «Cautio judicatum solvi»

130 Suivant une tendance marquée en faveur de la suppression conventionnelle des mesures procédurales discriminatoires envers les étrangers, cet article déclare qu'aucune caution, qu'aucun dépôt, sous quelque dénomination que ce soit, ne peut être imposé dans le contexte de la

[49] Voir Rapport de la Commission spéciale, No 110.

CHAPTER V — GENERAL PROVISIONS

129 This chapter contains a series of provisions which differ according to the topics with which they deal, and which had to be dealt with outside the framework of the foregoing chapters. On the one hand, there are certain procedural provisions common both to the proceedings for the return of the child and to the organization of access rights, and on the other hand there are provisions for regulating the problems arising out of the Convention's application in States with more than one system of law, as well as those which concern its relationship with other conventions and its scope *ratione temporis*.

Article 22 — 'Cautio judicatum solvi'

130 Following a marked tendency to favour the deletion from the Convention of procedural measures which discriminated against foreigners, this article declares that no security, bond or deposit, however described, shall be required within the context of the Convention. Two short

[49] See Report of the Special Commission, No 110.

Convention. Le texte mérite deux brefs commentaires. Le premier concerne le domaine d'application *ratione personae* de la prohibition consacrée; sur ce point, la solution retenue est largement généreuse, comme l'exigeait une convention construite sur l'idée sous-jacente de la protection des enfant.[50] En second lieu, la caution ou dépôt dont sont exonérés les étrangers sont ceux qui, dans chaque système juridique et sous différentes dénominations, visent à garantir qu'ils respecteront le contenu des décisions en ce qui concerne le paiement des frais et dépens découlant d'un procès. Dans un souci de cohérence, l'article précise que la règle joue seulement par rapport aux «procédures judiciaires ou administratives visées par la Convention», en évitant une formule plus large qui aurait pu être interprétée comme s'appliquant, par exemple aux procès visant directement la détermination du fond du droit de garde. D'autre part, il se déduit clairement de ce qui précède qu'elle n'interdit pas d'autres cautions ou dépôts possibles exigés, notamment les cautions imposées en vue de garantir l'exercice correct d'un droit de visite.

Article 23 – Exemption de légalisation

131 Cet article reproduit à la lettre le texte de l'article parallèle de l'avant-projet, qui se limitait à exprimer dans une disposition séparée une idée contenue dans toutes les Conventions de La Haye, impliquant la transmission de documents entre Etats contractants. Il se déduit de sa rédaction ouverte qu'il n'interdit pas seulement les «légalisations diplomatiques», mais toute autre exigence de ce genre; cependant, reste en dehors de cette disposition l'exigence possible d'authentification des copies ou documents privés, selon la loi interne des autorités concernées.

Article 24 – Traduction des documents

132 En ce qui concerne les langues à utiliser dans les relations entre Autorités centrales, la Convention a maintenu la solution retenue dans l'avant-projet, en vertu de laquelle les documents seront envoyés dans leur langue d'origine et accompagnés d'une traduction dans une des langues officielles de l'Etat requis ou, lorsque cette traduction s'avère difficilement réalisable, d'une traduction en français ou en anglais.[51] Sur ce point, d'ailleurs, la Convention admet la possibilité de formuler une réserve aux termes de l'article 42, en vertu de laquelle un Etat contractant pourra s'opposer à l'utilisation d'une des langues de substitution; la réserve ne pourra évidemment pas exclure l'utilisation des deux langues. Finalement, il faut souligner, d'une part que le système établi prétend être un système de facilité *minimum*, qui peut être amélioré par d'autres conventions excluant entre les Etats parties toute exigence de traduction; d'autre part qu'il n'a trait qu'aux communications entre Autorités centrales. En conséquence de quoi, les demandes et autres documents adressés aux autorités judiciaires ou administratives internes devront respecter les règles imposées par la loi de chaque Etat en matière de traduction.

[50] Voir la construction plus restrictive incorporée à l'article 14 de la *Convention tendant à faciliter l'accès international à la justice*, Convention adoptée aussi au cours de la Quatorzième session de la Conférence.
[51] Une solution partiellement différente est consacrée à l'article 7 de la *Convention tendant à faciliter l'accès international à la justice*, citée *supra*.

comments are in order here. The first concerns the scope of the stated prohibition *ratione personae*; on this point, an extremely liberal solution was arrived at, such as was required by a convention built upon the basic idea of protecting children.[50] Secondly, the security, bond or deposit from which foreigners are exempt are those which, in any legal system and howsoever described, are meant to guarantee respect for decisions on the payment of costs and expenses arising out of legal proceedings. The article, in its concern for coherence, states that the rule will apply only to those 'judicial or administrative proceedings falling within the scope of the Convention', and avoids a wider formulation which could have been interpreted as applicable, for example, to proceedings raised directly for a decision on the merits of custody rights. On the other hand, it can clearly be inferred from the preceding observations that it does not prevent other types of security, bond or deposit being required, particularly those which are imposed so as to guarantee the proper exercise of access rights.

Article 23 – Exemption from legalization

131 This article repeats word for word the text of the equivalent article in the preliminary draft Convention, which merely set forth in a separate provision an idea which is to be found in all Hague Conventions, involving the transmission of documents among Contracting States. The fact that it has been drafted in wide terms means that not only 'diplomatic legalization', but also any other similar sort of requirement, is forbidden. However, any requirement of the internal law of the authorities in question that copies or private documents be authenticated remains outside the scope of this provision.

Article 24 – Translation of documents

132 As regards the languages which are to be used as among Central Authorities, the Convention upheld the approach in the Preliminary Draft, by which documents are to be sent in their original language, accompanied by a translation into one of the official languages of the requested State or, where that is not feasible, a translation into French or English.[51] In this matter, the Convention also allows a reservation to be made in terms of article 42, under which a Contracting State can object to the use of one or other of the substitute languages, but this reservation cannot of course exclude the use of both. Finally, it must be emphasized firstly that the scheme which has been chosen offers only a *minimal* facility and may be improved upon by other conventions which exclude any requirement of translation as among States which are Party to them, and secondly that it governs only communications among Central Authorities. Consequently, applications and other documents sent to internal judicial or administrative authorities will have to conform to the rules regarding translation laid down by the law of each State.

[50] See the more restrictive construction which was incorporated in article 14 of the *Convention on International Access to Justice*, also adopted during the Fourteenth Session of the Conference.
[51] A somewhat different approach is found in article 7 of the *Convention on International Access to Justice*, referred to *supra*.

Article 25 — Assistance judiciaire et juridique

133 La disposition sur ce point élargit le domaine de l'assistance judiciaire dans une double perspective: d'un côté, par l'inclusion parmi les éventuels bénéficiaires, en plus des nationaux des Etats parties, des personnes qui auraient dans ces Etats leur résidence habituelle; de l'autre, par l'extension de l'assistance visée à la consultation juridique, un aspect qui n'est pas toujours couvert par les divers systèmes étatiques d'assistance judiciaire.[52]

Article 26 — Frais découlant de l'application de la Convention

134 Le principe exprimé au premier alinéa, d'après lequel chaque Autorité centrale assumera ses propres frais en appliquant la Convention, n'a pas rencontré d'opposition. Il implique avant tout qu'une Autorité centrale ne peut pas réclamer ces frais à une autre Autorité centrale. Quant à savoir quels sont les frais visés, il faut convenir qu'ils dépendront des services réels offerts par chaque Autorité centrale, en accord avec les possibilités d'action que lui reconnaît la loi interne de l'Etat concerné.

135 Par contre, le second alinéa a trait à l'un des points les plus controversés au cours de la Quatorzième session et qui a finalement été résolu par l'acceptation de la réserve figurant au troisième alinéa de ce même article. En effet, on n'a pu mettre fin à la controverse entre les délégations qui voulaient assurer au demandeur la gratuité totale dans l'application de la Convention (en incluant l'exonération des frais et dépens non couverts par le système d'assistance judiciaire et juridique, qui pourraient découler d'un procès ou éventuellement, des frais entraînés par la participation d'un avocat), et les délégations favorables à la solution contraire retenue dans l'avant-projet,[53] que par l'inclusion d'une réserve en faveur des secondes. La raison en est que, étant donné que les différents critères prenaient leurs racines dans la structure des systèmes juridiques impliqués, toute tentative de faire prévaloir, en termes absolus, une position sur l'autre, aurait conduit à l'exclusion *a priori* de la Convention d'un certain nombre d'Etats; or, personne ne souhaitait un tel résultat.[54] Par contre, l'accord a été total en ce qui concerne la norme incluse dans la dernière phrase du deuxième alinéa, qui autorise les Autorités centrales à «demander le paiement des dépenses causées ou qui seraient causées par les opérations liées au retour de l'enfant«.

136 Le quatrième alinéa incorpore une disposition de nature tout à fait différente, en vertu de laquelle les autorités compétentes internes peuvent mettre à la charge de «l'enleveur» ou de celui qui empêche l'exercice du droit de visite, le paiement de certains frais engagés par le demandeur ou en son nom, notamment «des frais de voyage, des frais de représentation judiciaire du demandeur et de retour de l'enfant, ainsi que tous les coûts et dépenses faits pour localiser l'enfant». Mais étant donné qu'il s'agit d'une norme simplement facultative, qui respecte le pouvoir d'appréciation concrète des tribunaux dans chaque cas d'espèce, sa portée semble être surtout symbolique, celle d'un éventuel élément de dissuasion d'une conduite contraire aux objectifs conventionnels.

[52] Voir, dans un sens similaire, les articles 1 et 2 de la *Convention tendant à faciliter l'accès international à la justice*, cité *supra*.
[53] Article 22, alinéa 2*a* de l'avant-projet élaboré par la Commission spéciale.
[54] Voir Doc. trav. Nos 51 et 61 (Propositions de la délégation belge) et Nos 57 et 67 (Propositions des délégations des Etats-Unis, du Canada et des Pays-Bas), ainsi que les P.-v. Nos 11 et 14.

Article 25 — Legal aid and advice

133 The relevant provision here enlarges the scope of legal aid in two respects. Firstly, it includes among the possible beneficiaries persons habitually resident in a Contracting State as well as that State's own nationals. Secondly, the legal aid available is extended to cover legal advice as well, which is not invariably included in the various systems of legal aid operated by States.[52]

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

134 The principle enunciated in the first paragraph, under which each Central Authority bears its own costs in applying the Convention, met no opposition. Quite simply, it means that a Central Authority cannot claim costs from another Central Authority. It must however be admitted that the costs envisaged will depend on the actual services provided by each Central Authority, according to the freedom of action conferred upon it by the internal law of the State concerned.

135 On the other hand, the second paragraph refers to one of the most controversial matters dealt with by the Fourteenth Session, a matter which in the end had to be resolved by accepting the reservation in the third paragraph of the same article. In fact, the argument between those delegations which wanted the applicant to be exempt from all costs arising out of the application of the Convention (including exemption from all costs and expenses not covered by the legal aid and advice system such as those which arise out of legal proceedings or, where applicable, the participation of counsel or legal advisers), and those which favoured the opposite solution adopted by the preliminary draft Convention,[53] was resolved only by including a reservation favouring the latter's point of view. The reason for this was that, since different criteria for the granting of legal aid were rooted in the very structure of the legal systems concerned, any attempt to make one approach prevail absolutely over the others would have led to the automatic exclusion of certain States from the Convention, a result which no one wanted.[54] However, there was total agreement as regards the rule contained in the last sentence of the second paragraph, authorizing the Central Authorities to 'require the payment of the expenses incurred or to be incurred in implementing the return of the child'.

136 The fourth paragraph contains a quite different type of provision, by which the competent internal authorities may direct the 'abductor' or the person who prevented the exercise of access rights, to pay necessary expenses incurred by or on behalf of the applicant, including 'travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child'. But since this rule is only an optional provision, which recognizes the discretion which may be exercised by the courts in each case, its scope would seem to be particularly symbolic, a possible deterrent to behaviour which is contrary to the objects of the Convention.

[52] See, in similar vein, articles 1 and 2 of the *Convention on International Access to Justice*, referred to *supra*.
[53] Article 22(2)(*a*) of the Preliminary Draft prepared by the Special Commission.
[54] See Working Documents Nos 51 and 61 (*Propositions de la délégation belge*) and Nos 57 and 67 (Proposals of the Canadian, Netherlands and United States delegations) and also *P.-v.* Nos 11 and 14.

Article 27 — Possibilité de rejeter une demande

137 Le bon sens indique qu'on ne peut pas obliger les Autorités centrales à accepter les demandes qui se situent hors du domaine d'application de la Convention ou qui sont manifestement sans fondement. Dans ces cas-là, la seule obligation des Autorités centrales est d'informer «immédiatement de leurs motifs le demandeur ou, le cas échéant, l'Autorité centrale qui leur a transmis la demande». Cela signifie que le rejet d'une demande peut être fait tant de l'Autorité centrale directement saisie par le demandeur que d'une Autorité centrale saisie originairement par une autre Autorité centrale.

Article 28 — Procuration exigée par l'Autorité centrale

138 La disposition contenue dans cet article n'est qu'une autre manifestation du point de vue adopté par la Convention en ce qui concerne l'organisation et les compétences des Autorités centrales. Puisqu'on veut éviter que les Etats aient à changer leur droit pour pouvoir l'accepter, la Convention prend en considération le fait que, selon le droit des divers Etats membres de la Conférence, l'Autorité centrale pourra avoir besoin d'une autorisation du demandeur. De fait, la «formule modèle» introduit, comme exemple des pièces produites éventuellement (note au No IX), une référence à la «procuration conférée à l'Autorité centrale», procuration qui devra donc être jointe, chaque fois qu'une Autorité centrale l'exigera, aux éléments envisagés à l'article 8 et aux demandes introduites en application de l'article 21.

Article 29 — Saisine directe des autorités internes compétentes

139 La Convention n'essaie pas d'établir un système exclusif entre les Etats contractants pour obtenir le retour des enfants. Elle se présente au contraire comme un instrument complémentaire se proposant d'aider les personnes dont le droit de garde ou de visite a été violé. Par conséquent, ces personnes ont le choix entre recourir aux Autorités centrales — c'est-à-dire utiliser les mécanismes propres à la Convention — ou bien choisir la voie d'une action directe devant les autorités compétentes en matière de garde et de visite de l'Etat où se trouve l'enfant. Dans la seconde hypothèse, donc quand les personnes concernées optent pour saisir directement les autorités en question, elles peuvent encore faire un deuxième choix et introduire leur demande «par application ou non des dispositions de la Convention». Dans le dernier cas, évidemment, les autorités ne seront pas tenues d'appliquer les dispositions conventionnelles, à moins que l'Etat ne les ait converties en règles internes, suivant en cela l'article 2 de la Convention.

Article 30 — Recevabilité des documents

140 Par cette disposition, la Convention a entendu résoudre le problème existant dans certains Etats membres de la Conférence en ce qui concerne la recevabilité des documents. Il s'agit donc simplement de faciliter l'admission par les autorités judiciaires ou administratives des Etats contractants des demandes introduites directement ou par l'intermédiaire d'une Autorité centrale, ainsi que des documents pouvant être annexés ou fournis par les Autorités centrales. En effet, on ne doit pas interpréter cet article comme incorporant une règle sur la valeur de preuve qu'il faut accorder à ces documents; ce problème tombe absolument hors du domaine conventionnel.[55]

[55] Voir article 26 de l'avant-projet, Doc. trav. No 49 (*Proposal of the United States delegation*) et P.-v. No 11.

Article 27 — Possible rejection of an application

137 Common sense would indicate that Central Authorities cannot be obliged to accept applications which belong outside the scope of the Convention or are manifestly without foundation. In such cases, the only duty of Central Authorities is to 'inform forthwith the applicant or the Central Authority through which the application was submitted, as the case may be, of its reasons'. This means that an application may be rejected by the Central Authority to which the applicant applied directly as well as by a Central Authority which was initially brought into the case by another Central Authority.

Article 28 — Authorization required by the Central Authority

138 The provision in this article is merely another example of the Convention's attitude to the organization and powers of Central Authorities. Since the aim is to avoid requiring States to change their own law in order to be able to accept the Convention, the Convention takes into consideration the fact that, in terms of the law of various Member States of the Conference the Central Authority would have the power to require some authorization from the applicant. As a matter of fact, the 'model form', as an example of the documents which might be attached to an application (see note to No IX), brings in a reference to 'the authorization empowering the Central Authority to act on behalf of the applicant', an authorization which, every time it is required by a Central Authority, will have to accompany those matters listed in article 8 and the applications submitted under article 21.

Article 29 — Direct application to competent internal authorities

139 The Convention does not seek to establish a system for the return of children which is exclusively for the benefit of the Contracting States. It is put forward rather as an additional means for helping persons whose custody or access rights have been breached. Consequently, those persons can either have recourse to the Central Authorities — in other words, use the means provided in the Convention — or else pursue a direct action before the competent authorities in matters of custody and access in the State where the child is located. In the latter case, whenever the persons concerned opt to apply directly to the relevant authorities, a second choice is open to them in that they can submit their application 'whether or not under the provisions of this Convention'. In the latter case the authorities are not of course obliged to apply the provisions of the Convention, unless the State has incorporated them into its internal law, in terms of article 2 of the Convention.

Article 30 — Admissibility of documents

140 This provision was intended to resolve the problem which existed in some Member States regarding the admissibility of documents. It merely seeks to facilitate admission before the judicial or administrative authorities of Contracting States of applications submitted either directly or through the intervention of a Central Authority, as well as documents which may be attached or supplied by the Central Authorities. In fact, this article must not be understood to contain a rule on the evidential value which is to be placed on these documents, since that problem falls quite outwith the scope of the Convention.[55]

[55] See article 26 of the preliminary draft Convention, Working Document No 49 (Proposal of the United States delegation) and *P.-v.* No 11.

Articles 31 à 33 — Application de la Convention en ce qui concerne les Etats plurilégislatifs

141 Ces trois articles règlent l'application de la Convention en ce qui concerne les Etats à systèmes juridiques non unifiés. A l'instar des dernières conventions élaborées par la Conférence de La Haye, une distinction est faite entre les Etats ayant plusieurs systèmes de droit d'application territoriale, et les Etats ayant plusieurs systèmes de droit applicables à des catégories différentes de personnes. Plus précisément, les solutions retenues s'inspirent de celles adoptées dans les conventions élaborées au cours de la Treizième session de la Conférence.[56]
En ce qui concerne le premier groupe d'Etats, l'article 31 précise comment il faut comprendre, d'une part la référence à la résidence habituelle de l'enfant, et d'autre part la référence au droit de l'Etat d'une telle résidence.
En ce qui concerne le deuxième groupe d'Etats, l'article 32 confie la détermination du droit dont il faut tenir compte aux règles en vigueur dans chaque Etat.
Finalement, sur le contenu de ces deux articles, il faut souligner que leur intérêt ne se limite pas aux Etats directement envisagés; en effet, les normes en question devront être prises en considération par tout Etat contractant dans ses relations avec eux, par exemple chaque fois qu'un enfant sera déplacé d'un de ses Etats vers un autre Etat ayant un système de droit unifié ou non.

142 D'autre part, l'article 33 délimite les cas dans lesquels les Etats plurilégislatifs sont tenus d'appliquer la Convention, en excluant les situations où un Etat ayant un système de droit unifié ne serait pas tenu de le faire. En somme, cet article se limite à déclarer que la Convention n'est applicable qu'aux relations internationales, en même temps qu'il qualifie de relations internes toutes celles qui se passent à l'intérieur d'un Etat, plurilégislatif ou non.

Article 34 — Relations avec d'autres conventions

143 Cet article a été commenté dans la première partie de ce Rapport (Nos 39 et 40).

Article 35 — Domaine d'application ratione temporis *de la Convention*

144 La question de déterminer si la Convention devait s'appliquer aux enlèvements qui se seraient produits entre deux Etats contractants antérieurement à son entrée en vigueur, ou seulement à ceux qui auraient eu lieu après cette date, s'est vue proposer différentes solutions au cours de la Quatorzième session. La première était sans doute la plus généreuse, puisqu'elle prévoyait l'application de la Convention à tout «enlèvement», indépendamment du moment de sa réalisation.[57] Cependant, cette décision a été suivie plus tard par l'acceptation de la possibilité pour tout Etat contractant de faire une déclaration en vue de limiter l'application de la Convention aux «enlèvements» intervenus après son entrée en vigueur dans cet Etat.[58] La situation restait ainsi largement ouverte, tout en reconnaissant néanmoins à chaque Etat la possibilité de restreindre l'application de la Convention, s'il le jugeait nécessaire. Il est clair

[56] Voir notamment le Rapport de M. von Overbeck sur la Convention sur la loi applicable aux régimes matrimoniaux, *Actes et documents de la Treizième session*, tome II, p. 374 et s.
[57] Voir Doc. trav. No 53 (*Proposal of the United Kingdom delegation*) et P.-v. No 13.
[58] Voir Doc. trav. No 68 (Proposition de la délégation du Canada) et P.-v. No 15.

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

141 These three articles govern the Convention's application to States with non-unitary legal systems. As in recent conventions of the Hague Conference, a distinction has been drawn between States which have several systems of law applicable in different territorial units, and those with several systems of law applicable to different categories of persons. To be more precise, the solution adopted received its inspiration from that reached by the conventions drawn up during the Thirteenth Session of the Conference.[56]

As regards the first group of States, article 31 explains how references to the child's habitual residence and to the law of the State of its habitual residence are to be understood.

As regards the second type, article 32 leaves the determination of the applicable law to the rules in force in each State.

Finally, it must be emphasized that the substantive provisions of these two articles are not restricted to the States directly concerned. In actual fact, the relevant rules are to be taken into consideration by all Contracting States in their relations with each other, for example whenever a child is removed from one of those States to another State with a unified or non-unified legal system.

142 On the other hand, article 33 limits the occasions where States with more than one system of law are obliged to apply the Convention, by excluding those in which a State with a unified system of law would not be bound to do so. Put shortly, this article merely states that the Convention applies only at the international level and at the same time characterizes as internal all those relationships which arise within a State, whether or not that State has more than one system of law.

Article 34 — Relationship to other conventions

143 This article was commented upon in the first part of the Report (Nos 39 and 40).

Article 35 — Scope of the Convention ratione temporis

144 The question as to whether the Convention should apply to abductions involving two States and which occurred prior to its entry into force or only to those occurring thereafter, was met with different proposed solutions during the Fourteenth Session. The first proposal was undoubtedly the most liberal, since it envisaged the Convention's applying to all 'abductions', irrespective of when it came into effect.[57] However, this decision was followed by acceptance of the idea that any Contracting State could declare that the Convention would apply only to 'abductions' which occurred after its entry into force in that State.[58] The situation therefore remained largely unresolved, with each State, where it deemed this necessary, being able to limit the Convention's application. It was clear that the operation of such declarations within a convention which is clearly bilateral in its application would create some technical problems, to

[56] See in particular Mr von Overbeck's Report on the Convention on the Law Applicable to Matrimonial Property Regimes, in *Acts and Documents of the Thirteenth Session*, Book II, p. 374 *et seq.*
[57] See Working Document No 53 (Proposal of the United Kingdom delegation) and *P.-v.* No 13.
[58] See Working Document No 68 (Proposal of the Canadian delegation) and *P.-v.* No 15.

que le jeu de telles déclarations dans le contexte d'une convention d'application nettement bilatérale posait quelques problèmes techniques. Pour y pallier, la Première commission s'est finalement prononcée en faveur de la solution contraire à la première, c'est-à-dire pour la plus restrictive. C'est donc celle qui apparaît à l'article 35, d'après lequel la Convention ne s'applique entre les Etats contractants, «qu'aux enlèvements ou aux non-retours illicites qui se sont produits après son entrée en vigueur dans ces Etats».[59] D'autre part, de l'ensemble des dispositions conventionnelles (et notamment de l'article 12, alinéa 2) on doit déduire qu'il n'existe pas de limite pour introduire l'action, dès lors que l'enfant n'a pas atteint l'âge de seize ans, selon l'article 4. En effet, l'introduction de l'action après l'expiration de la période d'un an, envisagée au premier alinéa de l'article 12, ne fait que nuancer l'obligation de faire retourner l'enfant, en admettant qu'elle ne s'impose pas lorsqu'il est établi que l'enfant s'est intégré dans son nouveau milieu.

145 La disposition a sans doute le mérite d'être claire. On ne peut cependant pas ignorer que son application est destinée à frustrer les expectatives légitimes des particuliers concernés. Mais étant donné qu'il s'agit en définitive d'une restriction à l'obligation de retourner l'enfant, rien ne s'oppose à ce que deux ou plusieurs Etats conviennent entre eux d'y déroger conformément à l'article 36, c'est-à-dire qu'ils se mettent d'accord pour appliquer rétroactivement la Convention.
D'ailleurs, la disposition ne concerne que les dispositions conventionnelles visant le retour de l'enfant. En effet, la réglementation conventionnelle du droit de visite ne peut être invoquée, par la nature même des choses, qu'à propos du refus de son exercice s'étant produit ou continuant à se produire après l'entrée en vigueur de la Convention.

Article 36 — Possibilité de limiter conventionnellement les restrictions au retour de l'enfant

146 En concordance avec les principes généraux qui inspirent la Convention et sur la base de l'expérience d'autres Conventions de la Conférence de La Haye,[60] cet article admet la possibilité que deux ou plusieurs Etats contractants conviennent de déroger entre eux aux dispositions de la Convention pouvant impliquer des restrictions au retour des enfants, notamment celles visées aux articles 13 et 20. Cela montre d'une part le caractère de compromis de certaines dispositions conventionnelles et la possibilité d'adopter des critères plus favorables à l'objectif principal de la Convention dans les relations entre Etats de conceptions juridiques très homogènes, et d'autre part que, comme nous l'avons souligné à plusieurs reprises au cours de ce Rapport, la Convention n'est inspirée par aucune idée d'exclusivité dans son domaine d'application. Or, si de telles conventions complémentaires voient le jour, il faudrait éviter un effet négatif, redouté par certaines délégations: le fait qu'en dehors du domaine d'application géographiquement restreint de tels accords, les Etats parties soient tentés de donner une interprétation large aux restrictions incluses dans cette Convention, de manière à affaiblir sa portée.[61]

[59] Voir Doc. trav. No 81 (Proposition du Président avec l'accord des délégations de l'Autriche, de la République fédérale d'Allemagne, de la Suisse et du Royaume-Uni) et P.-v. No 18. Une proposition orale du Rapporteur tendant à étendre la Convention aux situations créées au cours de l'année antérieure à son entrée en vigueur n'a pas été retenue.
[60] Par exemple la *Convention relative à la procédure civile, du premier mars 1954.*
[61] Voir sur cet article, les Doc. trav. No 70 (Proposition des délégations belge, française et luxembourgeoise) et No 80 (*Proposal of the United States delegation*), ainsi que les P.-v. Nos 15 et 18.

alleviate which the First Commission finally pronounced itself in favour of the opposite solution to that first adopted, *i.e.* the more restrictive. It is seen therefore in article 35, by which the Convention is to apply as among Contracting States 'only to wrongful removals or retentions occurring after its entry into force in those States'.[59] On the other hand, the inference must be drawn from the Convention's provisions as a whole (and in particular article 12, second paragraph) that no time-limit is imposed on the submission of applications, provided the child has not reached sixteen years of age, in terms of article 4. In fact, the commencement of an action after the expiry of the one year period stated in the first paragraph of article 12, merely lessens the obligation to cause the child to be returned, whilst it is recognized that the obligation will not arise if the child is shown to have become settled in its new environment.

145 The provision certainly has the merit of being clear. However, it cannot be denied that its application is fated to frustrate the legitimate expectations of the individuals concerned. But since in the last resort it is a limitation on the duty to return the child, it in no way prevents two or more States agreeing amongst themselves to derogate from it in terms of article 36, by agreeing to apply the Convention retroactively.

Moreover, the provision concerns only those provisions in the Convention regarding the return of the child. In actual fact, the provision of the Convention governing access rights can, in the nature of things, only be invoked where their exercise is refused or continues to be refused after the Convention has come into force.

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

146 This article, conform to the general principles underlying the Convention, which are based on the experience derived from other Hague Conventions,[60] allows two or more Contracting States to agree to derogate as amongst themselves from any of the Convention's provisions which may involve restrictions on the return of the child, in particular those contained in articles 13 and 20. This demonstrates, on the one hand, the compromise character of some of the Convention's provisions and the possibility that criteria more favourable to the principal object of the Convention may be adopted to govern relationships among States which share very similar legal concepts, while on the other hand, as we have emphasized on several occasions throughout this Report, the Convention is not to be regarded as in any way exclusive in its scope. Now, if such supplementary conventions see the light of day, one negative consequence, feared by some delegations, will have to be avoided, namely that beyond the geographical limits of such agreements, the States concerned will be tempted to interpret the limitations contained in the Convention in a wide sense, thus weakening its scope.[61]

[59] See Working Document No 81 (Proposal of the Chairman with the consent of the delegations of Austria, the Federal Republic of Germany, Switzerland and the United Kingdom) and *P.-v.* No 18. An oral proposal of the Reporter that the Convention be extended to cover situations which occurred during the year prior to its entry into force was not accepted.
[60] See, for example, the *Convention of 1 March 1954 on civil procedure.*
[61] See Working Documents Nos 70 (*Proposition des délégations belge, française et luxembourgeoise*) and 80 (Proposal of the United States delegation) as well as *P.-v.* Nos 16 and 18.

147 Les clauses finales contenues aux articles 37 à 45 de la Convention sont rédigées conformément aux dispositions adoptées à cet effet par les dernières sessions de la Conférence de La Haye. Il n'est donc pas nécessaire d'en faire le commentaire détaillé et nous nous limiterons à quelques brèves remarques à leur propos.
La première concerne l'adaptation des clauses finales à la décision adoptée en ce qui concerne l'ouverture sous condition de la Convention à des Etats non-membres de la Conférence. Ce point ayant été déjà abordé auparavant,[62] il suffit de souligner ici que la nature semi-fermée de la Convention provient du mécanisme de la déclaration d'acceptation par les Etats parties et non pas de l'existence d'une restriction quelconque relative aux Etats pouvant y adhérer (article 38).

148 Quant au «degré» de l'acceptation de la Convention par les Etats qui comprennent deux ou plusieurs unités territoriales dans lesquelles des systèmes de droit différents s'appliquent aux matières régies par la Convention, l'article 40 prévoit qu'ils pourront déclarer — au moment de la signature, de la ratification, de l'acceptation, de l'approbation ou de l'adhésion — que la Convention s'applique à toutes ou seulement à certaines des unités territoriales en question. Cette déclaration pourra être modifiée à tout moment par une autre déclaration plus extensive. En effet, une modification de la déclaration tendant à restreindre l'application de la Convention devrait être considérée comme une dénonciation partielle selon l'article 44, alinéa 3.
D'après l'article 39, la même solution s'applique pour les territoires représentés sur le plan international par certains Etats; en effet, bien que de telles situations soient appelées à disparaître comme une conséquence logique de l'application progressive du principe qui proclame le droit des peuples à disposer d'eux-mêmes, la Conférence a considéré souhaitable de maintenir une clause qui peut encore s'avérer utile.

149 Il convient enfin de dire un mot sur l'article 41, la disposition étant tout à fait nouvelle dans une Convention de La Haye; elle fut introduite, de même d'ailleurs que dans l'autre Convention adoptée lors de la Quatorzième session, à savoir la *Convention tendant à faciliter l'accès international à la justice*, à la demande expresse de la délégation australienne.
Le but de cet article est de préciser que la ratification de la Convention par un Etat n'entraîne aucune conséquence quant à la répartition interne des autorités de cet Etat dans le partage des pouvoirs exécutif, judiciaire et législatif.
La chose semble aller de soi, et c'est bien dans ce sens qu'il faut comprendre l'intervention du chef de la délégation canadienne lors des débats de la Quatrième commission où fut décidée l'introduction de cette disposition dans les deux Conventions (voir P.-v. No 4 de la Séance plénière); la délégation canadienne, exprimant ouvertement l'opinion d'un grand nombre de délégations, estimait l'introduction de cet article dans les deux Conventions comme inutile. L'article 41 fut néanmoins adopté, en grande partie pour donner satisfaction à la délégation australienne, pour qui l'absence d'une telle disposition semblait poser une difficulté constitutionnelle insurmontable.

150 En ce qui concerne le problème des réserves, la Con-

[62] Voir *supra* No 42.

147 The final clauses in articles 37 to 45 of the Convention have been drafted in accordance with similar provisions adopted by the most recent sessions of the Hague Conference. No detailed commentary is therefore necessary and we shall make only a few brief comments on them.

Firstly, the adaptation of the final clauses to the decision which was taken on the conditional opening of the Convention to non-Member States. This point has been dealt with earlier,[62] and it is sufficient merely to emphasize here that the 'semi-closed' character of the Convention derives from the means by which States Parties may declare their acceptance and not from any restriction placed on the States which may accede to it (article 38).

148 With regard to the 'degree' of acceptance of the Convention by States which contain two or more territorial units in which different systems of law are applicable to matters dealt with in this Convention, article 40 provides that they may declare — at the time of signature, ratification, acceptance, approval or accession — that the Convention shall extend to all its territorial units or only to one or more of them. Such a declaration can be modified at any time by another more extensive declaration. Actually, any modification of a declaration which tends to limit the applicability of the Convention ought to be regarded as a partial denunciation in terms of article 44, third paragraph.

Under article 39, the same result will occur with regard to States which are responsible for the international relations of other territories. Although such situations are meant to disappear as a logical consequence of the progressive application of the principle which proclaims the right of peoples to self-determination, the Conference felt it advisable to keep a clause which might yet prove to be useful.

149 Finally, a word should be said on article 41, since it contains a wholly novel provision in Hague Conventions. It also appears in the other Convention adopted at the Fourteenth Session, *i.e.* the *Convention on International Access to Justice*, at the express request of the Australian delegation.

This article seeks to make it clear that ratification of the Convention by a State will carry no implication as to the internal distribution of executive, judicial and legislative powers in that State.
This may seem self-evident, and this is the point which the head of the Canadian delegation made during the debates of the Fourth Commission where it was decided to insert such a provision in both Conventions (see *P.-v.* No 4 of the Plenary Session). The Canadian delegation, openly expressing the opinion of a large number of delegations, regarded the insertion of this article in the two Conventions as unnecessary. Nevertheless, article 41 was adopted, largely to satisfy the Australian delegation, for which the absence of such a provision would apparently have created insuperable constitutional difficulties.

150 On the question of reservations, the Convention

[62] See *supra*, No 42.

vention ne permet que celles prévues aux articles 24 et 26. Aucune autre réserve ne sera admise. D'autre part, l'article 42 précise, comme il est habituel, qu'un Etat pourra «à tout moment, retirer une réserve qu'il aura faite».

151 Finalement, il convient de souligner l'importance accrue de l'obligation de notification assumée par le Ministère des Affaires Etrangères du Royaume des Pays-Bas (article 45), dans le contexte d'une convention comme celle-ci, en raison notamment du jeu des déclarations d'acceptation des adhésions éventuelles.

Madrid, avril 1981

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allows only those provided for in articles 24 and 26. No other reservation is permitted. Moreover, article 42 sets forth the customary provision whereby a State can 'at any time withdraw a reservation it has made'.

151 Finally, the importance placed on the duty which was assumed by the Ministry of Foreign Affairs of the Kingdom of the Netherlands (article 45) to notify Member States and Contracting States should be emphasized, particularly in view of the role played by declarations of acceptance of future accessions in a convention such as this.

Madrid, April 1981

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