REPORT OF THE SECOND SPECIAL COMMISSION MEETING TO REVIEW THE OPERATION OF THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION HELD 18-21 JANUARY 1993

PART ONE:

Introduction

Para. 1 The second meeting of the Special Commission was held at the Peace Palace in The Hague, 18-21 January 1993. Forty-four countries were represented, twenty-three of which were Parties to the *Convention of 25 October 1980 on the civil aspects of international child abduction*, twenty-one not yet being Parties to this Convention. Two intergovernmental organizations (IGOs) and four international non-governmental organizations (INGOs) were represented by observers.

Para. 2 By way of comparison, thirty countries were represented at the first meeting of the Special Commission in October 1989, ten of which were then Parties to the Convention and twenty of which were not yet Parties, while two IGOs and seven INGOs were represented by observers.

Para. 3 Mr J.C. Schultsz, President of the Netherlands Standing Government Committee on Private International Law, opened the meeting and welcomed all participants. Mr Peter Pfund, Expert of the United States of America, who had chaired the first meeting of the Special Commission was unanimously elected to serve again. Mrs Alegría Borrás, Expert of Spain, was unanimously elected to serve as Vice-Chair. The Chairman expressed special pleasure at receiving representatives of Burkina Faso for the first time at a Hague Conference meeting.

Para. 4 This second meeting was being held pursuant to a recommendation adopted at the first meeting on 26 October 1989, to the effect that the Secretary General should convene a second session of the Special Commission before 1993. For technical reasons, it had been necessary to reschedule this meeting in January of 1993.

Para. 5 The Special Commission of January 1993 had before it the following preliminary documents:

- Preliminary Document No 1 of November 1992, *Checklist of issues to be considered at the second meeting of the Special Commission to review the*

operation of the Hague Convention on the civil aspects of international child abduction, drawn up by Adair Dyer, First Secretary at the Permanent Bureau.

- Preliminary Document No 2 of November 1992, *Summaries of German decisions on the Hague Convention of 25 October 1980 on the civil aspects of international child abduction* (illustrative document prepared by Dagmar Schreiber for the Permanent Bureau of the Hague Conference on private international law).
- Preliminary Document No 3 of January 1993, *Select Bibliography* for the attention of the Special Commission of January 1993.

- Preliminary Document No 4 of January 1993, *Statistics submitted by the Central Authorities of Austria, Spain, the United States, Israel and Switzerland*.

- Preliminary Document No 5 of January 1993, *Lists country-by-country of court decisions on the Hague Convention of 25 October 1980 on the civil aspects of international child abduction*.

During the meeting statistics were submitted by a number of additional countries and these were issued as addenda to Preliminary Document No 4. Likewise, copies of additional court decisions were submitted by certain countries and these were listed in addenda to Preliminary Document No 5.

Para. 6 Preliminary Document No 1, the "Checklist of issues to be considered", was adopted by the Special Commission as its agenda for the meeting. Additional items for discussion had been proposed in Working Documents Nos 1, 2 and 3, submitted respectively by the Norwegian, French and Austrian Central Authorities, and these points were to be taken up in their appropriate place. Moreover, the representative of Interpol was to be present at the morning meeting on 19 January 1993 and thus item 46 on the Checklist, dealing with the interface between civil and criminal proceedings, would be taken up out of order at that time.

Para. 7 The Chairman noted that among the important benefits to be gained from a meeting of this type, which was concerned with monitoring and improving the operation of the Convention, were the personal contacts and exchanges of views and experiences among the Central Authorities. Thus the rhythm of the sessions would be adjusted as necessary so as to allow the maximum

possible opportunity for these direct personal contacts, which were so important, to take place. Since the last meeting of the Special Commission in October 1989 the number of States Parties to the Convention had doubled from fourteen to twenty-eight. Thus the need for primary emphasis on building and maintaining an effective network among the Central Authorities had become even more critical than before.

It was noted and there was general agreement that there had been a positive evolution of Spain's performance as a part of this growing network since the Special Commission meeting of October 1989.

Para. 8 The backdrop to the meeting was formed by the more than 250 court decisions in total coming from more than a dozen countries concerning the application of the Convention. The broader background was made up of the statistics of cases handled under the Convention, which by the end of the meeting had been submitted by seventeen States Parties to the Convention.

Para. 9 This Report, drawn up by the Permanent Bureau, synthesizes the discussions and conclusions of the Special Commission. It is intended to assist the Central Authorities and other persons concerned with the application of the Convention in carrying out their daily tasks.

Para. 10 An effort was made to crystallize the Special Commission's "Conclusions on certain important points discussed by the Special Commission" (Commission Work. Doc. No 12 E and F). There was no vote on this text but the Permanent Bureau was authorized to edit the draft presented to the Special Commission during the last day of its discussions and add, as might be necessary, conclusions on the points reserved in the Working Document.

Para. 11 Before going on therefore to review the discussions on all of the questions raised in the Checklist, this Report sets out these edited conclusions, as follows:

PART TWO:

CONCLUSIONS ON CERTAIN IMPORTANT POINTS DISCUSSED BY THE SPECIAL COMMISSION

Conclusion 1 The Convention works well in practice and the States Parties are generally happy with its operation. Nonetheless, improvement can be made in a number of areas.

Conclusion 2 The key concepts which determine the scope of the Convention are not dependent for their meaning on any single legal system. Thus the expression "rights of custody", for example, does not coincide with any particular concept of custody in a domestic law, but draws its meaning from the definitions, structure and purposes of the Convention.

Conclusion 3 The Central Authorities designated by the States Parties play a key role in making the Convention function. They should act dynamically and should be provided with the staff and other resources needed in order to carry out their functions effectively.

Conclusion 4 Children who have been wrongfully removed or retained abroad are to be returned promptly, according to the Convention. Central Authorities should acknowledge receipt of an application immediately and endeavour to provide follow-up information rapidly. Practical arrangements for the safe return of children should be under contemplation from the commencement of the application.

Conclusion 5 Access to children is a normal counterpart to rights of custody. It would be desirable to have more information about the ultimate arrangements made for the exercise of access following the wrongful removal or retention of a child, both in cases where the child has been returned and in cases where return has been refused.

Conclusion 6 Interpol can play a constructive and helpful role in locating abducted children. It is not necessary to institute criminal proceedings in order to seek such help, which may be obtained on the basis of a missing persons report, and indeed criminal proceedings may be counter-productive in particular cases. Central Authorities of a number of countries systematically discourage the institution of such proceedings. It is up to each country to determine what use could be made of the INTERPOL communications network, in connection with child abductions.

Conclusion 7 Delay in legal proceedings is a major cause of difficulties in the operation of the Convention. All possible efforts should be made to expedite such proceedings. Courts in a number of countries normally decide on requests for return of a child on the basis only of the application and any documents or statements in writing submitted by the parties, without taking oral testimony or requiring the presence of the parties in person. This can serve to expedite the disposition of the case. The decision to return the child is not a decision on the merits of custody.

Conclusion 8 Due to the reservation taken under Article 26 of the Convention and the lack of a comprehensive legal aid system, the problem of obtaining practising lawyers to handle applications on a *pro bono* basis in the United States of America remains a hindrance to the rapid and efficient operation of the Convention in a significant number of cases where the United States is the requested State. This problem arises when the applicant cannot afford attorney's fees, except in the States of California and Washington where the Attorney General's office and local public prosecutors act as the intermediary of the United States Central Authority under Article 7 *f* of the Hague Convention. The Central Authority in the United States is continuing its efforts to assist in obtaining attorneys willing to act *pro bono* and efforts are beginning within the local bar associations in the other States to alleviate this problem.

Conclusion 9 The Permanent Bureau cannot, with its present resources, monitor all of the case law under the Convention in the different States Parties and communicate this case law to the Central Authorities and to practising lawyers. The Permanent Bureau, however, should make an effort to collect the most significant decisions handed down

by the courts and, where possible, communicate the essential aspects of these to the Central Authorities. For this purpose, a standard form was envisaged which Central Authorities might use in reporting court decisions to the Permanent Bureau.[1] This effort did not preclude that the Central Authorities might also send copies of routine court decisions to the Permanent Bureau for collection and ultimate use for statistical purposes.

Conclusion 10 The work done by the Permanent Bureau and the discussions held by the Special Commission are of continuing importance to the effective operation of the Convention. The Special Commission should be convened periodically to study the application of the Convention in practice.

Following the Checklist of issues to be considered at the second meeting of the Special Commission (Prel. Doc. No 1), adopted by the Special Commission as its agenda, the Report on the issues posed by the Checklist is as set out below:

[1] NB: Subsequent to the Special Commission meeting the Permanent Bureau drafted a standard form for this purpose and circulated it to the Central Authorities for comment. The form, as revised following receipt of comments, is attached as an annex to this Report

PART THREE:

REPORT ON THE ISSUES POSED BY THE CHECKLIST

Introduction

Question 1 Have the title or the preamble of the Convention given rise to any questions in practice?

Response:

It was pointed out that there was a difference between the preamble and the text of the Convention itself, in that the preamble spoke of the desire of the States signatory "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*" (emphasis supplied), while the text of the Convention spoke only of the "return" of children without specifying that this should be to the place of the child's habitual residence before removal or retention abroad. This had left open varied interpretations or applications of the obligation to return the child, some taking the position that the return should be to the applicant parent or to the Central Authority of the requesting State, while others found that the return could be made to the jurisdiction of the courts and other authorities of the requesting State. Under this latter view, the child might in appropriate cases, return to the State of his or her habitual residence accompanied by and still under the care and control of the abducting parent until the authorities of that State might rule otherwise.

It was pointed out that the failure to specify that the return was to a particular place or person had been intentional. In particular, it had been contemplated that in some cases the applicant parent might have changed habitual residence before the child could be located and an application for return prosecuted, and that in such a case it would be senseless to return the child to the place where he or she had formerly habitually resided in the custody of that parent. (*Note by the Permanent Bureau*: See Pérez-Vera Report, paragraph 110.) On the other hand the flexibility of the formulation made it possible in appropriate cases, particularly

where the abducting parent had been the child's primary caretaker before removing him or her abroad, to send the child back to the State of habitual residence temporarily in the care of that parent.

I - Scope of the Convention

Question 2 Have the objects of the Convention as described in Article 1 been interpreted by a court or other tribunal?

Response:

There was no discussion on this point.

Question 3 Have problems of implementation under Article 2 arisen?

Response:

Reference was made to Working Document No 2, which set out comments of the French Central Authority. This document stressed the importance, for the effective implementation of the Convention, that Central Authorities be given the resources and the powers, which would allow them to act in a dynamic fashion. In the French system, the Central Authority could give instructions to the district attorneys who could act on behalf of the victim, in close liaison with the Central Authority before the court.

It appeared from the discussion that the powers and resources of the Central Authorities varied considerably from country to country. In some countries it was not possible procedurally for the Central Authority to go to court on behalf of the applicant and thus the Central Authority regularly resorted to assisting the applicant in finding a competent attorney to handle the case. Where there was a comprehensive legal aid system available to foreign applicants, this system could still work very effectively. In addition to France, Argentina, Australia and Spain are countries where the State intervenes directly in all cases and covers the costs. In the States of California and Washington in the United States of America, the Attorney General's office and the District Attorneys are able to assist applicants in bringing their cases to court, but do not represent them directly. In other States of the United States of America, it is necessary to seek out competent counsel, willing to act *pro bono,* in appropriate cases through the local bar associations or through other networks,

notably the International Academy of Matrimonial Lawyers. The process was more complex in the United States of America, than in the other federal States which were parties to the Convention.

Question 4 What are "the most expeditious procedures available" in your country? (see also Article 11 of the Convention)

Response:

The discussion revealed that the quick setting of hearings and placing a time limit on appeals were the best way to expedite proceedings. Some countries such as Austria and the United Kingdom, had very tight legal rules or an accepted practice, regulating setting of hearing dates and/or time allowed for appeal. In Australia and Israel, the judiciary would set very tight appeal dates, typically under seven days. Experts from some other countries found that it was not always possible to ensure a quick hearing or an early appeal date.

One way to avoid delay and frivolous appeals was to enforce the order for return of the child or children while the appeal is pending. This had been done in some cases in France, where there did not appear to be a strong legal ground for the appeal, the Central Authority having the power to enforce the decision pending the appeal. In the Netherlands the order must be enforced, even if there is an appeal. Austria, Germany and Luxembourg also have the possibility for enforcement of a return order pending an appeal.

Experts from other countries enquired into the possible complications which could arise from return of a child while the appeal was pending, in case the appeal should be successful. In most systems such enforcement would not occur if a successful appeal was likely. An observer pointed to the possibility of using a "mirror image" order requiring that the applicant for return of a child obtain, from the court of the applicant's own country, an order to return the child to the country where the appeal was pending in case of successful appeal, as a condition for obtaining immediate enforcement of the lower court's order for return. Some experts questioned whether this method could work in their procedural systems. Others thought that the Central Authority in the State to which the child was returned would, if possible, give effect to the appellate decision.

The discussion turned to the question of whether the applicant parent might be required to attend in person, the proceeding abroad. Some experts thought that this was highly desirable or even essential, and that the presence of the applicant parent before the court was a reassuring factor, tending to result in an order for return of the children. However, the detriment was the considerable expense and difficulty of personal attendance in some cases, particularly where there was a long distance between the countries, or when the proceedings were subject to delay so that the applicant parent might have to remain abroad for an extended period of time. It appeared that, even in countries where the abducting parent could request the attendance of the applicant in court, the courts had only very rarely granted such requests. In many cases the court ruled on the basis of the affidavits. In this connection it was pointed out that Article 30 of the Convention provided for the application "together with documents and any other information appended thereto or provided by Central Authority" to be admissible in the courts or administrative authorities of the Contracting States. This provision facilitated the admissibility of any affidavits or supporting documents appended to the application or provided by Central Authority, and thus tended to make if possible for a judge to make a ruling without requiring the physical presence of the applicant parent.

Question 5 Have any of the following terms in Article 3 been interpreted by the courts in your country?

Response:

a Rights of custody (see also Article 5)

The discussion made it clear that, as Article 5 voluntarily and necessarily provides only a non-exhaustive definition for the key term "rights of custody" as used in Article 3, practical problems have arisen in several cases in the past. An unusual case which attested this concept was the British Columbian case cited in the Checklist involving the removal from California to British Columbia of a child of Aleut Indian decent.

The question was raised whether the practice of some countries' courts, to award rights of custody only under the obligation not to remove the child

from the territory of that State without consent of the court, constituted a specially-limited right of custody. Thus, as had been ruled by the English court in the case cited in the Checklist, the custodian who removed the child abroad in violation of this limitation might be found to have violated his or her own "rights of custody" within the meaning of Article 3. No definitive viewpoint was reached on this point.

Conversely the view expressed by the *Tribunal de Grande Instance de Périgueux* in the case cited in the Checklist, to the effect that an order of the court granting custody which prohibited the custodian from removing the child from the court's jurisdiction without consent of the other parent constituted only a "modality" attached to the right of custody and not a situation of joint custody, gathered no support. This view had been rejected by the *Cour d'appel d'Aix-en-Provence*, as well as by courts in Austria, Australia, the United Kingdom and the United States of America.

b Habitually resident (see also Article 4)

This factually-based concept raised some problems of application in practice, although in most cases the courts had no difficulty in applying it. Because Article 3 of the Convention referred to "the law of the State in which the child was habitually resident immediately before the removal or retention", certain courts had focused on the moment of removal of the child and, if only one parent had "rights of custody" at that moment, concluded that the former habitual residence was lost even though no new habitual residence might have been acquired. This approach, drawing on the intent of the departing parent and attributing that intent to the child, resulted in application of the concept of habitual residence in the way that the more intent-based term "domicile" was applied. However, unlike a change of domicile, no new habitual residence was immediately acquired.

The problem was raised of military personnel, particularly those of the United Kingdom and the United States of America, stationed abroad in foreign States. Such military personnel were sometimes held not to have established habitual residence in these places, as they had come there because of military orders. It was pointed out that

the habitual residence in question under the Convention is always only the habitual residence of the child, not that of the parent. (*Note by the Permanent Bureau*: In this connection it should be pointed out that, just after the Special Commission meeting in January 1993, a decision was handed down by the United States Court of Appeal for the 6th Circuit involving this concept. The federal district court for the Southern District of the State of Ohio had ruled that, where the child lived off-base in Germany with the mother and father before they separated, following which the mother (an American military servicewoman) had taken the child to live on-base for a few days before removing the child to the United States of America, (1) the child's habitual residence was in United States territory, not German territory; and (2) the father was no longer actually exercising rights of custody. The Court of Appeals reversed the lower court on the first of these grounds, finding that the child's place of habitual residence was clearly in Germany at the time of removal and, on the second ground, remanded the case to the trial court with instructions to determine under *German law* whether the father was still actually exercising rights of custody, intimating that under *American law* he would clearly have been held to be doing so: *Friedrich* v. *Friedrich*, No 92-3117 decided 22 January 1993, with one judge dissenting, by the United States Court of Appeals for the 6th Circuit.)

It was stressed in the Special Commission that the term "habitual residence" as well as the term "rights of custody" should normally be interpreted in an international way and not by reference to a specific national law.

c Actually exercised? (see also Article 13)

It was pointed out that the question of whether or not a parent was "actually exercising" custody rights should be determined with reference to the particular acts which a parent was able to carry out in the exercise of such rights. (*Note by the Permanent Bureau*: In this connection the case decided by the United States Court of Appeals for the 6th Circuit, discussed just above under "habitual residence", is instructive.)

Question 6 Have your courts dealt with questions under Article 3 concerning:

a *Joint custody by operation of law or otherwise (e.g. by court order)*?

Response:

See the discussion under Question 5 *a*, above. It was stated that joint custody rights had been abused in some cases. However, the Permanent Bureau awaits supporting documentation on this point, since the reported cases do not seem to show such abuse.

b *The relation between Articles 3 and 35, particularly as regards the concept of "retention of a child"*?

Response:

The "wrongful retention" of a child had uniformly been held by the courts to be a single event for purposes of Articles 3 and 35, rather than a continuing offense. Thus if the removal of the child abroad had taken place before the Convention entered into force between the two countries in question and the retention had become wrongful before such entry into force, neither the removal nor the retention was covered by the Convention. This did not of course prevent the application of Article 21 (access). Indeed, if the child was being retained in a Contracting State and was under the age of 16 (Article 4), the child was covered by the Convention and Article 21 could be involved. (*Note by the Permanent Bureau*: See *In re G (a minor)*, Court of Appeal (London), judgment 9 December 1992.)

Certain countries had by legislative action made the Convention's principles retroactive for their authorities, notwithstanding Article 35, and the Central Authorities of these countries had experienced no particular problems in handling such cases.

Question 7 Has the cutoff age of 16 years under Article 4 given rise to any problems in practice?

Response:

The only problems caused in practice were where siblings had been removed or retained abroad, one being over 16 and the other(s) being under 16.

Question 8 When a child has been returned following a removal or retention in breach of Article 3, have "rights of access" as envisaged in Articles 5 *b* and 21 generally been instituted or restored?

Response:

It was generally agreed that follow-up information after the return of children was insufficient or even completely lacking. Co-operation between Central Authorities on this point should be enhanced, with a view to creating post-return situations conducive to the prevention of future re-abductions.

II - Central Authorities

Question 9 Have any problems arisen in practice concerning the designation of Central Authorities under Article 6?

Response:

None of the States which had issued from the former Yugoslavia had declared its intent to be bound by the Convention, nor had any Central Authority been designated.

Slovenia had declared that it was not a Party to the Convention, since its declaration of independence had preceded the deposit of an instrument of ratification by the former Yugoslavia.

Question 10 Have any of the duties of Central Authorities, as set out in Article 7, raised any problems in practice?

Response:

The experts agreed that better information about the duties of the respective Central Authorities is necessary. It was proposed that each Central Authority might issue informational material describing its duties, functions and means at its disposition which should be distributed to the other Central Authorities. (*Note by the Permanent Bureau*: At the time of completion of this Report, such information had been submitted by the Central Authority for Norway and, as to duties under Article 21, by the Central Authority for England and Wales. Such submissions were to be distributed as annexes to the Permanent Bureau's Circular No

2(93) addressed to the Central Authorities. Moreover, the Council of Europe as recently issued an updated version, dated 14 January 1993, of its document DIR/JUR(93)2 entitled "*Information for the attention of the Central Authorities set up under the Custody Convention*".)

Question 11 Are the activities of the Conference's Permanent Bureau in disseminating information to and about the Central Authorities useful?
Do you have any suggestions as to how the usefulness of such activities may be improved?

Response:

The very helpful and reliable role of the Permanent Bureau as collector and transmitter of information concerning the Convention was widely acclaimed.

However, in this context, the Secretary General drew attention to the fact that the activities of the Permanent Bureau in this field had already exceeded its limited resources and caused budgetary problems for the Hague Conference. He therefore suggested that the Commission might consider recommending the establishment of additional financial means for the Conference in order to guarantee satisfactory documentation and information on all aspects of the Convention.

III - Return of children

Question 12 Have any questions arisen as to who may make an application under Article 8?

Response:

The first question raised was directed more to the scope of the Convention (see Chapter I) than to the capacity to make an application. The exchange was as follows:

The Observer from India drew attention to the problem of "child-trafficking" across borders, where parents, who generally have joint rights of custody, collude in the abduction to the detriment of the child. He asked whether the Convention provided any means of deterring this type of situation.

Mr Dyer (First Secretary) answered with regret that these cases did not fall within the scope of the Convention, but indicated that the 1961 Hague

Convention on the Protection of Minors might provide some help in some aspects of these cases.

Moving to another point, the Israeli Expert addressed the question to the Commission of whether in practice the return requests had always gone through the Central Authority of the State of habitual residence, or if they had also been filed directly with the Central Authority of the requested State or even with a court itself. Several experts agreed that these "direct" applications are perfectly admissible under the Convention and occur quite frequently. Therefore, it was considered to be helpful in these cases if the Central Authority of the country of habitual residence would be informed of "direct" applications, especially in the light of its possible later participation in the return process.

Question 13 Have any questions arisen as to whose "custody rights" must have been breached?

Response:

The question here was who had the capacity to claim custody rights in cases where, broadly speaking, an institution had been accorded the custody rights. The experts agreed that, in general, this situation does not cause any real problems as long as the "institution" is an administrative one, but it is quite different if a court is involved (as in the case of the English concept of a "ward of court").

The German Expert indicated that the main problem with this concept is the fact that a private individual is conferred custody over the child at the same time as the child is made a ward of court, which raises the question of the legal means at the disposition of the person in whose interest the wardship exists. An Observer of IAML stated that Article 28 provided a tool for resolving this problem at least in some cases.

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

Response:

The experts agreed that an application under the Convention does not need a special form, but that a certain degree of standardization had proved to be very helpful in the past. This is best demonstrated by the model form which was developed as an annex to the Convention. As to concrete measures,

multilingual forms, filled out in typescript, giving the date of the abduction and with a statement of the law on (joint) custody rights attached to it, were proposed.

The Austrian Expert pointed out that the Central Authorities have competence to fill out and sign application forms in a language other than the original one, once an application has been filed with them.

Question 15 Has Article 9 ever been applied?

Response:

There was no discussion on this point.

Question 16 To what extent and under what conditions have voluntary returns been obtained under Article 10? (See also Article 7 *c* and statistics submitted by the United States of America.)

Response:

Mr Dyer (First Secretary) mentioned that "voluntary" returns tend to occur frequently in cases where a Hague Convention proceeding has been started, but not yet reached the final stage of decision (in court), and where the abductor returns the child shortly before he or she would have been forced to do so anyway.

The French Expert mentioned that the Central Authority often plays an essential role in organizing the voluntary return of a child, a fact which demonstrates well its educational function and the resulting deterrent effect.

Question 17 Have the procedures of Article 11, second paragraph, been employed?

Response:

The Scottish Expert indicated that the procedure of Article 11, paragraph 2, has not been used in a formal way, but appears informally on a frequent basis and seems to work very well.

Other experts agreed on the general necessity of obtaining a receipt for the arrival of an application, which receipt could be similar to the one used under the Luxembourg Convention. (*Note by the Permanent Bureau*: see Council of Europe document DIR/JUR(93)2 referred to under Question 10, above, p. 31.)

Question 18 Does the one year period referred to in Article 12, first paragraph, begin when the rights are first breached or when the child is first removed across the frontier?

Response:

In this context, a typical situation arises where one parent leaves the State of habitual residence with the child for a visit of a certain length to which the other parent has consented, and where the respective parent and child then stay longer than was originally consented to by the left-behind parent.

The Austrian Expert brought to the attention of the Commission that the date of the crossing of an international border is irrelevant in this respect, but that the decisive moment is when the consent of the left-behind parent to the duration of the visit actually ends.
(*Note by the Permanent Bureau*: The situation described above is to be distinguished from the situation described in the commentary to Question 18 of the Checklist. The issue raised there was whether an abduction which breaches custody rights triggers the application of the Convention immediately for the purposes of the one-year period referred to in Article 12, first paragraph, or whether that period only starts to run when the abductor removes the child across an international frontier. The hypothesis is that the abductor keeps the child internally within the country of the child's habitual residence for an extended period of time, perhaps even several months, before removing the child to another country. In the different hypothetical situation discussed in the Special Commission, where the child has been removed to another country with the consent of the custodian for a visit abroad, but does not return at the appointed time, the date of crossing of the international frontier is, as stated by the Austrian Expert, irrelevant.)

Question 19 Has the second paragraph of Article 12 been interpreted or applied by your courts?

Response:

The experts stated that two different approaches had been developed by different courts for dealing with the question of which elements are considered relevant and necessary for the determination as to

whether the child has settled in the new environment under Article 12, paragraph 2. On the one hand, the restrictive approach asks for the child to be integrated as a part of the surrounding community, not only the immediate household of the abducting parent. On the other hand, some courts hold that the child has settled down in its new environment when it has lived almost exclusively within its "new" family, this being especially true in the case of very young children.

Question 20 Has the third paragraph of Article 12 been applied in your country?

Response:

In answer to Mr Dyer's (First Secretary) question as to whether Article 12, paragraph 3 had ever been applied in any of the States Parties to the Convention, the United Kingdom Expert replied that English courts had applied it in some cases involving Scotland and Northern Ireland.

Question 21 Have the courts of your country refused return of any child on grounds set out in Article 13 *a*? If so, was the refusal based on:

a Failure actually to exercise the custody rights?

Response:

Introducing the topic of the "exceptions to return" obligation under Article 13, Mr Dyer (First Secretary) stressed that the application of Article 13 would counteract the Convention's goal of returning the child and that therefore the exceptions of Article 13 should only be used carefully and by no means excessively.

b Consent to the removal or retention?

Response:

Concerning the question of consent to the removal or retention, the Austrian Expert reported a case where the court had held that there had been tacit consent by the allegedly left-behind parent.

c Subsequent acquiescence in the removal or retention?

Response:

So far as acquiescence is concerned, another expert mentioned the necessity to differentiate between acquiescence itself and later-occurring withdrawal of an acquiescence which had existed at an earlier stage.

Question 22 Have the courts of your country refused return of any child on grounds set out in Article 13 *b*?

Response:

Most experts reported that in their jurisdictions Article 13 *b* is given a very narrow interpretation and that therefore few defences based upon this argument are successful.

However, one expert suggested that this provision might be used in cases where a very young child has spent a large part of his or her life with the abducting parent and would not remember the other parent. Others considered this to be an unacceptable use of the provision.

Furthermore, another expert wondered whether this provision might be used in cases where the parent from whom the child has been abducted had subjected the child to sexual abuse. Others pointed out that in such cases the returning State should entrust the requesting State to make a proper pronouncement on the issue of custody. They suggested that in such cases all that was necessary was to ensure that the child is properly protected during the substantive hearing either by allowing him or her to return in the custody of the abducting parent or by placing him or her in the custody of a third party.

An observer pointed out that an abducting parent may refuse to return because of fear of domestic violence. In Ireland, the only State to mention such a case, the Court refused an order to return partly on the grounds that any domestic violence would pose a severe psychological risk to the children.

Many experts suggested that Article 13 *b* should not be used to protect a child from a particular parent, as this is more properly dealt with in the requesting State. Two experts suggested that the more correct question is whether the child faces a grave risk by being sent back to that State. If this interpretation is correct, one expert questioned the need for such a provision.

One of the cases presented by way of illustration concerned the question of habitual residence and whether this might alter if the child had remained with the abducting parent for a long time. It was pointed out that the Convention specifically defines the place of habitual residence by reference to the place from which the child is abducted and that, therefore, this could not change.

In cases where an Article 13 *b* defence is raised, the meeting questioned whether social welfare reports should be sought and considered by the Court. A number of experts pointed out that social welfare reports can take three months to prepare and that, therefore, if they were not already available, the court should not delay the procedure by waiting for them.

Question 23 Has return been refused because of objection by the child under Article 13, second paragraph? If so, what was the age of the child(ren)?

Response:

Many experts agreed that the views of the child should be accorded due weight but felt that it was important to bear in mind the fact that children are relatively easily influenced. The Secretary General of the Conference, along with a number of experts, pointed out that any decision concerning the weight to be accorded to the views of the child should be left to judicial discretion and that, therefore, it is futile to standardise the approach.

Finally, the experts turned to the question of whether the child herself or himself could initiate a request by contacting the Central Authority. The Convention is silent on this point. A few experts stated that this goes beyond the purpose of the Convention. On the other hand, others considered that nothing in the Convention precluded such a claim and that it could be particularly useful if the child were being held abroad involuntarily in a place unknown to the parent left behind. In such a case, the child might not be able to communicate with the parent left behind, but might be able to contact the Central Authority of the State where he or she was being held.

Question 24 Has the third paragraph of Article 13 entered into play in any cases where Article 13 has been invoked?

Response:

There were no comments concerning this item.

Question 25 Have any questions arisen in practice concerning the application of Article 14?

Response:

There were no comments concerning this item.

Question 26 Have any determinations as envisaged in Article 15 been obtained in your country? Is any special legislation or court rule required in your country to authorize a court to make such a determination?

Response:

Mr Dyer (First Secretary) explained that, under the Convention, the judge is not bound by a decision made in the State of habitual residence of the child to the effect that the child has been wrongfully removed or retained. Nonetheless, he hoped that courts in returning States would give effect to such pronouncements.

Question 27 Has Article 16 been applied in your country?

Response:

Experts from many countries noted the importance of this Article. They also noted the need for the Central Authority to play an active role in informing any tribunal asked to decide upon the substantive issues concerning custody that it should stay its decision until the issue of the return of the child has been resolved.

The Austrian Central Authority in a document distributed to the Special Commission (Work. Doc. No 3), had posed *inter alia* the following situation for discussion:

In practise difficulties might arise after the return has been ordered in the requested State, if in the State of the child's habitual residence immediately before the abduction a custody order has been made in favour of the abducting parent (although this order has not become final). The

authorities of the requested State might hesitate in such a case to enforce the return order.

Many experts agreed with the point made by the Austrian delegation concerning the hypothetical situation described above.

Question 28 Has Article 17 been applied or interpreted in your country?
Response:

There were no comments concerning this item.

Question 28A (Article 18)

Although no Checklist item referred to Article 18 of the Convention, it was pointed out that in several countries there are administrative authorities which have certain powers under the Convention. These countries are Denmark, Switzerland and the United Kingdom, but in the United Kingdom such powers are not normally exercised with respect to children.

Question 29 Has Article 19 been cited or interpreted by the courts in your country?

Response:

There were no comments concerning this item.

Question 30 Has Article 20 been interpreted or applied in your country?

Response:

Mr Dyer (First Secretary) and many experts insisted that the application of Article 20 should be avoided because it gives rise to many problems. Furthermore, it was suggested that Article 20 is already covered by the earlier grounds for refusing to return a child, listed under Article 13.

IV - Rights of access

Question 31 Have any difficulties been experienced in enforcing orders for return of children?

Response:

There were no comments concerning this item.

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

Response:

It was noted that, whilst Article 21 recognizes rights of access, it has no firm legal provisions to enforce such rights. A number of experts considered this to be a major problem because Central Authorities might be unwilling to act unless there is a firm legal requirement and judges might not attribute sufficient weight to these rights. Many others disagreed, pointing out that Central Authorities could assist in giving effect to access provisions, at least by providing administrative assistance to bring the case before a tribunal. They argued that the final decision concerning access should be made by a judge. Two experts pointed out that access is an important part of custody and that more might be possible if one recognizes access as a legitimate interest in custody.

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

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

(*Note by the Permanent Bureau*: Subsequent to the Special Commission meeting in January 1993 the Permanent Bureau received a report of an important court decision involving Article 21 of the Convention handed down by the Court of Appeal (London) on 9 December 1992. In that case the applicant sought to enforce a Canadian order for access which had been handed down before the child had moved with the custodian (and with consent of the Canadian court) to England. The court ruled that Article 21 did not give an applicant the right to have a foreign access order enforced in the courts. The court held, however, that the Convention applied to the child in question presented to Article 4 since the child was habitually resident in a Contracting State (United Kingdom) and had not yet attained the age of

16 years. In this case the Central Authority for England and Wales had assisted the applicant in bringing a request for enforcement of access rights before the English courts and the Central Authority had therefore fully performed its obligations under Article 21 of the Convention. The request however could not be considered as a request for enforcement of access rights granted by the foreign court, but rather had to be made as an independent request for access rights directed to the courts of the child's habitual residence. As to such a request, the foreign access order should be given great weight, but would not be enforceable as such.)

V - General provisions

Question 32 A (Article 22)

Response:

Although the Checklist contained no question relating to Article 22, one expert explained that this article in his country is interpreted in favour of the requesting parent, but not of the abducting parent.

Question 33 Have any problems arisen concerning the translation requirements of Article 24?

Response:

All participants in the Special Commission agreed that it is necessary to address the problems which arise from the need for documents to be translated. They agreed that applications should normally be sent in the language of the State to which the application is made and that only in exceptional circumstances should it be necessary to revert to the official languages, French and English.

The possibility was mentioned for States to enter into bilateral agreements on the question of which State would shoulder the responsibility of translation. In certain cases, two States had entered into bilateral arrangements under which each State's Central Authority forwarded the applications in the original language without translation.

Question 34 Have any problems arisen in the application of the provisions of Article 25 concerning the availability of legal aid and advice?

Response:

There were no comments concerning this question.

Question 35 Has Article 26 concerning charges and costs, or the reservation permitted thereunder, given rise to any problems?

Response:

A number of States had taken this reservation, but in most it had offered no problem. Typically, either lawyers on the public payroll could take the case to court for the applicant, as in France, or the applicant could be referred to a private attorney, with automatic legal aid, as in England. The absence of a comprehensive legal aid system, either at the state or at the federal level, in the United States accentuated the effect of the reservation, since the Central Authority had to expend much time and effort in trying to obtain *pro bono* counsel for applicants who could not afford to retain a private attorney. This problem was alleviated in the States of California and Washington where lawyers on the public payroll were authorized to assist applicants in getting their cases before the courts. The Center for Children and the Law had carried out a survey and one of the recommendations arising from this survey was that the Californian state-funded system should be more widely adopted among the other States. This recommendation was being considered at the governmental level.

At the local level also efforts were being made by the bar associations in the United States to fill this gap. Most local bar associations had *pro bono* programmes and these could be mobilized, together with training sessions to familiarize lawyers with the Convention. A pilot programme of this type had been set up by the Dallas Bar Association (Dallas, Texas) following the negotiation of an agreement with the Paris, France bar under which both lawyers' associations would co-operate to facilitate implementation of the Hague Child Abduction Convention in their respective jurisdictions. It was hoped that this pilot programme would be followed elsewhere in the United States and that the resulting network of trained *pro bono* counsel on call, combined with the local bar associations' lawyer referral services would greatly alleviate the United States Central Authority's problems in finding competent and

affordable counsel for foreign applicants. Conclusion number 8 of the Special Commission relates to this point.

Question 36 Have any applications been refused in your country under Article 27?

Response:

It was pointed out in connection with this question that, in cases where the Central Authorities refuse a request for help, the individual can apply directly to the courts. Article 29 of the Convention always leaves open the possibility of direct access either to the judicial or to the administrative authorities.

Question 37 Does the Central Authority in your country require a written authorization as envisaged in Article 28? If so, is there a standard form for this purpose?

Response:

The Austrian Expert explained that Austria does not have a standard form for authorizing the Central Authority to take a power of attorney because this is done informally by using the wording of Article 28. The German Expert explained that German law gives the Central Authority the power of attorney.

Question 38 Have any questions arisen in practise concerning the application of any of Articles 29-33?

Response:

There were no comments concerning these articles.

Question 39 Have any questions arisen concerning the relationship of the Convention to another international treaty as is dealt with in Article 34?

Response:

Many experts remarked on the absence of practical difficulties in applying the partially-parallel Conventions of The Hague and Luxembourg. This has been achieved because in some countries the implementing laws deal with the relation between the Conventions, and in other countries the judges have ruled on their relationship without difficulty. The Secretary General explained that the Permanent Bureau and the Council of Europe have an excellent working relationship on the interplay between these Conventions.

Question 40 Have any questions arisen under Article 35 concerning retroactive application of the Convention? (See also Question 6 *b*, above.)

Response:

This question had already been dealt with under Question 6 *b*, above.

Question 41 Has your country entered into any agreement derogating from the Convention's provisions as envisaged in Article 36?

Response:

Several experts announced the existence of bilateral agreements to limit the restrictions to which the return of the child may be subject. Other bilateral agreements were pending. (See the Commentary to Question 41 in the Checklist.)

VI - Questions directed to the operation of the Convention in general

Question 42 What can be done to improve co-operation between Central Authorities?

Response:

Many experts remarked on the importance of the work done by the Permanent Bureau under this Convention and of the importance of special meetings such as the one presently sitting. They also accepted that neither the Secretary General, nor the Permanent Bureau, could be expected to inform private individuals or lawyers about the Convention. Their primary role is to inform governments and Central Authorities who, in turn, should pass on the information.

It was suggested that Central Authorities should inform the Permanent Bureau of their telephone numbers and the hours at which they can be contacted by telephone, and, where possible, a telephone number via which they can be contacted at the weekend and in case of emergency.

One observer suggested that the Permanent Bureau might try to install a computerized database of all cases, but the Secretary General explained that the present budget would not cover extra services. An

expert suggested that countries might consider the possibility of increasing the budget.

Question 43 What can be done better to harmonize case law in the courts of the Contracting States?

Response:

Whereas, the Commission agreed on the positive role the Permanent Bureau has played in the past in collecting case law from the different States Parties to the Convention, it also acknowledged that, from a future perspective, the Permanent Bureau could and should not serve as a general information centre for inquiries on the Convention.

The Secretary General stated that the financial limit for the Permanent Bureau's activities of collecting and distributing information on the case law was reached quite some time ago and that there is an urgent need on behalf of the Hague Conference to reduce its activities in this field, unless it were to obtain considerable extra funding to finance such activities, which seemed to be unrealistic in the near future.

The Secretary General also emphasized that such activities, i.e. the filing, translating and summarizing of cases, simply were not covered by the statutory duties and capacities of the Permanent Bureau, as the latter was not supposed to act as an information supplier.

Therefore, the Commission consented to the fact that the Permanent Bureau should only be sent short summaries of the leading cases, as well as statistics, by the Central Authorities in order for those to be collected and put together for distribution through institutional channels or to scholars, but neither to the general public, nor to lawyers in private practice. For these latter persons, the appropriate contact agencies can only be the Central Authorities.

Concerning the actual appearance and form of the summaries to be submitted to the Permanent Bureau by the Central Authorities, it was considered essential for them to be selective, short, possibly in English or French, and indicating in one sentence what had been the main issue under the Convention. One way to comply with the latter demand could be a short indication of the relevant article of the Convention that had been invoked in the respective case.

An Observer of IAML regretted this restrictive position towards information through the Permanent Bureau, as he thought that its activities in the past had been very helpful to the practising lawyers who guaranteed the successful operation of the Convention in daily life in the courts, especially those who provided counsel on a *pro bono* basis.

The Secretary General indicated that the International Academy of Matrimonial Lawyers was one of the institutional channels to which he had referred.

This question is dealt with in Conclusion number 9 of the Special Commission. (See also Preliminary Document No 5 which was before the Special Commission, "Lists country-by-country of court decisions on the Hague Convention of 25 October 1980 on the civil aspects of international child abduction".)

Question 44 What can be done to improve the overall efficacy of the Convention's operation?

Response:

The Observer for India thought that the Convention was very useful and hoped that steps might be taken to bring additional countries "into the fold". He would be glad if the Permanent Bureau could measure the extent of the problem of international child abduction in countries other than the 28 which were currently Parties to the Convention, with a view to expanding the network of co-operation.

Mentioning the fact that a large number of Parties to the Convention is desirable, the Russian Expert drew attention to the fact that the procedure for accession to the Convention provided by Article 38, which can be seen as sort of an individual "approval clause", might be detrimental to the accession of some States otherwise interested in becoming Parties to the Convention. The Secretary General regretted the difficulties posed by this provision, but indicated that in practice the Permanent Bureau constantly tried its best to overcome these difficulties.

This question is dealt with in Conclusion 10 of the Special Commission.

Question 45 Has your country's implementing legislation operated in a satisfactory manner?

Response:

It was broadly recognized that carefully-drafted and thought-out implementing legislation was very important to achieving satisfactory operation of the Convention.

Question 46 To what extent do criminal proceedings and extradition proceedings intersect with the operation of the Convention on the civil aspects of international child abduction?

Response:

This question was taken up out of order on the second day of the Special Commission meeting, since the Observer for INTERPOL was able to be present on that day. The Observer for INTERPOL made a presentation based on a written

./. submission, a copy of which is annexed to this Report.

Following a discussion of the INTERPOL submission, the discussion turned to the programme known as "Project return" which was described in a briefing note presented by the Canadian delegation. A copy of this note is annexed to this report. The Experts from both Australia and the United Kingdom indicated the existence of similar initiatives in their own States.

A general discussion of the intersection of criminal and civil aspects of international child abduction then followed.

In cases where the main intention was to use a civil action to ensure the return of the abducted child, as envisaged under the Convention, the experts agreed that recourse to criminal procedures ought not to be encouraged. The object was not to punish the abducting parent. Furthermore, criminal proceedings might prove to have detrimental effects upon the civil proceedings, and might also interfere with the child's right to maintain normal relations with both parents (as guaranteed under Articles 9 and 10 of the UN Convention on the Rights of the Child, adopted 20 November 1989).

Many experts thought it unlikely that a prosecuting authority would pursue criminal proceedings if either the child had already been returned or the return of the child was thought to be more

important. Of course the experts recognized that it is not possible to interfere with the prosecuting authority's discretion to make the final decision.

A number of experts recognized that criminal proceedings might be appropriate where the crime went further than simple abduction.

Some experts argued that a criminal prosecution should never be used as a justification for refusing to return a child (under Article 13 *b*), that the decision as to what is best in each case should be left to the returning State. Other experts considered that criminal prosecution might be a legitimate reason for use of Article 13 *b*.

Question 47 Do you have statistics concerning applications handled under the Convention?

Response:

In reply to this question, five countries submitted statistics in advance of the meeting which were issued as Preliminary Document No 4. During the meeting one of these countries updated its statistics and eleven more countries submitted statistics to the Permanent Bureau, these submissions being issued as addenda numbers I through XII to Preliminary Document No 4.

Question 48 What should you do with this Checklist now that you have finished reading it?

Response:

As had been the case at the first Special Commission meeting held in October 1989 to study the operation of the Hague Child Abduction Convention, the Checklist was adopted and used as the agenda for the discussions of the Special Commission. Thus the Checklist itself served again as the framework for the Report of the Special Commission.